

# Coronavirus and civil procedure – Litigation risks of annual general meetings under the COVID-19 Act in Germany

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The law to mitigate the consequences of the COVID-19 pandemic in civil, insolvency and criminal procedure law (COVID-19 Act, in German: *Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht (COVID-19-Gesetz)*) of 28 March 2020 makes it easier to convene and conduct annual general meetings, but also entails risks of rescission and liability. The management board is required to take appropriate measures to prevent such risks.

The COVID-19 Act enables the management board to shorten the notice period for convening the annual general meeting (AGM) from 30 to 21 days. If the management board makes use of this option, the deadlines for the proof of shareholding in listed companies, the notifications pursuant to Section 125 of the German Stock Corporation Act (AktG) and requests for supplements will be adjusted accordingly. An objective reason for shortening the notice period is not required by law, even though shareholder representatives demand it for shareholders, banks and shareholders' associations because of the short notice.

Online participation is also possible even without authorization in the articles of incorporation; for the first time, virtual annual general meetings are permitted. In this respect, the exercise of voting rights can – although little use has been made of this to date - be made possible not only by means of written and electronic postal voting and the authorization of proxies of the company or third parties, but also by electronic participation.

In order to prevent companies from not using the new possibility to conduct virtual annual general meetings, the right of appeal is limited to intentional violations of the COVID-19 Act provisions. In this respect, the mere acceptance of the infringement should suffice. The management board should therefore ensure at an early stage, coordinate with the AGM service providers and document that the technical requirements for the chosen form of participation are met.

Whether an annual general meeting that has already been convened can be converted into an online or a virtual annual general meeting, at least if the shortened deadlines are complied with, is not clear. In order to avoid any risk of rescission, it is therefore advisable to cancel an already

convened annual general meeting and to convene a new one under the changed conditions of participation.

The management board may also hold the annual general meeting after the expiry of the eight-month period set by Section 175 (1) sentence 2 German Stock Corporation Act (AktG) until the end of the financial year. A postponement sounds simple, but in practice it can be difficult and involves risks. In fact, a meeting room for sometimes hundreds of shareholders must be found at short notice. For annual general meetings convened after 3 September 2020, the provisions of the Act on the Implementation of the Second Shareholders' Rights Directive (ARUG II) on shareholder identification and the exchange of information with shareholders (know-your-shareholder) apply. It is not foreseeable when an annual general meeting can take place again without the consideration of the COVID-19 pandemic. However, security checks to detect symptoms of illness are questionable in terms of personal rights and data protection law, and an inadmissible refusal to participate carries considerable risks of rescission. If the one-year deadline is exceeded, this does not lead to the voidability of resolutions adopted too late, but the members of the management board, the supervisory board as well as the auditors are in the event of fault personally liable for any damage incurred by the company or the shareholders - for example, due to late dividend payments.

Contrary to Section 131 German Stock Corporation Act (AktG), shareholders have no right to information at virtual general meetings. The company only has to provide shareholders with the opportunity to ask questions via electronic communication. There is no right to an answer. The management board decides on the answer at its own discretion. In doing so, it may select meaningful questions, leave questions unanswered and give preference to shareholder associations and institutional investors with significant voting interests. In addition, the management board may stipulate that questions must be submitted by electronic communication at least two days before the annual general meeting. This allows for the preparation of answers and avoids the annual general meeting from being bombarded with questionnaires. Actions for rescission based on the failure to answer a question are only possible if it can be proven that the company has acted intentionally. In order to avoid any risk of rescission, it should therefore at least be documented why questions were not answered, taking into account the recommendation of the German Corporate Governance Codex that an annual general meeting should be concluded after four to six hours at the latest.

If the management board wants to make use of the facilitations provided by the COVID-19 Act the supervisory board's approval is required. For this reason, deficiencies in resolutions at the supervisory board level that are relevant for appeal should be avoided.

Probably also due to the short time frame in which the COVID-19 Act had to be passed, a number of questions remain open, e.g.:

- **How are countermotions and election proposals to be handled in accordance with Sections 126 and 127 of the German Stock Corporation Act (AktG)?**

Since these cannot be made in an online or virtual annual general meeting, they could not be dealt with in the annual general meeting. To avoid the risk of rescission, however, it is recommended that countermotions and election proposals that have been properly submitted be treated as if they had been submitted at the annual general meeting.

- **Are supervisory board resolutions invalid if elections to the supervisory board do not take place within the eight-month period of Sections 102 (1), 120 (1) sentence 1 of the German Stock Corporation Act (AktG) due to the postponement**

## of the annual general meeting?

In order to create legal certainty, an application for the judicial appointment of supervisory board members in accordance with Section 104 of the German Stock Corporation Act (AktG) is recommended, if necessary.

- **How can the delay in the appointment of the auditor be dealt with if the annual general meeting is postponed?**

If the auditor has not been elected by the end of the fiscal year, the company must file a motion for judicial appointment to avoid a penalty payment. Therefore, the supervisory board should issue the audit mandate subject to the appointment by the annual general meeting.

- **How is the two-day deadline for submitting questions calculated?**

In order to avoid the risk of rescission, two full days should be allowed between the receipt of questions and the day of the annual general meeting in accordance with the concept of Section 123 German Stock Corporation Act (AktG).

- **Can questions be rebuked as unanswered?**

According to the COVID-19 Act, the management board must give shareholders the opportunity to ask questions and object to a resolution of the annual general meeting, but not to reprimand unanswered questions. This corresponds to the exclusion of the right to information, but should not protect against actions for rescission due to unanswered questions and actions for compulsion to provide information pursuant to Section 132 German Stock Corporation Act (AktG).

## Conclusion

The COVID-19 Act makes it easier to convene and conduct annual general meetings, but leaves many questions unanswered and therefore involves a number of risks. The management board is required to counter these risks appropriately and, by doing so, also to reduce the risk of liability.

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