

**PwC Legal Austria (oehner & partner  
rechtsanwaelte gmbh)**

The Austrian LLC now an even more attractive  
investment vehicle

**TLS Associazione Professionale di Avvocati  
e Commercialisti (Italy)**

Right to appeal against the shareholder resolution  
approving the Financial Statements of the company

# ***PwC International Business Reorganisations Network – Monthly Legal Update***

## ***Edition 7, July 2017***

### ***Contents***

PwC Legal Austria (oehner & partner  
rechtsanwaelte gmbh) – The Austrian LLC  
now an even more attractive investment  
vehicle 1

TLS Associazione Professionale di  
Avvocati e Commercialisti (Italy) – Right  
to appeal against the shareholder  
resolution approving the Financial  
Statements of the company 3

### ***Welcome***

Welcome to the seventh edition of the PwC  
International Business Reorganisations (**IBR**)  
Network Monthly Legal Update for July 2017.

The PwC IBR Network provides legal services to  
assist multinational organisations with their cross-  
border reorganisations. We focus on post-deal  
integration, pre-transaction separation and carve  
outs, single entity projects, and legal entity  
rationalisation and simplification as well as general  
business and corporate and commercial structuring.

Each month our global legal network brings  
you insights and updates on key legal issues  
and developments relevant to  
multinational organisations.

We hope that you will find this publication helpful,  
and we look forward to hearing from you.

### ***In this issue***

In our July 2017 issue:

- PwC Legal Austria (oehner & partner  
rechtsanwaelte gmbh) reports on the new  
streamlined process for setting up a limited  
liability company in Austria; and
- TLS Associazione Professionale di Avvocati e  
Commercialisti (Italy) considers the  
circumstances in which a party may appeal  
against the shareholder resolution approving the  
Financial Statements of the company.

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# ***PwC Legal Austria (oehner & partner rechtsanwaelte gmbh) – The Austrian LLC now an even more attractive investment vehicle***

## ***At a glance***

On 12 April 2017, the Austrian Deregulation Act 2017 (**Act**) was published, which will bring a substantial reduction in the administrative burdens previously faced by entrepreneurs in Austria. In particular, from 1 January 2018, the incorporation of limited liability companies (**GmbH**) will be streamlined via an online portal, reducing both set-up time and costs.

The alleviated procedure will only apply to GmbHs with individual founders that are both the sole shareholder and sole managing director, and adopt standard articles of association (*Errichtungserklärung*) that meet the requirements of the new Act. GmbHs that do not satisfy the new criteria will continue to use the existing incorporation procedures with a reduced notary fee.

Verification of identity and specimen signatures will now be carried out as part of opening the *GmbH* mandatory bank account, creating a 'one-stop' administration process.

## ***In detail***

### ***The Austrian GmbH – An Overview***

The Austrian GmbH can be formed by one or more shareholders with a minimum share capital of € 35,000, half of which has to be paid up in cash upon incorporation. Compared to other limited liability companies, this capital requirement is relatively high and has therefore been subject to constant discussions over the past decades.

#### **1. Recent developments**

##### ***a Reduction of share capital***

In 2013, the “GmbH light” was introduced, which could be incorporated with a minimum share capital of € 10,000 (with half paid-up). However, this was soon amended by the legislator to revert to the original € 35,000 minimum. What remained though, is a reduced funding requirement due to a “privileged foundation” election which became available from 1 March 2014 and allows for a temporarily lower share capital to be used.

If an Austrian GmbH makes use of this privilege, the capital contributions can retain the minimum of € 10,000 (again, with half paid up) for a period of 10 years. After that time, the share capital must be increased to the regular minimum amount of € 35,000 (again, with at least € 17,500 paid up).

##### ***b Reduction of shareholders' liability***

The main advantage of the privileged foundation is not only the lower funding requirement, but also the reduced shareholder liability as shareholders are only personally liable for the unpaid amount of the privileged contribution (i.e. € 5,000, during the first 10 years). By contrast, if the contribution is fully paid up, the shareholders cannot be held personally liable at all.

### *c Reduction of minimum tax rate*

In addition to the share capital benefits, the legislature also reduced the minimum corporate income tax rate from 5% of the minimum share capital (typically € 1,750 per year) to € 500 per year for the first 5 years and to € 1,000 for the second 5 years following incorporation (payable in quarterly instalments). The tax paid is then credited to the GmbH's future tax liability.

