

ISSUE 10

»»FROM MANDATORY MEETING TO TRUE DIALOGUE««

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A wake-up call from Dr Daniela Favocchia

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Tried and true – the annual general meetings held by German corporations swear by this principle. The primary goal involved in organizing and carrying out these gatherings is to avoid making any slip-ups that could cause trouble and set costs into motion. The things that worked last year will be the things that work this year. A new trick or two may be added, but spring cleaning is rarely done. The right choice of food and beverages – munchies that are neither too expensive nor too cheap – has all of the makings necessary to create a hot potato. The effort that goes into organizing these events is enormous. As the meeting drags on, the back office becomes more crowded than the rows of seats out front. To ensure that shareholders can exercise their rights at all times, hand dryers in restrooms may even be turned off throughout the meeting for the purpose of piping the action on the main floor directly into these facilities.

Instead of pointed statements by a company's executive leadership, the debate is characterized by long lists of shareholder's questions with comprehensive but clearly reticent answers from management. To top things off, the answers will be simply read aloud, word by word by word. These two sides of the coin called the right to information have virtually become the "trademark" of the German annual general meeting. Shining moments of communication glory are something else entirely.

Even a non-contested meeting with a simple agenda may easily consume half a day. The length of a meeting is viewed as an indication of the comprehensive nature of the information provided. The all-day affair is still considered to be the gold standard of such events in Germany, even though other legal systems can get by with much-shorter versions of the very same gatherings. And we don't have to look all the way across the Atlantic to the United States to see what I am talking about, that country where shareholder meetings may not even take up a full hour. A look at Germany's neighbors in France and the Netherlands will do just fine – countries where these meetings rarely last for more than three hours.

Digital revolution? From paper to the tablet

In many ways, the law is much more advanced than the general way of doing things. The "hybrid" annual general meeting, a congregation of shareholders that is either attended in person or via the internet, is – in principle – permitted. But companies are reluctant to go this far. They are too worried about technical glitches that, in the worst-case scenario, could result in legal



challenges and, in the best-case scenario, could leave a dark stain on a company's image. The idea of allowing real participation by shareholders sitting at home still causes a lot of tension. Wouldn't shareholders who were no longer forced to step in front of a big audience and ask their questions with no holds barred simply place too much strain on the technical systems? Would critics be perhaps more insulting and obnoxious if they did not have to square off face to face against their antagonists?

German corporations are in good company here: Hybrid shareholder meetings have failed to gain traction everywhere, including the Netherlands, the United Kingdom and France. The reasons are sung in chorus: worries about the technology. Only the United States seem to be a step ahead of German companies: Many states there even permit companies to hold totally virtual annual general meetings. Technology companies for their part take advantage of this opportunity fairly often.

The digital revolution that has swept through the classic annual general meeting attended in person boils down to just one thing at many German companies: Tablets are used in place of paper ballots, a process that may indeed speed up the tallying of votes (but not the collection process). Frequently, shareholders are permitted to cast their ballots online, as well as to submit them by using conventional means like mail-in ballots and faxes. Live streaming of the entire annual general meeting for the benefit of a company's shareholders has been seized on as a way to expand the audience of listeners as harmlessly as possible. Active participation was not part of the package, though.

»The hybrid AGM has not been used to its full potential thus far – reservation has been too great.«

Digitalization only as a make-shift solution?

The 2020 season of annual general meetings started like every year with the early annual general meetings of Siemens and ThyssenKrupp. The focus of preparations was initially placed on environmental issues and the sparks they could produce. Long-forgotten special guidelines for handling possible trouble-makers were pulled out and dusted off.

But it soon became quite clear that the emerging Covid-19 pandemic would hinder, if not fully prevent classic annual general meetings attended in person by shareholders from being held. People began to put their heads together in search of ways to urge as many shareholders as possible to “attend” the meeting online as a way of rescuing the meeting and having just a few people on site. But it remained unclear whether possible restrictions imposed by government officials could really be followed. Nobody had the slightest notion about how many shareholders would eventually exercise their right to attend the meeting in person.

The German legislator ultimately lent a helping hand: Virtually overnight, he came up with an exemption from regulations that turned all previous and proven principles upside-down. All of a sudden, shareholders or their proxies appeared to be an unnecessary part of the meetings. Shareholders should be able to cast their votes using electronic communications from their homes and follow the events during a live stream. Even the far-reaching right to information was condensed into a simple right to ask questions, a right that included a possible deadline for the submission of questions and the clear legal notification that no right to an answer was being offered.



»The 2020 AGM season has become a test-run for digital formats.«

Critics soon spoke up, people who complained about “phantom” annual general meetings and demanded a quick return to normality. Only with a careful approach under state-of-emergency laws – but not the exploitation of all potential leeway – the extraordinary 2020 season of annual general meetings can pave the way to modernize the institution.

Crisis scenario as a digital testbed

One concern frequently uttered by companies was eliminated in the process as well: The legislator eased the rules associated with the technical difficulties that may occur with virtual annual general meetings. The right to file a legal challenge related to technical disruptions was largely eliminated. In this regard, German lawmakers blasted open the legal tunnel that helped annual general meetings complete their journey into the digital age. This is unlike such countries as France, where such protective measures have not been put into place and where the shift to the virtual world seems to have found little acceptance up to now.

