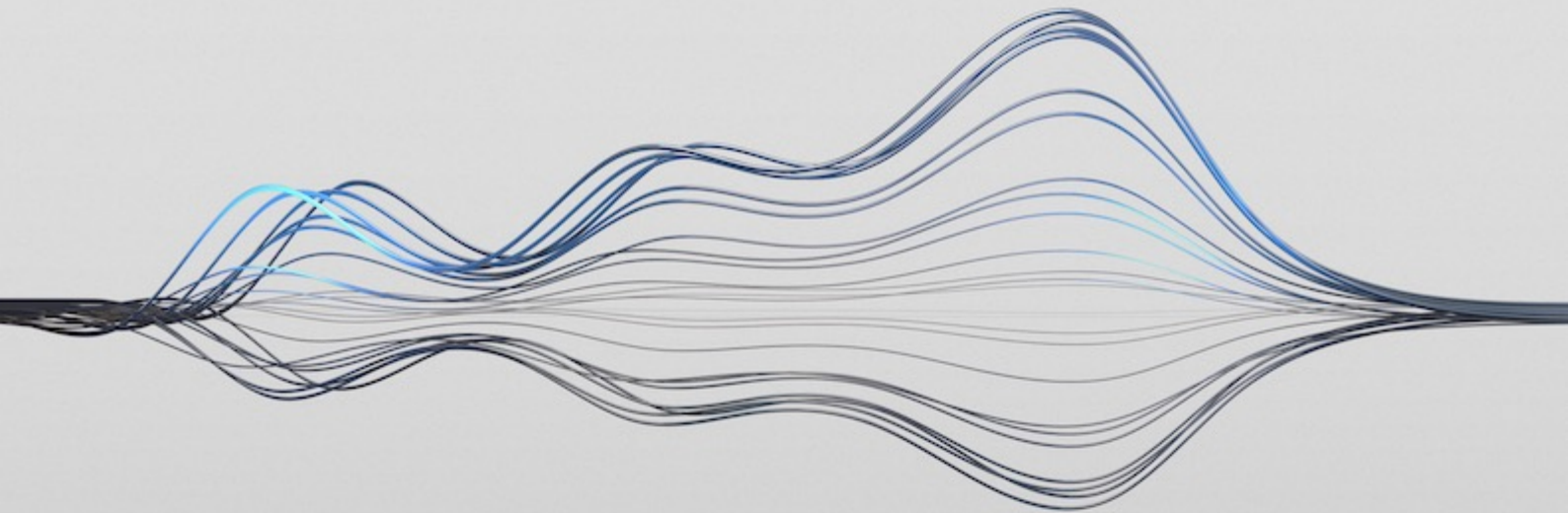


AUSTRIA

Global Guide to Directors' Duties





Austria

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Corporate entities

What type of company is typically used in group structures?

In Austria, the most common type of company used in group structures is the limited liability company (*Gesellschaft mit beschränkter Haftung* or *GmbH*). This guide therefore focuses on the management of a GmbH.

(Note that on 1 January 2024, a new law was enacted in Austria which allows for the formation of a flexible company, similar to a limited liability company.)

Types of director

What is a "director"?

A director (or also managing director; in German *Geschäftsführer*) is the individual who manages the business of the GmbH. A director is responsible both for the business of the company as such as well as for all administrative duties, e.g. preparation of financial statements, filings with the companies register, tax filings, etc.).

Shareholders are free to decide whether a director shall be allowed to represent the company alone or together with another director (or more directors or together with a Prokurist; see [What are the different types of director?](#)).

What are the different types of director?

Austrian company law does not differentiate between different types of director – all directors are subject to the same duties.

However, in addition to a director, proxy holders may be appointed (in German *Prokurist*). A Prokurist may also represent the company and may sign agreements, however, this power is limited to typical transactions for a company. The power of representation of a Prokurist may also be restricted to e.g. a specific branch office.

Eligibility

Who can be a director?

A director must be at least 18 years old, but there are no nationality or residency restrictions (for corporate law purposes). It is not possible to appoint legal entities as directors, only individuals.

Minimum / maximum number of directors

A private company must have at least one director. There is no maximum. The company's articles of association may, however, specify a greater minimum number and/or specify a maximum.

Appointment and removal

How are directors appointed?

Directors must consent to their appointment and are appointed by the company's shareholders (via a shareholders' meeting or by written resolution). In exceptional cases, directors can be appointed by having their names and dates included directly in the articles of association.

The appointment must be made by written resolution in notarised form. Details of the appointment must be filed with the companies register without undue delay. The respective director must also provide a specimen signature in notarised form to the companies register. The director's residential address and full date of birth are included on the record (which is open for public inspection). The notice to the companies register is to be signed in notarised form by as many directors as required (depending on whether a director can represent the company alone or together with another director).

How are directors removed?

Shareholders have a residual statutory power to remove directors by a majority resolution (subject to certain procedural requirements). If a director is appointed in the articles of association, their removal may be restricted to important reasons.

When a director leaves office, notice must be filed at the companies register without undue delay. The companies register must be provided with the respective resolution in notarised form or the original resignation letter. The notice is to be signed in notarised form by the remaining director(s) (depending on whether a director can represent the company alone or together with another director).

Board / management structure

Typical management structure

The directors are collectively responsible for the management and operations of the company and for ensuring that the company meets its statutory obligations. A GmbH typically has a unitary board structure.

How are decisions made by directors?

The manner in which directors can make decisions is set out in the company's constitution. Either the articles of association provide how decisions are taken, otherwise, without a specific provision in the articles of association, the directors have to act unanimously.

Authority and powers

As far as third parties are concerned, directors are able to bind the company and enter into contracts on its behalf even if there are internal limits on their power to do so (e.g. in the company's constitution or in internal policies and protocols).