## **2. New legislation**

### *a Sole shareholder GmbHs*

With the enactment of the Act, the legislator has taken a further step in streamlining administration and reducing costs for incorporating GmbHs. With effect from 1 January 2018, the incorporation of a GmbH will be possible in a one-stop-shop procedure for sole shareholder GmbHs (i.e. where the sole shareholder is also the sole managing director, which accounts for approximately 38% of all GmbH incorporations).

While the exact application of the amendments is subject to further regulation by the Minister of Justice, at a high level, the changes will include:

- a the possibility to make use of the “Business Service Portal” (*Unternehmensserviceportal, USP*) allowing an individual sole shareholder to establish a GmbH online with their citizen card (*Bürgerkarte*) or by registering their mobile phone;

- b abolishing the requirement for the articles of association to be notarised (provided that it contains the standardised content);
- c the physical identification of the founder to be completed by the bank at which the founder opens the mandatory bank account for the GmbH and pays in the share capital;
- d the specimen signature will also be given to, and verified by, the bank which will then forward a copy of the identification, the specimen signature as well as the confirmation of payment of the share capital to the Companies' Register; and
- e the ability for all newly founded businesses in Austria to take advantage of the “new-foundation-aid” (*Neugründungsförderung*), which provides exemptions and/or relief from specific taxes and fees applicable to GmbHs, by simply clicking a box in the online portal. In doing so, those companies are no longer required to undertake a mandatory consultation with representatives of the Chamber of Commerce and/or the Social Security in person- instead, this can now be conducted virtually by technical means.

### *b Other GmbHs*

Businesses that cannot satisfy the “sole shareholder GmbH” requirement, will instead benefit from a reduction in the statutory notary fees payable for new GmbH formations. Furthermore, the share capital for those businesses may be paid to an escrow account of the notary instead.

## ***Closing words***

Following from significantly reduced funding requirements in previous years, the legislator has now eliminated overly burdensome administrative requirements for the incorporation of a sole shareholder GmbH. The procedure is now completed with ‘one-stop’ mainly taking place online and at a bank. Although the latest amendments benefit almost exclusively individual founders, corporate shareholders will feel some relief with reduced notary fees. As a result, the formation of a GmbH in Austria will be faster and more cost-effective following the introduction of the Act.

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## ***TLS Associazione Professionale di Avvocati e Commercialisti (Italy) – Right to appeal against the shareholder resolution approving the Financial Statements of the company***

### ***At a glance***

Article 2429 of the Italian Civil Code (**ICC**) requires the Board of Directors to deliver the draft Financial Statements (together with Management's report) to the Board of Statutory Auditors and the external Auditor (**Controlling Bodies**) for review at least 30 days before the Shareholders' meeting convened for the approval of the Financial Statements.

Following their review, the Controlling Bodies are required to draft their reports which are then required to be delivered by the Board of Directors (together with the draft Financial Statements and Management's report) to the legal seat of the company at least 15 days before the Shareholders' meeting convened for the approval of the Financial Statements. The purpose of this requirement is to allow the Shareholders time to review the entire set of documents constituting the Financial Statements and consciously approve them during the meeting.

In the event of breach of these requirements, those Shareholders which were absent, dissenting or abstained from voting or, alternatively, the Board of Directors, the Board of Statutory Auditors or the Supervisory Board are entitled to appeal against the resolution approving the Financial Statements in order to have it annulled.

### ***In detail***

#### **1. Approval of Financial Statements under Article 2429 of ICC**

Article 2429 of ICC requires the Board of Directors to deliver the draft Financial Statements (together with Management's report) to the Controlling Bodies for review at least 30 days before the Shareholders' meeting convened for the approval of the Financial Statements.

Following their review, the Controlling Bodies are required to draft their reports which are then required to be delivered by the Board of Directors (together with the draft Financial Statements and the Management Report) to the legal seat of the company at least 15 days before the Shareholders' meeting convened for the approval of the relevant Financial Statements. The purpose of this requirement is to allow the Shareholders time to review the entire set of documents constituting the Financial Statements and consciously approve them during the meeting.

