



Information

The Modernization of the Partnership Law – Impacts on the GmbH & Co. KG

The Act to Modernize the Law on Partnerships ("MoPeG") will enter into force on January 1, 2024. The Act is regarded as the reform of the century in corporate law. The changes also have a particular impact on the corporate form of the GmbH & Co. KG. Below you will find the main points of the reform with regard to the limited partnership and the GmbH & Co. KG.

Limited partners' right to information

The limited partners' right to information will be strengthened in the future. Section 166 Subsection 1 HGB (new version) grants limited partners the right to information on company matters "insofar as this is necessary for the exercise of their membership rights, in particular if there is reason to assume dishonest management". The rights to information are mandatory and cannot be restricted by partnership agreement, as previously. Any provision in a partnership agreement that restricts the right to information is invalid.

Unitary company

The form of a so-called unitary company, a GmbH & Co. KG, in which the KG holds all shares in the general partner GmbH, which has been recognized by case law and literature for a long time, is now also regulated by law. Section 170 Subsection 2 HGB, as amended, stipulates that in future the entirety of the limited partners will exercise the partnership rights of the KG in the shareholders' meeting of the general partner GmbH. In this way, the legislation corresponds to what has already been best practice.

Limited partner liability

The unlimited liability of a limited partner joining a KG prior to the registration in the commercial register continues to exist (Section 176 HGB new version). However, the unlimited entry liability only applies to the entry of a further limited partner and no longer, according to previous case law, to the case of the transfer of shares. At least that is the predominant opinion of the recent literature on this subject.

Insolvency of the general partner

In Section 179 HGB (new version), the case of simultaneous insolvency of the KG and the general partner is now regulated by law. This typically affects the GmbH & Co. KG. The opening of insolvency proceedings against the assets of the general partner no longer leads to its withdrawal pursuant to Section 130 HGB if insolvency proceedings are also opened against the assets of the limited partnership or an application for the opening of insolvency proceedings is filed and the conditions for the opening are met. In the event of the exclusive insolvency of the general partner, the general partner shall withdraw from the KG pursuant to Section 130 Subsection 1 No. 3 HGB (new version).

Freelancer KG

The MoPeG opens up commercial partnerships to liberal professions. Sections 107 Subsection 1, 161 Subsection 2 HGB (new version) allow freelancers to choose the legal form. In future, this will also open the way to the GmbH & Co KG. Compared to the previously permissible partnership company with limited liability, this holds the advantage that the liability of the limited partners is generally limited and does not only provide for a limitation of liability for damages due to incorrect professional practice. However, the prerequisite is that "the applicable professional law permits the registration" (Section 107 Subsection 1 sentence 2 HGB - new version). When choosing the legal form of a GmbH & Co. KG, any obligation to pay trade tax (Section 2 Subsection 1, Section 5 Subsection 1 GewStG), the obligation to file for insolvency (Section 15a InsO) and the obligation to disclose the annual financial statements (Sections 264a in conjunction with 325 HGB) must also be considered.

Free choice of seat

The MoPeG now expressly clarifies in Section 706 BGB (new version) that companies registered in Germany have a free right to choose their registered office irrespective of the place of registration. This enables German partnerships to pursue all business activities outside German territory and still remain a German partnership. In the future, a GmbH & Co. KG will also be able to move its administrative headquarters abroad, irrespective of the registered office of the general partner company.

Voting power and profit participation

The MoPeG now stipulates voting power and profit participation according to participation ratios and no longer according to the headcount; in terms of profit distribution, the legislator now assumes the principle of full distribution, and the preliminary dividend of 4 percent of the capital share previously provided for by law is no longer applicable.

Law on defective resolutions

Resolution procedures and the law on deficiency in resolutions have been codified for partnerships for the first time. A period of three months applies for the appeal against shareholders' resolutions, which may not be reduced to less than one month by the partnership agreement.

Recommendation for action

As a result of the changes that will apply from January 1, 2024 on, a number of provisions in partnership agreements may no longer be up to date or may even be directly invalid. To avoid disadvantages, we recommend a timely review of the existing provisions in the articles of association.

Do you have any questions or need further information?

Feel free to contact us.

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