

Digitalization of General Meetings of Stock Corporations (Part 2)

German Covid-19-Regulation

Sven Bösing, LL.M. | Attorney-at-law, Associate | Schalast Rechtsanwälte | Notare
Dr. Jörg Kaufmann, LL.M. | Attorney-at-law, Counsel | Schalast Rechtsanwälte | Notare

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Part 2 of this three-part essay deals with the current **German Covid-19 regulation** on general meetings of stock corporations with a view to the ongoing digitalization process of general meetings.

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I. Introduction

Public measures to fight the Covid-19 pandemic, especially the restrictions on freedom of assembly, have had a massive impact on the capacity of many companies to act.¹ In particular, many stock corporations have been unable to pass resolutions in general meetings (*Hauptversammlungen*).² This has resulted in significant problems pertaining to the adoption of annual accounts, the determination of profit distribution and the implementation of capital and restructuring measures. Moreover, Sec. 174 para. 1 s. 2 of the German Stock Corporation Act (*AktG*) actually requires stock corporations to hold the annual general meeting (*Ordentliche Hauptversammlung*) within the initial eight months of the respective business year, meaning for most corporations, until the end of August. German lawmakers have therefore decided to introduce several legislative measures with the aim of facilitating the convening and holding of virtual general meetings of stock corporations. These measures have been implemented by means of Art. 2 Sec. 1 of the Act on the Mitigation of the Consequences of the Covid-19 pandemic (Covid-19 Mitigation Act).³ They apply to annual general meetings (*Ordentliche Hauptversammlungen*) as well as to extraordinary general meetings (*Außerordentliche Hauptversammlungen*) of German stock corporations irrespective of a stock exchange listing.⁴ The derogations from the German Stock Corporations Act (*AktG*) are applicable only to general meetings that are

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¹ BT-Drs. 19/18110, p. 3.

² *Herb/Merkelbach*, DStR 2020, 811; *Schmidt/Noack*, Legal Aspects of the Coronacrisis, 1st edition 2020, sec. 9 rec. 62.

³ https://www.bmju.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/Bgbl_Corona-Pandemie_EN.pdf?__blob=publicationFile&v=2.

⁴ *Herrler*, GWR 2020, 191.

scheduled to take place in 2020.⁵ The Federal Ministry of Justice and Consumer Protection is authorized, however, to extend the applicability of the legislative measures by ordinance (*Rechtsverordnung*) until 31 December, 2021.⁶

II. Art. 2 Sec. 1 Covid-19 Mitigation Act

1. Easements on the Applicability of Sec. 118 AktG

According to Art. 2 Sec. 1 para. 1 Covid-19 Mitigation Act the decisions on the participation of stockholders (*Aktionäre*) in general meetings of stock corporations by way of electronic communication according to Sec. 118 para. 1 s. 2 AktG (electronic participation), the casting of votes by way of electronic communication according to Sec. 118 para. 2 AktG (voting by correspondence), the participation of members of the supervisory board (*Aufsichtsrat*) by means of video- and audio transmission according to Sec. 118 para. 3 s. 2 AktG and the admission of video- and audio transmission according to Sec. 118 para. 4 AktG may be made by the executive board (*Vorstand*) of the stock corporation without authorization by the company's articles of association (*Satzung*) or rules of procedure (*Geschäftsordnung*). These derogations, however, cannot be considered as substantive changes to the existing legal regime.⁷ The digital elements in Sec. 118 AktG were signed into law several years before the outbreak of the Covid-19 pandemic. The Covid-19 legislation merely lifts the requirement of prior authorization in the company's *Satzung* or *Geschäftsordnung*.

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2. Facilitation of Virtual General Meetings

Art. 2 Sec. 1 para. 2 Covid-19 Mitigation Act stipulates that the executive board may decide to hold the general meeting without the physical presence of stockholders or their authorized agents as a virtual general meeting (*virtuelle Hauptversammlung*) pursuant to the following: 1. the entire general meeting is implemented via video- and audio transmission; 2. voting rights by the stockholders can be exercised by means of electronic communication (voting by correspondence or electronic participation) and by granting power of attorney; 3. stockholders are given the opportunity to ask questions by means of electronic communication; and 4. stockholders who have exercised their voting rights in accordance with no. 2. are – in deviation from sec. 245 no. 1 AktG by waiving the requirement of attendance in the general meeting – given the opportunity to object against a resolution of the general meeting.