Thanks to these rules, the 2020 season for annual general meetings may turn out to be a secure lab where the technical requirements for future digitalization of the gatherings can be put through their paces – worry free. Once trust in the technical

possibilities has been created, companies will most likely utilize them in the future – the principle of tried and true applies to enhancements, too.

Naturally, not all of the – perceived or actual – problems associated with the drawn-out German annual general meeting will be eradicated simply by stepping into the virtual world. State-of-the-art IT can dramatically shorten the voting processes, in particular vote counting. Other time-intensive facets may be better reduced by using the leeway already offered by current law. The reading aloud of formalities can be kept to a minimum if tried and true texts are being tossed over board left-and-right.

Right to information or real debate?

But one time-consuming and energy-draining aspect of the annual general meeting remains set in stone despite of all efforts for digitalization: the general debate. A move into the virtual world will not provide any relief here. Anybody who is bent on asking querulous questions in an attempt to provoke mistakes will also do so online.

Here, too, a look across Germany's borders does a world of good. On paper, a similarly far-reaching right to information also exists here as a result of requirements included in the European directive on shareholder's rights. Germany's neighbors have also formally incorporated these requirements into their laws. But the actual practice differs significantly from the German debate. The reasons for this difference can only be speculated about: Are only cultural disparities in play here? Or does this have something to do



with the fact that German law attaches far-reaching rights to file legal challenges in response to inaccurate information that is provided? The latter aspect is reason enough in everyday practice to provide the most extensive amount of information possible and to limit shareholder rights as late as possible. Other countries, particularly the Netherlands, tend to take a more heavy-handed approach to controlling the debate and limiting speaking times and the number of questions at a significantly earlier stage of the meeting. Another factor could be the practice of holding the debate as a general debate. In other jurisdictions, questions may be asked only about the topic that is currently under discussion, a practice that may result in more focused questions.

»Legislators must create the framework for an open discussion culture.«

In the United States, a company will typically refer shareholders to the IR department and provide information at some point following the meeting if they ask questions that cannot be answered by the (few) people from the company who happen to be at the meeting. But this option conflicts with shareholders' right to equal treatment and cannot be incorporated into German shareholder law just like that.

The French have come up with another way of preventing questions from spinning out of control: Typically, shareholders can submit their written questions in advance – up to four days before the meeting. The questions are answered online by the company, a step that cuts down on the number of questions asked twice.

Institutional investors regularly take advantage of this option in hopes of receiving more consistent answers.

The approach is very similar to the question-submission process spelled out in Germany's Covid-19 law, even though the French model does not limit the opportunity to ask follow-up questions or (other) questions during the meeting. A similar approach in Germany would not be imaginable without the help of lawmakers, though. Germany's Stock Corporation Act provides for a right to deny information in regards to answers provided ahead of time – an option rarely used – only if the information was available online at least seven days before the annual general meeting.

Thus, a series of steps must be taken to bring the general debate that runs ad nauseam under control: First, companies should more forcefully use the leeway already available to them, and the chairman of the meeting should have the courage to limit an individual's speaking time or to refuse (extensive) questions in individual cases. The German Corporate Governance Code calls for the meetings to last four hours to six hours, plenty of time also for contested meetings. A measured legal ruling is needed in this regard. The right to information is important, but it is not a means unto itself. As a result of the excessive affirmation of information obligations, the right to information transforms into a gateway for legal challenges and in the process does a disservice to cultivating an open culture of discussion. Conferences set up for analysts show that there is indeed another way. In these get-togethers, a relatively small number of people communicate in a much more reasonable and open manner than any annual general meeting does.

Based on the experiences with the written process in the 2020 season of annual general meetings, German lawmakers



should act to ever-so-gently restrict the right to file legal challenges resulting from inaccurate information or to create the opportunity to answer questions in a written process. The goal must and should be to facilitate a transition from a purely mandatory date in the calendar to a real dialogue between a company's management team and shareholders.

From mandatory meeting to sound communications

The 2020 season for annual general meetings has unexpectedly turned into a far-reaching experiment in which ways to digitalize and shorten annual general meetings are being put to the test:

— Digitalization, in particular, has received an unexpected boost. Technical opportunities may be tried out in a largely sheltered environment. This is particularly the case when it comes to extensive streaming along with voting possibilities that are open for the longest possible time via the meeting portal. It can be presumed – and hoped for – that these possibilities will continue to be used in the future.

— But the freedom created by laws related to Covid-19 to limit shareholder rights should be responsibly applied if the opportunity to modernize and streamline the regularly scheduled annual general meeting is to be seized. No one should ever get the wrong impression that a company's goal is to simply hold a meaningless event where attendance and co-determination rights of shareholders are restricted to the greatest degree possible.

The author

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Even without lawmakers getting involved, the annual general meeting can be streamlined by using the freedom that already exists and, above all, by the revision of almost sacred speaking scripts.

