

MELCHERS LAW: CORPORATE LAW

COVID-19: The new regulations on shareholders' meetings of limited liability companies (*GmbH*) and general meetings of public limited companies (*Aktiengesellschaften*) strengthen the ability of companies to act

The current measures to contain the COVID 19 pandemic severely limit the ability of many companies to act, also in terms of internal organisation. In particular, assembly bans delay or even prevent important shareholder resolutions and company decisions. The Lower House of Parliament (*Bundestag*) has therefore now adopted a package of measures drafted in advance by the Federal Government (*Bundesregierung*), with which, among other things, the ability of companies to act and make decisions is to be ensured.

New regulations for the GmbH

According to the current legal requirements, shareholders' resolutions must be passed in shareholders' meetings (see Section 48 para. 1 GmbHG). In exceptional cases, if all shareholders declare in text form that they agree to the written casting of votes (Section 48 para. 2 GmbHG), it is not necessary to hold a shareholders' meeting. The current legal regulations therefore basically regard a physical presence meeting as the rule and only permit a deviation from this if all shareholders agree.

In view of the currently applicable contact bans, the German legislator has taken remedial action here. Notwithstanding Section 48 para. 2 GmbHG, it should be possible for shareholders' resolutions to be passed in text form or by written submission of votes even without the consent of all shareholders. The regulation of Section 48 para. 2 GmbHG was and is of a dispositive nature, so that the articles of association could contain deviating regulations even before the change in the law. However, the new regulation enables the company to exclude the physical presence at the shareholders' meeting even in the event that there is no corresponding provision in the articles of association.

New regulations for AG, KGaA and SE

In addition to the GmbH, simplifications have also been created for holding general meetings (*Hauptversammlung*) at AG, KGaA and SE. General meetings are to be able to be held completely virtually and without the physical presence of stockholders (*Aktionäre*). This will pave the way for online general meetings, as is already the case in Switzerland and Austria. This gives the management board (*Vorstand*) a considerable amount of decision-making leeway. It alone decides on the participation of stockholders in the general meeting by means of electronic communication in accordance with Section 118 para. 1 sentence 2 AktG, even if it is not authorized to do so by the articles of association or by rules of order.

In case that a general meeting is nevertheless held with physical presence, the management board can enable stockholders to participate or vote electronically even without the existence of an authorization in the articles of association. In this case, the stockholders' right to ask questions and speak may well entail the risk that the general meeting may be lost under a flood of contributions and speeches. Therefore, the new law stipulates that the management board may already indicate in the invitation that questions must be asked up to two days before the annual general meeting. In addition, the management board should be able to decide at its own discretion which questions it answers and how.

Furthermore, the period of notice for convening the general meeting was reduced from 30 to 21 days, as well as the general meeting can now also take place after the end of the eight-month period within the financial year.

In addition, the management board may decide, with the approval of the supervisory board (*Aufsichtsrat*) but without a resolution of the general meeting, to pay a discount on the net retained profits to the stockholders without having been authorized to do so by the articles of association.

If the general meeting has already been convened, the general meeting can be cancelled according to general principles and convened according to the new rules.

Temporal validity

According to the current version of the law, the regulations are valid until the end of 2020, but if the effects of the COVID 19 pandemic make this necessary, the Federal Ministry of Justice and Consumer Protection (*Bundesministerium der Justiz und für Verbraucherschutz*) has already been authorised to extend the validity of the above-mentioned amendments by ordinance until 31 December 2021 at the latest.