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⁵ Art. 2 sec. 7 para. 1 Covid-19 Mitigation Act.

⁶ Art. 2 sec. 8 Covid-19 Mitigation Act.

⁷ Herrler, GWR 2020, 191.

3. Decision-Making Power

The decision to hold a virtual general meeting of the stock corporation rests with the executive board.⁸ According to Art. 2 Sec. 1 para. 6 Covid-19 Mitigation Act the decision of the executive board requires the approval of the supervisory board. The explanatory memorandum (*Gesetzesbegründung*) to the Covid-19 Mitigation Act states that this procedure shall prevent possible abuse of the new statutory provisions and ensure the supervisory function of the supervisory board.⁹ In this context, the supervisory board may – in deviation from Sec. 108 para. 4 AktG – adopt an approving resolution, by telephone for example, irrespective of the provisions in the company’s articles of association or rules of procedures without the physical presence of the board members in writing.

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It is noteworthy that German lawmakers are aware of an abuse potential in the regulations of Art. 2 Sec. 1 para. 2 Covid-19 Mitigation Act. German stock corporations might take advantage of the new legislation at the expense of stockholders’ rights. Stock corporations can only avail themselves, however, of statutory options created by lawmakers. More to the point, the temporary derogations from the Stock Corporations Act can be seen as a legislative experiment currently being conducted by German lawmakers. Rather than insisting on a hard-and-fast approach to the legal specifics of virtual general meetings for an indefinite time period, lawmakers are willing to experiment with new regulations within a delimited time frame.

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4. Transformation into a Virtual General Meeting

Under German corporate law, general meetings of stock corporations are conceived and set up as in-present meetings that take place in a conference room.¹⁰ Stockholders have an individual right to participate in general meetings (*Teilnahmerecht*). A violation of this participation right is a valid ground for challenging (*Anfechtungsgrund*) a resolution passed in a general meeting and may even render resolutions passed in such general meeting null and void. In this context, it does not matter whether or not the stockholding in question could have influenced the outcome of the adopted resolution.¹¹

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Before the German Covid-19 legislation came into force, a virtual general meeting (*virtuelle Hauptversammlung*) was considered as a meeting whose venue is located in cyberspace, which means that nobody congregates in a specific location.¹² The virtual general meeting according to Art. 2 Sec. 1 para. 2 Covid-19 Mitigation Act, however, does not reach this level of digitalization. This type of general meeting is characterized by the fact that it takes place without the physical presence of stockholders and their representatives.¹³

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⁸ Art. 2 sec. 1 para. 2 Covid-19 Mitigation Act.

⁹ BT-Drs. 19/18100, p. 27.

¹⁰ Schmidt/Noack, Legal Aspects of the Coronacrisis, 1st edition 2020, sec. 9 rec. 60.

¹¹ BGH, NZG 2015, 1227, 1234 rec. 40; Hüffer/Koch, AktG, 14th edition 2020, sec. 243 rec. 16.

¹² MüKo-AktG/Kübis, 4th edition 2018, sec. 118 rec. 17; Dubovitskaya, NZG 2020, 647, 648.

¹³ Herb/Merkelbach, DStR 2020, 811, 816.

Nonetheless, the attendance of the chair of the meeting (*Versammlungsleiter*) at a specific place and time is required.¹⁴ The members of the executive board as well as the supervisory board are also required to participate in the general meeting.¹⁵ The participation requirement for members of the supervisory board may be fulfilled by the use of video and audio transmission according to Sec. 118 para. 3, s. 2 AktG. During the Covid-19 pandemic members of the executive board are also allowed to make use of this digital easement.¹⁶ If the taking of notarial minutes of the general meeting is required according to Sec. 130 para. 1 AktG, the notary public in charge of the minutes must also be present in the meeting.¹⁷