But lawmakers, too, will have to get involved to facilitate communications that are more transparent and fruitful for both parties. The opportunity to submit written questions, an option introduced for the first time as part of the Covid-19 law, should be thoroughly taken into consideration. A modification of the right to file legal challenges should be included in this review as well.

The assumption of some elements of the Covid-19 law and the artful weighing of freedom offered under current law could turn the unloved mandatory meeting into a format that, in terms of good communication, could serve to provide shareholders with a comprehensive overview of their company. In good times, satisfied shareholders who place their trust in their management team as a result of transparency may simply be a nice-to-have. In bad times, however, they can be the crucial factor behind a company's continued existence.

There is certainly no lack of discussion points and change ideas related to annual general meetings in Germany. We should seize the momentum that is being created now to rethink the concept of the annual general meeting as a forum of trust and transparency for companies and their shareholders in the digital age. By doing so, the annual general meeting can evolve from a caricature to a role model of corporate governance.

Seizing the momentum: Annual general meetings as great moments of communication

The Covid-19 legislation approved by the German government has created some significant opportunities. German annual general meetings that have, to a certain extent, fallen behind the times, could finally enter the digital age. To ensure they do so, companies, shareholders and German legislators must continue boldly down the new path they have taken, so that mandatory shareholder meetings can become real moments of great communication.

It is the same procedure every year: powerful top managers hold long speeches to their shareholders, but painstakingly consider every word they utter on this day as they walk through a minefield fraught with legal risks. In a best-case scenario, shareholders will fire back with a barrage of critical questions, unless they happen to be more interested in the culinary delights that German companies serve during their annual general meetings (AGMs). This is not what real communication looks like.

Many of the voting decisions are already a done deal, made long before the shareholders convene. A large proportion of the companies listed on Germany's blue-chip index, the DAX, has been in foreign hands for many years now. These mostly Anglo-Saxon investors talk with the management and supervisory boards weeks ahead of the AGM and cast their votes a few days before the buffet is even set up. They no longer have the time to attend a German meeting in person. By the time the chairman of the supervisory board steps up to open the meeting at 10 a.m., the die has already been cast.

Creating a new form of AGM by using the right communication strategy

Nonetheless, you cannot just abandon the shareholder meetings that are attended in person as there would be legitimate resistance from the German investors who attach great importance to live debate. However, the opportunities offered by the virtual world during this crisis year of 2020 should be seized now and used in the long term: they could give every shareholder around the world the chance to attend and cast votes at a German AGM – either in person or online. Companies conducting such a “hybrid AGM” would express true interest in their shareholders. It would require a little extra effort, but with the right communication strategy, companies could score some big points with all their stakeholders – and not just with shareholders.

The chairmen of the supervisory board and the management board usually get the ball rolling at the AGM and fill its

opening segment with their speeches. At a “hybrid AGM,” they would have to do something more. They would have to give speeches that would inspire and convince both shareholders who are sitting in the audience as well as those viewing them from screens around the world. For the speakers, it would be even more important to find the right tone, use compelling language, make the appropriate facial expressions and create the right impression. They should also take their digital audience’s limited attention span into account, for instance giving shorter, more compact speeches. To help break up the potential monotony of these speeches in an online context, they could use digital formats (such as videos, animations that display numbers, graphics, photos and key quotes).

Twitter & co. are already a key part of a company’s communication mix. Why not take this even further and let followers participate in the AGM events inside and outside the hall? Video portraits of the new candidates for the supervisory board, or visual explanations of complex or controversial issues, could contribute to a better understanding and guide decisions in the desired direction. In addition, if the CEO summarizes the results of the meeting shortly afterwards in a personal video message, and thanks the shareholders for their participation, he or she would complete the company’s positive image as a successful and contemporary company.

There are many ways to make German AGMs more modern and shareholder friendly. However, at a more fundamental level shareholders viewing the meeting online must also be granted a comprehensive right to speak and ask questions virtually. The 2020 emergency legislation fails to go far enough for this in some respects. For example, the opportunity of submitting questions before the AGM can even have a positive effect on the quality of

the dialogue with investors because the answers provided by a company's management can be compiled with less time pressure than they currently are. In return, the speeches held by the chairmen of the supervisory and management boards should be made public in advance, giving shareholders an opportunity to raise relevant questions. Some companies already took this step during the 2020 AGM season.

Catapulting the AGM into the digital age and creating new “shareholder value”

Companies should use the momentum being generated right now to catapult German AGMs into the digital age. For legislators, this could mean that parts of the emergency legislation must be permanently incorporated into the German Stock Corporation Act – the provision for the “hybrid AGM” to take place irrespective of the articles of association, for instance, or the limitation on the right of appeal so that the general debate can be conducted in a more focused manner. All of this would represent true progress to shareholders who are seriously interested in their companies.

Despite the crisis we are facing right now, German companies should be expected to aim for something more than simply getting through their AGM without hitches or criticism. Instead, they should use the new opportunities to demonstrate solidarity and transparency, and to set new market standards. By doing so, they would not only be pioneers of good corporate governance but would also create a new form of “shareholder value”.

About the author

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