

Coronavirus and Corporate Law – Virtual general meetings / resolution contestation / convening procedure

Dr Daniel Rubner
Dr Lutz Pospiech

On 27 March 2020, the "Act to Mitigate the Consequences of the COVID-19 Pandemic in Civil, Insolvency, and Criminal Procedure Law" (hereinafter: COVID-ZivilG) has been promulgated in the Federal Gazette. It has entered into force with retroactive effect as of 1 March 2020.

Article 2 COVID-ZivilG contains the "Act on Measures in Corporate, Cooperative, Association, Foundation, and Condominium Law to Mitigate the Effects of the COVID-19 Pandemic". The Act aims at enabling companies to hold general and shareholders' meetings by using electronic means of communication. Simultaneously. Also, the in-court review of violations of shareholders' rights will be severely restricted. In the following, we provide an overview of the most relevant corporate law provisions of Art. 2 COVID-ZivilG.

Temporal application

The provisions of Art. 2 COVID-ZivilG are conceived as exceptional rules. Accordingly, the wordings of the German Stock Corporation Act (AktG) and of the German Limited Liability Companies Act (GmbHG) remain unchanged. Instead, the new Act allows for temporally limited derogations from the AktG and the GmbHG. According to Art. 2 § 7 COVID-ZivilG, the exceptional rules shall apply only to general and shareholder meetings held in 2020.

Participation in the general meeting via means of electronic communication

The AktG already provides for the participation of individual shareholders in the general meeting by means of electronic communication. Hitherto, this requires a corresponding provision in the company's articles of association.

According to Art. 2 § 1 paras. 1, 6 COVID-ZivilG, the executive board, with the consent of the supervisory board, can now decide on (i) the possibility of shareholders to participate in the general meeting by means of electronic communication, (ii) the casting of votes by means of electronic communication (postal voting), (iii) the participation of members of the supervisory board by means of video and audio transmission and (iv) the permission of video and audio transmission – even without a corresponding authorisation in the articles of association.

Online general meeting

The mere participation in the general meeting via electronic means of communication has to be distinguished from the so-called online general meeting. So far, a pure online general meeting without any physical presence at a specific place has not been provided for by law.

Art. 2 § 1 para. 2 COVID-ZivilG now provides for the first time for general meetings to be held as a virtual general meeting without the physical presence of shareholders or their proxies. The holding of an online general meeting requires that (1) the video and audio transmission of the entire meeting is provided, (2) the shareholders' voting rights and authorisation can be exercised via electronic communication (postal vote or electronic participation), (3) shareholders are given the opportunity to ask questions via electronic communication, and (4) shareholders who have exercised their voting rights in accordance with no. 2 are given the opportunity to object to a resolution of the general meeting by way of derogation from § 245 no. 1 AktG, waiving the requirement to be present at the general meeting.

The decision to hold the general meeting as a virtual meeting can be taken by the executive board with the consent of the supervisory board (Art. 2 § 1 paras. 2, 6 COVID-ZivilG).

Shareholders' information rights at the online general meeting

Art. 2 § 1 para. 2 COVID-ZivilG reads: "The executive board shall decide according to its best judgement which questions it answers and how; it can also stipulate that questions shall be submitted by electronic communication at least two days prior to the meeting".

It remains unclear what is specifically meant by this provision and to what extent the standard of best judgement should replace the standard of § 131 AktG. According to the latter, upon request of a shareholder any information shall be provided to the general meeting if and to the extent such information is deemed necessary for a correct judgement on an item on the agenda.

According to the reasons given by the parliamentary groups of CDU/CSU and SPD when introducing the bill, the executive board shall not be obliged to answer all questions of shareholders. Instead, it may summarise them and select meaningful questions in the interest of all other shareholders. The executive board may give preference to shareholder associations and investors with a significant share of the voting rights (Bundestagsdrucksache 19/18110, p. 26).