The authority of directors vis-à-vis third parties cannot be limited, neither by resolution of the shareholders nor by the articles of association.

Delegation

The directors may delegate tasks to employees, however, the directors remain responsible for the company's operations and management.

Duties and obligations of directors

What are the key general duties of directors?

The key duties of a director are set out in the Act on Limited Liability Companies (the Act):

- The managing directors owe a duty to the company to exercise the care of a prudent business person in their management of the company.
- A managing director is deemed to act with the diligence of a prudent business person if, in making a business decision, the director is not guided by extraneous interests and it can be assumed, on the basis of adequate information, that they are acting in the best interests of the company.
- The managing directors must ensure that an accounting system and an internal control system are maintained which meet the requirements of the enterprise.
- Copies of the annual financial statements, including the management report, and of the consolidated financial statements, including the group management report, must be sent to each shareholder without delay after their preparation.
- In the interests of the company, the directors are required to convene shareholders' meetings whenever they deem it appropriate.

What are directors' other key obligations?

The Act requires directors to prepare and file annual accounts and submit other information to the companies register. The accounts and other information must be submitted to the companies register within nine months after the end of the previous financial year.

Directors are also responsible for ensuring that the company complies with its other statutory and legal obligations, for example under environmental and health and safety laws, employment laws, consumer protection laws, competition laws and bribery/anti-corruption laws.

Transactions with the company

Transactions between the company and a director usually do not require the consent of shareholders if such transactions are at arms' length (except in the first years after incorporation), unless a director is discharged from an obligation or is granted a special advantage (in which case the director – if they are also a shareholder – has no voting right).

Liabilities of directors

Breach of general duties

Directors owe their duties to the company itself and not directly to shareholders or creditors. Therefore, only the company can bring an action for breach of duty against a director.

Directors who violate their duties shall be jointly and severally liable to the company for the resulting damage. In particular, they shall be liable for compensation if:

- Company assets are distributed in breach of the provisions of the Act or of the articles of association, in particular if capital contributions or additional contributions are returned in whole or in part to shareholders, interest or shares in profits are paid out, or own shares in the company are acquired, pledged or withdrawn.
- Payments are made after the time at which they were obliged to request the opening of the insolvency proceedings.

Shareholders are able to bring an action for breach of duty on behalf of the company in certain circumstances.

A company may seek a range of remedies against a director for breach of duty including damages, recovery of misapplied property (including the payment of unlawful dividends), accounting for profit made in breach of duty, an injunction to prevent breach and rescission of a contract.

Liabilities on insolvency

Additional personal liabilities may arise for directors if the company is insolvent or nearing insolvency. Directors who knowingly or negligently allow a company to carry on trading when it is insolvent may be held liable for fraudulent or wrongful trading. These expose the director to liability to contribute to the company's assets on a winding up and, in the case of fraudulent trading, to criminal penalties. Liability for wrongful trading can be avoided if the director can satisfy the court that they took every step they ought to have taken to minimise the loss to creditors. In practice, this may limit the director's ability to resign when the company is insolvent or nearing insolvency.

Other key risks

Personal liability for directors may, in certain circumstances, arise under Austrian legislation including that relating to environmental and health and safety, employment, consumer protection and bribery/anti-corruption. In certain cases, criminal liability may arise.

A director may also be disqualified by the court from acting as a director upon request of the majority of shareholders. Failure to comply with company-related obligations, such as the preparation and filing of accounts, can also lead to fines for all (and not only individual) directors.

Protection against liability

How can directors be protected from liability?

- **Ratification.** Shareholders can ratify conduct by a director which is negligent or in breach of duty by a majority resolution (excluding the votes of the director concerned or their connected persons). Ratification by shareholders does not, however, absolve a director from any liability to a third party in relation to the matter concerned (e.g. creditors in an insolvency/pre-insolvency situation).
- **Indemnity.** Although it is not possible for a company to exempt its directors from liability, a company is able to indemnify its directors against certain liabilities incurred to third parties. An indemnity can potentially cover both the award of damages against a director and the costs involved in defending a claim but also regulatory fines. However, such an agreement can only be made between the company (represented by the shareholders or the remaining directors) and the respective director after a fine has been imposed or a liability was confirmed by court. Any in-advance agreement on the payment of damages or fines would potentially decrease a director's level of diligence and is therefore void.
- **Insurance.** Directors' and officers' (D&O) insurance is not common in Austria for companies with limited liability, only directors of large size companies may have a D&O insurance. It typically provides both cover for individual directors against claims made against them in their capacity as director, including defence costs (which applies when indemnification by the company is not available), and company reimbursement when it has indemnified its directors (subject to an excess/retention). Policy exclusions typically include claims in respect of a director's fraud, dishonesty, wilful default or criminal behaviour.

What practical steps can directors take to avoid liability?

Directors should:

- Keep informed about the affairs of the company, particularly its financial position. Directors should have access to up to date financial information, prepare thoroughly for and regularly attend board meetings and familiarise themselves with key legislation affecting the business.
- Make full disclosures to the other directors and shareholders if they have outside positions or interests which may give rise to a conflict of interest and/or if they have a personal interest in any proposed or existing transaction or arrangement with the company.
- Keep records and take advice – directors should ensure that full written records of board proceedings are made reflecting the reasoning behind key decisions.
- Also in a group situation, keep in mind that directors must act in the best interest of their group company. Whilst group interests and that company's interests are usually aligned, this may not always be the case (eg when their group company's solvency is adversely impacted). It is important to keep communication and reporting lines as open and clear as possible between parent and subsidiary companies when issues may arise and seek appropriate advice.

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