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Social insurance obligations of shareholding directors

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Back in 2015 the Federal Social Court (Bundessozialgericht, BSG) reclassified the social insurance status of shareholding directors, thereby developing precise, manageable benchmarks. The BSG has further clarified this case law with three decisions dated 1 February 2022 (BSG, judgments dated 1 February 2022 – B 12 KR 37/19 R; B 12 R 19/19 R; B 12 R 20/19 R) and provided important practical information.

1. Basic social insurance classification of shareholding directors

Where a shareholding director is a job that is obligated to make social insurance contributions rests on whether the shareholding director has the legal authority to determine the fate of the company by influencing the Shareholders' Meeting, in particular by preventing unpleasant instructions being given to them. If this is the case, then the shareholding director is to be viewed as self-employed from the view point of social insurance law.

The director is assumed to have the required legal authority if they hold at least 50% of the shares in the GmbH (German private company with limited liability). As this is not always the case in practice, lawyers and tax consultants have in the past attempted, with variable levels of success, to develop alternative constructions to also enable directors holding lesser percentage of shares to be classed as self-employed and not be obligated make social insurance contributions. The BSG has recently been able to express its views on a number of these constructions and questions. Some of these questions are the type of acts which provide legal authority, designations over trusts under company law or the law of obligations, the impact of direct participation in parent companies, the impact of family relationships and questions of confidentiality. The BSG took the opportunity with its decision dated 1 February 2022 to give its views on two additional situations: the required structuring of minority blocking rights and the impact of the relationship between multiple (minority) shareholding directors.

2. Required scope of minority blocking rights for (minority) shareholding directors

In 2018, the BSG held (BSG, judgment dated 14 March 2018 - B 12 KR 13/17 R) that a minority shareholding director is only classed as self-employed if they have a "real/qualified" minority blocking right enshrined in the Articles of Association which is not restricted by certain circumstances but instead encompasses all business activities without restriction. The BSG made it clear with both decisions dated 1 February 2022 - B 12 KR 37/19 R; B 12 R 19/19 that the requirement for the blocking minority to cover "all business activities without restriction" is also to be understood in this manner.

So in order to be classed as self-employed it is not sufficient for the blocking minority to only cover certain resolutions of the Shareholders' Meeting (such as changes to the Articles of Association and concluding employment contracts with directors) and not even then if the director also holds a special right regarding the constitution of the company where they cannot be removed as a director as long as they have a minority shareholding in the GmbH (BSG, judgment dated 1 February 2022 – B 12 KR 37/19).

A blocking minority enshrined in the constitution of the company is then also not sufficient if this places the director in a position to prevent resolutions of the Shareholders' Meeting which relate to their removal as a director or the appointment of other directors and Prokurists (person holding a general power of commercial representation), instructions on managing the company, or the waiver, amendment and removal of the Board of Management. The BSG does not view such a sweeping blocking minority as sufficient because it does not cover all business activities (BSG, judgment dated 1 February 2022 – B 12 R 19/19 R; unlike the lower court: Baden-Württemberg Regional Social Court (LSG), judgment dated 25 October 2019 – L 8 BA 1226/18).

3. No aggregation of shares

The BSG also made it clear in an additional decision (judgment dated 1 February 2022 – B 12 R 20/19 R) that the required legal authority also does not occur in the event of an equal distribution of shares between three shareholding directors. The court held that the (minority) shareholding directors were interdependent when it came to decision making in the Shareholders' Meeting because they each had to take the interests of the others into account. However, this did not result in an aggregation of shares which would establish them as self-employed under social insurance law. The court noted here that the Federal Supreme Court (Bundesgerichtshof, BGH) answered this question differently in the area of occupational pensions and classed (minority) shareholding directors as self-employed and/or not similar to an employee if they collectively hold more than 50% of the shares (BGH, judgment dated 1 October 2019 – II ZR 386/17).

4. Practical relevance

In particular, it has been recently increasingly observed that companies are being requested by the German pension insurance organisation (Deutsche Rentenversicherung) to retroactively pay four year's worth of social insurance contributions plus late payment penalties for their supposedly self-employed directors. The inaccurate classification of directors under social insurance law is mostly based on the prevailing legal option before changes were made to the case law of the BSG in 2015 that minority shareholders could count as self-employed in terms of social insurance law even without blocking minority if they were the "head and soul" of the company (such as is the case with family companies). In light of this, the classification of minority shareholding directors under social insurance law should be critically scrutinised and, if necessary, adapted to current case law in order to avoid Deutsche Rentenversicherung demanding retroactive payments.

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