

Company law: profit distributions, general meetings and supervisory board meetings in times of COVID-19

Distribution lock for the Austrian limited liability company (GmbH) in the event of a reduction in assets

Many companies are already facing significant negative economic impacts caused by the COVID-19-crisis. In some business, losses will often be unavoidable even for otherwise successful companies.

The financial year of many companies concurs to the calendar year; this year the preparation and adoption of the current annual financial statements collide with "COVID-19 losses". Therefore, the distribution lock of § 82 (5) GmbHG should be highlighted, which applies to limited liability companies, and is relevant to the current situation:

Pursuant to this provision, the balance sheet profit is excluded from distribution to the shareholders proportionally, if the financial situation has deteriorated considerably (not only temporarily), in the period between the balance sheet date and the adoption of the annual financial statements. The amount excluded from distribution shall be carried forward to new account. This means: In case of a (significant and not merely temporary) reduction in the company's assets before the annual financial statements are adopted, any available net profit may not be fully distributed.

Liability risk for executive bodies and repayment obligation in the event of violation of the pay-out-ban:

Should a diminution of the company's assets occur before the annual financial statements are adopted, it has to be examined whether the reduction in assets is significant and not only temporary. If the answer is yes (significant), the management (and the supervisory board, if existing) must inform the shareholders in time before the resolution on the adoption of the annual financial statements is passed. The shareholders may only decide on a distribution of dividends to an extent that does not violate the distribution lock. In case the shareholders decide on a distribution of dividends to an extent not complying with the distribution lock, the managing directors must refuse the distribution, despite the shareholders resolution to the contrary. Managing director, supervisory board and shareholders are well advised to examine the existence of a material impairment of assets. If the distribution lock is violated, this may result in compensation, liability and reimbursement obligations for the corporate bodies.

Further barriers outside the scope of a distribution lock:

Even outside the scope of the distribution lock distributions from a GmbH are not permitted without restrictions if losses occur after the balance sheet date (according to the prevailing legal opinion, this is the case, for example, if the losses only occur after the annual financial statements have been approved, but before the resolution on the distribution of the balance sheet profit is passed). This is especially relevant if the distribution would endanger the existence of the company. In this case, the fiduciary duty requires that no (existence-endangering) distributions be made. Irrespective of the existence of the requirements of the statutory distribution lock, the corporate bodies of a GmbH must therefore carefully examine the rules of distributions in loss situations.

Possibilities to hold general meetings and supervisory board meetings virtually:

To facilitate the holding of general meetings for the duration of the measures to prevent the spread of the coronavirus, the "COVID-19 Act" ("COVID-19-GesG") provides rules to hold general meetings without physical presence of the participants during this period. Therefore, the act focuses on the possibility of holding a general meeting in form of a video conference. Detailed regulations will be contained in a regulation to be issued at a later time.

Irrespectively, it is still possible to pass shareholder resolutions in writing (circular resolution).

The possibility created in COVID-19-GesG also applies to supervisory board meetings. Under the current legal situation, only qualified video conferences constitute a meeting within the meaning of § 30i GmbHG and therefore only such video conferences qualify as quarterly meetings. A qualified video conference is a meeting when all participants can see and hear each other, the quality of the connection allows all details of the facial expressions of the other party to be seen and unauthorised persons cannot

access the conference.

Due to the special expertise of SAXINGER in the LegalTech sector, we offer our clients tailor-made packages for holding virtual shareholder meetings or supervisory board meetings.

Suspension of deadlines for the submission of annual financial statements:

The "2nd COVID-19-Act" stipulates that the period from 22nd March 2020 to 30th April 2020 is not part of the period in which a declaration is to be made in court. This also affects the nine-month period for filing the annual accounts: If annual accounts are submitted after 21st March 2020, the deadline for submission is extended by 40 days. Therefore, if the last balance sheet date was 31st December 2019, the annual accounts must now be submitted by 09th November 2020 at the latest (instead of 30th September 2020).

Our experts of the COVID-19-Unit will be happy to advise you in this context.

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We point out that the legal situation can change constantly, but we are on effort to keep the contents up to date.



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