

Higher Regional Court of Munich: No registrability without legal basis in the articles of association

The decision of the Higher Regional Court of Munich dated July 25, 2017 - 31 Wx 194/17 deals for the first time at higher court level with even two topics that are relevant in practice. On the one hand, the Court specifies the requirements for representation regulations in articles of association of a GmbH. On the other hand, the Court clarifies the legal requirements and consequences of so-called shareholder resolutions piercing the articles of association ("satzungsdurchbrechende Gesellschafterbeschlüsse").

Representation of a GmbH

Representation of a GmbH by its managing directors is regulated by statutory law. Deviations from the legal model - in the form of extensions or restrictions of the power of representation - are generally permitted and widespread in practice. They can be implemented by including an abstract representation regulation with validity for all managing directors in the articles of association. Furthermore, in many cases, the articles of association contain an authorization of the shareholders' meeting to specify the scope of the power of representation for each individual managing director by way of a shareholder resolution. Both forms of deviation – abstract and individual – need to be registered with the commercial register.

Problem

There is a controversial discussion in jurisprudence and legal scholarship, whether an individual determination of the power of representation by a simple shareholder resolution requires an explicit authorization in the articles of association, not only in the case of an extension of the power of representation (e.g. by way of granting sole power of representation), but also in the case of its limitation (e.g. by way of formation of representative pairs). The question has not yet been decided by the German Federal Supreme Court, but has been affirmed by the Higher Regional Court Munich now:

Facts of the case

The representation regulation in the articles of association being in dispute contained the typical standard clauses which read as follows: *"In case only one managing director is appointed, he shall represent the company singly. If several managing directors are appointed, the company shall be represented by two managing directors acting jointly or by a managing director and proxy holder acting jointly. Single power of representation and/or the power to represent the company in legal transactions with himself or as a representative of a third party may be granted to one managing director, several or all managing directors [...]."*

The shareholders' meeting restricted the power of representation of the managing director by simple shareholder resolution, authorizing him to represent the company only jointly with another managing director or a commercial proxy holder. Contrary to the provisions in the company's articles of association the shareholders did not grant such managing director sole power of representation for the event that he would be the only managing director of the GmbH. The register court of the commercial register denied the registration of such representation regulation by way of an interim information order.

The Court's decision

In the following legal action, the Higher Regional Court of Munich confirmed the denial of the registrability of this representation regulation by the register court. According to the decision of the Higher Regional Court, the resolution is in contradiction with the articles of association. The articles do not authorize the shareholders' meeting to determine the representation regulation by way of restriction to limit the representation competences of the managing director in deviation to the regulations in the company's articles of association.

According to the Court, the shareholder resolution contains a representation regulation for the future, which permanently deviates from the regulations contained in the articles of

association. Such a shareholder resolution deviating from the articles of association is not null and void, but invalid if not executed by notarial deed.

In addition, the Court clarified that in case of appointment of only one managing director the regulation would in any event constitute an inadmissible case of joint representation, since the requirement of the proxy holder's cooperation would grant him an inadmissible veto position.

Practice note

Not only the extension, but also the restriction of the power of representation of the managing directors requires a notarized amendment of the articles of association or an explicit authorization of the shareholders' meeting in the articles of association. An authorization only for extensions is not sufficient for making a restriction.

If shareholders wish to be as flexible as possible in respect of extension and restriction of the power of representation, the articles of association should contain a general authorization of the shareholders' meeting to change the power of representation that covers both extensions and limitations. Such an authorization could read as follows:

"The right of representation may be determined differently by shareholder resolution, in particular the shareholders may grant sole power of representation."

Notwithstanding the above, a managing director shall always be entitled to represent the company alone in case he is the company's sole managing director.

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