# Munich Higher Regional Court Challenges Established Practice for Capital Increases from Authorized Capital

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## Executive Summary

A recent decision of the Munich Higher Regional Court calls into question a long-established market practice used in capital increases from authorized capital by German listed companies. If followed by other commercial registers, the ruling could create significant challenges for accelerated bookbuild offerings that rely on the immediate fungibility of newly issued shares. As further appellate review is unlikely in the near term, companies contemplating capital increases under exclusion of subscription rights should carefully consider the implications of the decision and take steps to mitigate registration risk.

## The Decision

The Munich Higher Regional Court (*Oberlandesgericht München*) recently called into question a long-established market practice for equity offerings by German listed companies. In a decision dated May 28, 2026 (31 Wx 82/26), the court refused to register a capital increase from authorized capital. The transaction involved newly issued shares that were intended to participate retroactively in profits for a financial year that had already ended. At the time of issuance, the shareholders' meeting had not yet adopted a dividend resolution, and subscription rights had been excluded pursuant to Section 186(3) sentence 4 of the German Stock Corporation Act (*AktG*).

According to the court, the combination of (i) retroactive dividend entitlement, (ii) exclusion of subscription rights, and (iii) the use of authorized capital constitutes an impermissible interference with the membership rights of existing shareholders. The court held that the mere possibility of a damages claim would not provide sufficient protection for shareholders affected by such dilution.

## Practical Impact: Could This Spell the End of Accelerated Bookbuild Offerings?

The decision could have immediate and significant practical implications. If newly issued shares are granted dividend rights that differ from those attached to existing shares—with respect to a financial year that has already ended and for which no dividend resolution has yet been adopted—the new shares would need to trade separately until the dividend has been paid. They would therefore receive a separate ISIN. As a result, the new shares would not be fungible with the existing shares during that period. This is particularly problematic in the context of accelerated bookbuilding offerings, which typically depend on the rapid placement of fully fungible shares with institutional investors within a very short timeframe (usually several hours). The decision therefore risks disrupting established market practice and may materially complicate future offerings.

Beyond the practical implications, the decision is also unconvincing on its merits. In particular, the court does not explain what economic detriment existing shareholders would suffer in the circumstances of the case. The better view is that retroactive dividend entitlement for newly issued shares relating to a completed financial year should also be permissible where subscription rights are excluded pursuant to Section 186(3) sentence 4 AktG. This is because the economic value of that dividend entitlement must be reflected in the issue price of the new shares; existing shareholders are therefore not affected economically. Unfortunately, the court did not grant leave for a further appeal to the Federal Court of Justice (*Bundesgerichtshof*), meaning that clarification at the highest judicial level is unlikely in the near term.

## Recommended Action

Companies contemplating a capital increase from authorized capital under exclusion of subscription rights between the beginning of the fiscal year and the annual shareholders' meeting should therefore always consider the following steps:

1. **Engage with the commercial register court at an early stage.** The proposed dividend entitlement of the new shares and the intended exclusion of subscription rights should be discussed with the competent register court before the transaction is launched.
2. **Address the issue expressly in the management board resolution.** The resolution approving the capital increase should include a brief explanation of the exclusion of subscription rights, the dividend entitlement of the new shares, and the balancing of the interests of the company and its existing shareholders.

Requiring a specific justification may appear inconsistent with the statutory purpose of the simplified exclusion of subscription rights under Section 186(3) sentence 4 AktG. Nevertheless, in light of the Munich Higher Regional Court's decision, including such a justification may reduce the risk of delays or objections during the registration process.

## Key Contacts

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