Furthermore, we assume that the assessment made by the executive board to this effect will no longer be subject to a full in-court review. Rather, the judicial review will probably be limited to "errors of judgement".

If the executive board decides to answer the respective question, it will still have to do this correctly and completely – despite the ambiguous wording that it is up to the judgement of the executive board which questions it answers and "how".

Restricted rights to challenge resolutions

§ 243 para. 3 no. 1 AktG already contains the provision that a dispute about resolutions of the general meeting cannot be based on the fact that shareholders' rights exercised electronically have been violated by a mere technical fault, except in case of gross negligence or intent by the Company.

Article 2 § 1 para. 7 COVID-ZivilG now further restricts the possibility of legal disputes: The contesting of a resolution of the general meeting shall be excluded in case of violations of the provisions on participation and voting by means of electronic communication, unless the company can be proven to have acted with intent.

The same (i.e. contestability only in case of intent) shall apply if the executive board unlawfully fails to provide information at the general meeting and/or if it provides incorrect information. In both cases the respective violation of shareholders' rights only leads to the contestability of the corresponding resolution of the general meeting if the executive board has acted wilfully in this respect. Both the wording of the provision and the reasons given for the introduction of the bill speak for such severe a restriction of the shareholders' rights: "Violations of the limited duty to provide information in para. 2 sentence 2 do not establish any possibility of contestation. However, this shall not affect the possibility of dispute in the case of intentional violations of the law" (Bundestagsdrucksache, 19/18110, p. 27).

Convening the general meeting

Regardless of whether the meeting is held as a physical or virtual general meeting, the provisions for the convening of the meeting are eased:

The annual general meeting does may be held within twelve months after the end of the business year (Art. 2 § 1 para. 5 COVID-ZivilG), rather than within the first eight months.

The deadline for convening a general meeting may be reduced to the 21st day prior to the meeting. With regard to listed companies, the proof of share ownership (record date) must refer to the beginning of the twelfth day prior to the general meeting. In the case of bearer shares, such proof must be received by the company on the fourth day prior to the general meeting at the latest, except in cases where the invitation to the general meeting provides for a shorter period for the receipt (Art. 2 § 1 para. 3 COVID-ZivilG).

Down payments on dividends

Down payments on dividends are now possible without any resolution of the general meeting or corresponding authorisation in the articles of association. A resolution of the executive board with the consent of the supervisory board shall suffice (Art. 2 § 1 para. 4, 6 COVID-ZivilG).

GmbH: Voting by circulation procedure

With regard to limited liability companies (GmbHs), it was already possible to pass shareholders' resolutions without physical presence, in particular to hold votes by means of a so-called circulation procedure.

Art. 2 § 2 COVID-ZivilG now stipulates that, in deviation from § 48 para. 2 GmbHG, resolutions of the shareholders can be passed in text form or by written submission of the votes even without the consent of all shareholders.

Conclusion

The company law provision of the COVID-ZivilG will simplify considerably the preparation and holding of general meetings planned for 2020. However, the significant restrictions on the rights of shareholders to information and their rights to contest resolutions only apply if the respective meeting is held as an online general meeting.

Note

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Our Offices

GÖRG Partnerschaft von Rechtsanwälten mbB

BERLIN

Kantstraße 164, 10623 Berlin
Phone +49 30 884503-0, Fax +49 30 882715-0

COLOGNE

Kennedyplatz 2, 50679 Köln
Phone +49 221 33660-0, Fax +49 221 33660-80

FRANKFURT AM MAIN

Ulmenstraße 30, 60325 Frankfurt am Main
Phone +49 69 170000-17, Fax +49 69 170000-27

HAMBURG

Alter Wall 20 – 22, 20457 Hamburg
Phone +49 40 500360-0, Fax +49 40 500360-99

MUNICH

Prinzregentenstraße 22, 80538 München
Phone +49 89 3090667-0, Fax +49 89 3090667-90