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Draft legislation to mitigate the consequences of the COVID-19 pandemic

Corporate Law

Due to the spread of the novel SARS-CoV-2 (COVID-19 pandemic), the German federal states have taken a number of measures in recent weeks that have led to extreme restrictions on both private and economic life in Germany and were unimaginable just a few weeks ago. In particular, the ban on meetings with more than two participants and the requirement for a minimum distance of 1.5 meters between individuals currently makes it impossible for many companies of various legal forms to hold shareholder and board meetings in the way they used to. The current legal situation usually requires - subject to a deviating provision in the articles of association or the consent of all parties involved - a physical meeting with the right of the shareholder or board member to participate in person. This has serious consequences. As a matter of principle, no distributions can be made without resolutions on the approval of the annual financial statements and the appropriation of profits. Furthermore, especially in times of economic crisis, it is often of existential importance for companies to implement special measures, such as restructuring or capital measures, quickly.

In order to solve these problems, the German government is planning a number of facilitations in this area with the law to mitigate the COVID 19 pandemic in civil, insolvency and criminal proceedings. The following presentation is based on the legislative draft by

the parliamentary groups of CDU/CSU and SPD as of 24 March 2020. The law is to be finally discussed and adopted by the Bundestag and Bundesrat in the course of this week. Although it cannot be ruled out that various amendments will be made to the current draft during the legislative procedure, we do not expect any further substantial changes to the proposed provisions pertaining to corporate law.

- **Stock Corporations**

- Annual General Meeting

- Section 118 German Stock Corporation Act (AktG) already allows the management board (*Vorstand*) to broadcast the Annual General Meeting (AGM) by video and audio allowing shareholders to participate in the meeting "virtually", if the articles of association of the company provide for this. This requirement of a respective provision in the articles of association shall now be abolished, so that the management board no longer requires a special authorization for these measures. However, the draft law goes even further and allows the management board to conduct the AGM completely "virtual", i.e. to completely exclude the right of shareholders to participate physically.

- To this end, a video and audio transmission of the entire meeting must be ensured, whereby according to the explanatory notes to the legislation, it shall not be an absolute requirement that the transmission runs technically trouble-free and, in particular, reaches every shareholder. In addition to the transmission, shareholders must be enabled to exercise their voting rights, ask questions and file objections to a resolution in the meeting minutes (including those of the notary). Here it will be interesting to see how quickly and at what cost AGM service providers are able to provide the necessary technology for holding such virtual AGMs.

- Right to ask questions and challenge resolutions

- Until now, German stock corporations in practice have been rather reluctant to allow "virtual" participation of shareholders in the Annual General Meeting. One of the main reasons for this was the fear that activist shareholders could bombard the board of directors with a flood of questions by e-mail, including either irrelevant or even inadmissible questions, with the purpose to create grounds for contesting the meeting or to make the meeting fail altogether. In order to prevent this, the new draft legislation strengthens the position of the management board by denying shareholders the right to receive an answer to every specific question. Instead, the management board can decide at its own discretion which questions it will answer and in what manner. The management board may also stipulate that questions must be submitted by electronic communication at least

two days before the AGM. This way, questions on one topic can be grouped together and answered in a summary way or even answered in advance on the company's website in the form of a FAQ list. The draft legislation reduces the risk of a flood of legal challenges by drastically restricting the challenge rights of the shareholders. According to the draft, challenges of a resolution cannot be based on an alleged violation of the regulations on electronic participation in the AGM, except in case of intentional actions by the company.

Deadlines

In order to make the convening and preparation of the Annual General Meeting more flexible, the Management Board will in future be allowed to significantly shorten the deadlines for convening the Annual General Meeting, notifying banks and shareholders' associations and submitting requests for additions to the agenda to 21, 12 and 14 days, respectively, before the meeting. Deviating provisions of the articles of association are irrelevant in this respect.

At the same time, the period for holding the Annual General Meeting is extended. Contrary to Section 175 para. 1, sent. 2 AktG, stock corporations will no longer have only eight months for this purpose, but the entire fiscal year.

Permissibility of interim distributions

Finally, the possibility of a German stock corporation to make advance distributions of (anticipated) profits to its shareholders is expanded. Under the new legislation, the management board may, even without a corresponding authorization in the articles of association, make an advance distribution out of the company's anticipated balance sheet profit to the shareholders after the end of the financial year on the basis of provisional annual financial statements. However, the restrictions on the amount of these advance payments pursuant to § 59 para. 2 AktG continue to apply.

Supervisory Board approval

All of the above-mentioned decisions of the Management Board require the approval of the Supervisory Board, whereby here too, in deviation from Section 108 (4) of the German Stock Corporation Act (AktG), irrespective of any deviating provisions in the Articles of Association or the rules of procedure, resolutions may be passed without the physical presence of the members in writing, by telephone or in a comparable manner, even if not all of the members of the Supervisory Board agree to this procedure.

- **KGaA; SE**

The above provisions apply in essence also to companies organized in the legal forms of a KGaA and SE, with the necessary exceptions or adjustments required because of the specificities of their legal form. In the case of an SE, however, it should be noted that, pursuant to Art. 54 para. 1 sent. 1 of the SE-Regulation, the AGM must necessarily take place within the first six months of the fiscal year (i.e. generally until June 30, 2020). The German legislator was not able to extend this period due to the lack of legislative authority.

- **Period of validity**

The above-mentioned facilitations shall initially apply until 31 December 2020, with the Federal Ministry of Justice being able to extend their application until 31 December 2021 at the most, if this appears necessary due to the continuing effects of the COVID 19 pandemic.

- **GmbH**

In the case of the GmbH, too, shareholder resolutions outside of physical shareholder meetings will be made easier in future. Contrary to section 48 para. 2 German Act on Companies with Limited Liability (GmbHG), resolutions may also be passed in writing or in text form, even if not all shareholders agree to this procedure.

- **Corporate Transformation**

Finally, the legislator also wants to facilitate conversions by extending the deadline. Whereas previously the closing balance sheet of the transferring legal entity was allowed to be no more than eight months old on the day of registration with the commercial register, this period is now extended to twelve months. This is intended to supplement the provisions to facilitate virtual shareholders' meetings, as it is feared that the technical effort involved in the preparation of such meetings may lead to delays which in some cases make it impossible to meet the eight-month deadline.

- **Conclusion**

Overall, the draft legislation triggered by the current corona crisis, brings a number of useful simplifications for the organization and conduct of shareholder meetings. Particularly the "virtual" AGM of German stock corporations provides interesting options for the management board. It remains to be seen to what extent the organizers of AGMs are able to provide the technical infrastructure necessary to make use of these possibilities.

If successful, this crisis legislation could be the starting point for a further modernization of German stock corporation law.

Dr. Markus Bauer (markus.bauer@rittershaus.net) is a member of the Corona-Task-Force at Rittershaus and available to provide legal advice on all issues concerning corporate law.

The author:



Dr. Markus Bauer
Partner
Member of the RITTERSHAUS Corona Task Force
Frankfurt am Main
Tel.: +49 175 250 15 36
mailto:markus.bauer@rittershaus.net

RITTERSHAUS

Rechtsanwälte Partnerschaftsgesellschaft

Mannheim Office
Harrlachweg 4
68163 Mannheim
Tel.: +49 621 4256 0
Fax: +49 621 4256 250

Frankfurt Office.
Bockenheimer Landstraße 77
60325 Frankfurt/Main
Tel.: +49 69 274040 0
Fax: +49 69 274040 250

Munich Office
Maximiliansplatz 10
80333 München
Tel.: +49 89 121405 0
Fax: +49 89 121405 250

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