

What's New in German Corporate Law?

Virtual Annual Meetings and Less Abusive Shareholders' Activism

Dr. Anne Kindt and Dennis Stanek, CMS Hasche Sigle, Hamburg

The German legislature has transformed the EU-directive on shareholders' rights (2007/36/EC) into German law. The new law will become effective once the German Federal President has signed the respective act (*Gesetz zur Umsetzung der Aktionärsrechterichtlinie – ARUG*).

The new regulations are meant to give shareholders of German stock corporations (*Aktiengesellschaften*) – in particular those from outside of Germany – enhanced access to corporate and financial information of the company. Additionally, the exercise of voting rights shall be facilitated through an increased use of the internet. Hereby – and through less complex rules regarding the exercise of voting rights in cooperation with the shareholders' depositary bank (*Depotbank*) – the legislative bodies aim to increase the participation of shareholders in the companies' annual meetings.

While transforming the EU-directive, the legislator has – also in the course of the *ARUG* – implemented new measures against so called predatory shareholders (*räuberische Aktionäre*).

Publications via the Internet

The new law makes the companies' websites the central medium for information exchange between companies and their shareholders. In particular, the shareholders' access to all data relevant for the company's annual meeting shall be facilitated. Listed companies will be obliged to publish all such relevant data on the firm's website within short after having convened the annual meeting. For example this will concern the company's financial statements, the documentation of intercompany agreements (*Unternehmensverträge*, Secs. 291 et seq. of the German Stock Corporation Act - *AktG*) or announcements regarding intended *Squeeze-Outs* (Sec. 327c *AktG*). Moreover, under the modified law German stock corporations are exempted from the cost-intensive duty to serve to its shareholders convocation notifications regarding the annual meeting in writing. Such written form may now be replaced by electronic convocations. Lastly, companies are no longer obligated to provide for certain documents (such as intercompany agreements or merger documentation) during the annual meeting in

hardcopy form, as long as all shareholders get electronic access to such documents – for example via online terminals.

Virtual Annual Meetings

Subject to the company's articles, the modified regulations on virtual annual meetings make available the opportunity for single shareholders to participate in annual meetings via the internet, by e-mail or by letter. Yet, the new law does not provide for the opportunity of a completely virtual annual meeting, i.e. companies are still obliged to hold physical annual meetings. The new possibility should mainly concern the exercise of shareholders' voting rights ("e-voting"); however, companies may even provide their shareholders with the opportunity to exercise further rights (e.g. the right to put questions) in an online real-time-system. Technical details regarding virtual annual meetings are to be regulated individually by the company's articles of association or – to the extent the articles provide for a respective authority – by the company's management. It remains to be seen how companies will technically deal with this new aspect of investor relations.

Yet, the transformation of directive 2007/36/EC shall not provide for new fields of activity for what is called "predatory shareholders' activism" (also see below): subject to deviating provisions in the companies' articles of association, challenging the shareholders' resolutions due to electronic malfunctions in the course of virtual participation in annual meetings is restricted to cases of (at least) gross negligence.

Proxy Voting

Proxy voting is often the sole means by which small shareholders may effectively pursue their interests in large corporations. Therefore, shareholders frequently issue proxies to their depository bank (*Depotstimmrecht*). Under the old regime such authorization of a bank was largely complicated – in particular for the bank itself.

The new law facilitates such authorization process: on the one hand, banks may – if at all willing to act on behalf of the shareholders and not bound by specific directives – submit their own voting-proposals with respect to the set agenda items. On the other hand, banks may also offer to vote in the name of the shareholder in accordance with the voting-proposals of the management board (*Vorstand*) or the supervisory board (*Aufsichtsrat*). In any case, however, banks are obliged to also offer shareholders the opportunity to forward all proxy-related documents to a third person as nominated by the shareholder, in particular to shareholders'

associations (*Aktionärsverbände*). Lastly, according to the new regulations the proxy may – subject to deviating provisions in the articles of association – be issued in the so called *Textform*, i.e. also via email.

Predatory Shareholders

The new law aims to further contain the abusive challenging of shareholders' resolutions by so called "predatory shareholders" (*räuberische Aktionäre*). The approach already taken by previous German legislation in 2005 to ease the blockade pressure applied by predatory shareholders by introducing a release procedure (*Freigabeverfahren*) for important resolutions that are subject to registration with the commercial register (§ 246a *AktG*) has shown some success. It allows shareholders' resolutions to be entered in the commercial register even though appeal proceedings are still pending. The new law follows this approach by further specifying and – at the same time – broadening the conditions of the release procedure:

The criteria the court has to apply when balancing the different interest within its release procedure decision are now specified by law. Thus, the court is given a clear guideline for its decision to differentiate between legitimate and abusive appeal proceedings.

In addition, there is a bagatelle quorum: shareholders holding shares with a total nominal value of less than 1.000 EUR and can only claim less serious violations of laws and bylaws (*Satzung*) can no longer impede shareholders' resolutions against the predominant majority of the other shareholders. They may only claim damages.

The essential pressurizing medium of predatory shareholders is the delaying of the implementation of important resolutions. Thus, it was pivotal to shorten the length of the release proceedings since the main blackmail potential lies in a long duration of proceedings. Therefore, there is now only one instance to decide on the matter of release proceedings; competent being the higher regional courts (*Oberlandesgerichte*). Through the omission of a second instance, companies will have a reliable result within three to four months at the latest. In consequence, the pressure to settle out of court will abate.

Several procedural regulations will further avert a delay of release proceedings, which are designed as fast-track proceedings. Henceforth the power of attorney for challenging the shareholders' resolution also extends to the release proceedings. Time consuming servicing to the claimant himself, who might have his domicile abroad, e.g. in China or Dubai, will be-

come dispensable. In addition shareholders are granted earlier access to the court records, if the servicing of the writ is delayed by non-payment of the suit money.