#### **2. The Shareholders' right to information**

Under Italian law, Shareholders have the right to obtain, review and consider the Financial Statements and all the relevant documents that are to be discussed during the Shareholders' meeting at least 15 days before that meeting.

For this reason, the following documentation is required to be delivered to the legal seat of the company:

- a draft Financial Statements;
- b full copies of the last Financial Statements referring to the controlling company (if any);
- c full copies of the last Financial Statements related to the subsidiaries companies (if any);
- d summarising table including data related to the affiliated companies;
- e Management's report;

f Board of Statutory Auditors' report (if  
appointed); and

g External Auditor's report (if appointed).

The above-mentioned documents should give the  
Shareholders a complete and clear picture of the  
financial situation of the company and should  
ensure a conscious and fully-informed approval of  
the Financial Statements.

In other words, the Shareholders have the right to  
obtain copies of the above-mentioned  
documentation without the possibility of the  
company refusing to provide them. In this regard, it  
is worth noting that, where the company refuses to  
provide the above-mentioned documents, the  
Shareholders' meeting resolving to approve the  
Financial Statements may be annulled.

The prevalent view is that the Shareholders' right to  
information is not infringed where the above-  
mentioned documentation is only made available  
during office hours on working days. However, the  
Shareholders' right of information is infringed  
where the above-mentioned documentation is  
delivered by the Board of Directors to the local unit  
or simple administrative seat of the company  
instead of being delivered to the registered office (as  
recorded in the Italian Register of Companies).

### **3. Possibility to derogate from the terms provided by Article 2429 ICC**

Both the prevalent view and relevant cases law  
recognise that the Board of Directors and the  
Controlling Bodies may deviate from the 30 day and  
15 day terms.

In practice, it is not uncommon for a Board of  
Directors to be in a position such that it cannot  
approve the draft Financial Statements in a timely  
manner so as to submit them to the Controlling  
Bodies within the 30 day term. In these  
circumstances, the Controlling Bodies may not have  
sufficient time to finalise their review and prepare  
their reports so as to allow them to be filed by the  
Board of Directors within the 15 day term as  
required by law.

In light of the above, Italian law allows the Board of  
Statutory Auditors to waive, both totally and  
partially, the 30 day term where the Board of  
Statutory Auditors assists the Board of Directors  
with the preparation of the draft Financial  
Statements and is constantly aware of the relevant  
content and possible issues.

Accordingly, it is reasonable to consider that the  
Shareholders' meeting approving the Financial  
Statements in lack of the 30 day term provided by  
Article 2429 ICC is not appealable in circumstances  
where the Controlling Bodies are not prevented  
from drafting their respective reports and  
accordingly ensuring that the Board of Directors file  
them at the legal seat of the company in time.

The same prevalent view also considers that the  
Shareholders may waive the 15 day term recognised  
by the ICC. In such case, the Shareholders' meeting  
must unanimously resolve to waive such term prior  
to the meeting convened for the approval of the  
Financial Statements.

In this respect, it is worth highlighting that  
compliance with the term for the filing of the above-  
mentioned documentation is to be determined with  
respect to the day on which the meeting is effectively  
held. This means that the validity of the resolution  
cannot be considered in the event the Shareholders'  
meeting approves the Financial Statements in  
second call when the 15 day term has effectively  
expired.

### **4. Subjects entitled to appeal against the Shareholders' meeting resolution breaching the terms provided by Article 2429 ICC**

The Shareholders' meeting resolution made in  
breach of, respectively, the 30 and 15 day terms set  
out in Article 2429 ICC could be appealed by those  
Shareholders which were absent, dissenting or  
abstained from voting or, alternatively, by the same  
Board of Directors, Board of Statutory Auditors or  
by the Supervisory Board.

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In this regard, it is worth highlighting that the Shareholders - in order to validly challenge the meeting approving the Financial Statements - need to demonstrate the existence of a real interest in declaring the meeting as invalid. This is to avoid an argument that the objection is made only as a pretext to prevent the correct management of the company.

In light of the above, the prevalent view considers that the appealing Shareholders must demonstrate that the defects and irregularities of Financial Statements approved on the basis of an unlawful resolution prevents them from knowing the current financial situation of the company as well as the value of their respective shareholding.

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