

FEDERAL COURT OF JUSTICE CONFIRMS THE ADMISSIBILITY OF RESTRICTION OF TIME ALLOWED FOR SHAREHOLDERS TO SPEAK AND ASK QUESTIONS

In its judgment dated 8 February 2010 (II ZR 94/08), the Federal Court of Justice decided that the bylaws of a stock corporation may grant the chairperson of shareholders' meetings extensive powers to impose an appropriate limit to the time allotted to shareholders to speak and ask questions at annual shareholders' meetings.

It is also permissible to fix an appropriate time frame for the maximum duration of annual shareholders' meetings as well as the time allotted individual shareholders for the purposes of being heard and asking questions, in which case the chairperson may specify the time allowed on a case-by-case basis using due discretion. It is further permissible to allow for the possibility of requiring that the discussion end at 10:30 p.m. in order to be able to proceed with voting on the items on the agenda and ensure that the annual shareholders' meeting is closed on the same day.

The chairperson must take into account the specific situation at the annual shareholders' meeting in exercising the discretion granted the chairperson. The chairperson must in particular respect the principles of objectivity, proportionality and equality of treatment, which need not be explicitly formulated in the bylaws.

With this decision, the Federal Court of Justice reversed a judgment on appeal of the Frankfurt Higher Regional Court dated 12 February 2008 that found restriction of the time reserved for shareholders to speak and ask questions by company bylaws to be in violation of the provision contained in section 131(2) sentence 2 of the Stock Corporation Act. The appellate court reasoned that section 131(2) sentence 2 of the Stock Corporation Act was to be construed to mean that bylaws may govern only the procedure for restriction of the right of shareholders to speak and ask questions and that this right may not, however, be restricted in respect of duration by a provision of a company's bylaws.

The Federal Court of Justice disagreed and ruled that the provision of the bylaws empowering the chairperson to impose an appropriate limit on the time allotted shareholders to speak and ask questions at annual shareholders' meetings was valid.

The provision of section 131(2) sentence 2 that was included in the Stock Corporation Act in the year 2005 in connection with the Act on Corporate Integrity and on the Modernization of the Right to Contest Resolutions (Gesetz zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts – UMAG) stipulates that a company's bylaws or rules of procedure may be used to empower the chairperson of a shareholders' meeting to set appropriate limits to the right of shareholders to speak and ask questions and regulate the details of such limits.

The Federal Court of Justice grounded its decision to permit limitation of the time allowed for shareholders to exercise their right to speak and ask questions in the fact that such a provision in bylaws (i) is covered by the wording of section 131(2) sentence 2 of the Stock Corporation Act and (ii) serves to achieve the intent and purpose of the provision. According to the Court, the intent and purpose of the provision contained in section 131(2) sentence 2 of the Stock Corporation Act is to prevent the abuse of the right to speak and ask questions by a few shareholders who, in many cases, subsequently use this right to justify contestation of resolutions and then ruthlessly pursue their own interests at the expense of the company. The authority to regulate the power of the chairperson of a shareholders' meeting to restrict the right of shareholders to speak and ask questions through the bylaws lies with the shareholders, who make their decisions in this respect independently within certain limits.

Stock corporations should consider placing motions to restrict the right of shareholders to speak and ask questions through amendment of the company's bylaws on the agenda in the case of upcoming annual shareholders' meetings.

We have provided below the wording of the bylaws restricting the right of shareholders to speak and ask questions that the Federal Court of Justice considers permissible. It is necessary to take into account here that the admissibility of restrictions on the right of shareholders to speak and ask questions also depends upon the concrete circumstances in the individual case, as well as the fact that the specific formulation adopted in the bylaws should be subjected to legal review in each individual case in the context of preparation for an annual shareholders' meeting.

“RESTRICTION OF THE RIGHT OF SHAREHOLDERS TO SPEAK AND ASK QUESTIONS AT THE ANNUAL SHAREHOLDERS’ MEETING

(1) The chairperson is empowered to limit the time allotted shareholders to exercise their right to speak and ask questions in accordance with the following conditions:

a) In the event the agenda (including any minority requests pursuant to section 122 of the Stock Corporation Act) includes only motions to be voted on in respect of the items appropriation of profit, formal approval of the actions of Management, formal approval of the actions of the members of the Supervisory Board, selection of the statutory auditor and authority to acquire own shares or such items individually, the chairperson may restrict the time allotted shareholders to exercise their right to speak and ask questions in such a manner as to ensure that the duration of the annual shareholders’ meeting in its entirety does not exceed six hours. For the purposes of determination of the duration of the annual shareholders’ meeting, time taken up by interruptions of the annual shareholders’ meeting and the speech of Management and the comments of the chairperson prior to commencement of the general discussion shall not be counted.

b) In the event the agenda (including any minority requests pursuant to section 122 of the Stock Corporation Act) also includes motions to be voted on other than those enumerated in a), the chairperson may restrict the time allotted shareholders to exercise their right to speak and ask questions in such a manner as to ensure that the duration of the annual shareholders’ meeting in its entirety does not exceed ten hours. The second sentence of subparagraph a) shall apply accordingly.

c) The chairperson may restrict the time allotted a shareholder to speak or ask questions to 15 minutes each time that shareholder occupies the floor or, if at least three other speakers claim the floor when a shareholder obtains the floor, to ten minutes. The chairperson may restrict the time allotted a shareholder to speak and ask questions during the meeting to a total of 45 minutes.

d) The restrictions pursuant to subparagraphs a) through c) may be enforced by the chairperson at any time, including upon commencement of the meeting.

e) Restrictions pursuant to subparagraphs a) through d) above shall be deemed appropriate within the meaning of section 131(2) sentence 2 of the Stock Corporation Act.

(2) Independently of the power of the chairperson to restrict the right of shareholders to speak and ask questions pursuant to paragraph 1, the chairperson may order that the discussion be closed at 10:30 p.m. of the day of the meeting and commence voting on the motions on the agenda. Further questions will no longer be admissible after the discussion is declared closed in the cases pursuant to sentence 1.

(3) The right of the chairperson to restrict the right of shareholders to speak and ask questions beyond the scope of the provisions contained in paragraphs 1 and 2 pursuant to provisions of law or pursuant to other principles recognized in the case law shall remain unaffected by the provisions contained in paragraphs 1 and 2.“

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