Sec. 121 para. 3 s. 1 AktG makes it mandatory for the stock corporation to provide information on the location of the general meeting (*Ort der Hauptversammlung*), which means the postal address of the meeting place, in the invitation to said meeting. Non-compliance with this statutory requirement constitutes a ground for nullity (*Nichtigkeitsgrund*) of resolutions passed in the general meeting. The provision of the location information is intended to enable stockholders and other participants of the in-present general meeting to find the actual meeting place.¹⁸ The virtual general meeting according to Art. 2 Sec. 1 para. 2 Covid-19 Mitigation Act is characterized, however, by the physical absence of stockholders. Moreover, the idea of a location is contrary to the ubiquitous nature of the internet.¹⁹ Nonetheless, the type of general meeting is not entirely of a “virtual” nature as the personal attendance of at least some participants is mandatory, which is why the commonly used terminology of the meeting being a “*virtual general meeting*” appears misleading (more accurate it is a general meeting with exclusively virtual participation possibility for the stockholders). In order to avoid a risk of nullity of resolutions passed in a virtual general meeting, therefore, the postal address should be provided in the invitation to the general meeting.²⁰

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5. Video and Audio Transmission of the General Meeting

According to Art. 2 Sec. 1 para. 2 no. 1 Covid-19 Mitigation Act, the exclusion of the stockholders’ physical presence is only allowed if video and audio transmission of the entire general meeting occurs. This requirement applies to any stock corporation irrespective of a stock exchange listing.²¹ The transmission can be implemented by a livestream over the internet, but must include the opening, the speeches of the members of the executive board and of the chairman of the advisory board, as well as the general

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¹⁴ *Wicke*, DStR 2020, 885.

¹⁵ Sec. 118 para. 3 s. 2 AktG.

¹⁶ *Wicke*, DStR 2020, 885, 886.

¹⁷ *Herrler*, GWR 2020, 191, 193.

¹⁸ *Herrler*, GWR 2020, 191, 192.

¹⁹ *Simons/Hauser*, NZG 2020, 488, 491.

²⁰ *Herrler*, GWR 2020, 191, 192.

²¹ *Wicke*, DStR 2020, 885, 886.

debate and the casting of votes. It is not a requirement, however, that the transmission be received error-free by each individual stockholder.²²

6. Exercise of Voting Rights

It is mandatory that stockholders have the possibility to exercise their voting rights by means of electronic communication (either voting by correspondence or electronic participation) and by granting power of attorney in the virtual general meeting.²³ At least one of these two methods must be provided to the stockholders. In practice, stockholders are generally granted only the possibility of voting by correspondence.²⁴ The opportunity to grant power of attorney, however, needs to be provided in any case.²⁵

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7. Opportunity to ask Questions (*Fragemöglichkeit*)

Due to the exclusion of the physical presence of stockholders in the virtual general meeting, Art. 2 Sec. 1 para. 2 no. 3 Covid-19 Mitigation Act requires that stockholders are granted the opportunity to ask questions by means of electronic communication. The executive board decides at its reasonable discretion how it will answer which questions. In addition, the executive board may require that questions are submitted by means of electronic communication no later than two days before the general meeting. Further questions, including supplementary questions asked after this point of time, are not permitted.²⁶ Finally, a suitable communication channel, such as a restricted web portal or an email address, must be provided for the submission of the stockholders' questions.

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The opportunity to ask questions replaces the right to information in the sense of Sec. 131 AktG (*Auskunftsrecht*). According to the aforementioned statutory provision, each stockholder must be provided in the general meeting – upon his/her request – with information on matters of the stock corporation insofar as this is necessary for the adequate assessment of an agenda item. The opportunity to ask questions (*Fragemöglichkeit*), however, does not include a right to a response.²⁷ German lawmakers have in this context taken a conscious decision to curtail a stockholder's right in order to facilitate the handling of stockholders' questions in the general meeting. This course of action cannot be justified by the consequences of the Covid-19 pandemic alone because the right to information (*Auskunftsrecht*) can also be granted by electronic means. It is to be noted that the right to information is frequently used by stockholders in general meetings to exert pressure upon the stock corporation in order to achieve certain goals. By figuring the right to information as a mere opportunity to ask questions, lawmakers

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²² BT-Drs. 19/18100, p. 26.

²³ Art. 2 sec. 1 para. 2 Covid-19 Mitigation Act.

²⁴ Herrler, GWR 2020, 191, 193.

²⁵ Herb/Merkelbach, DStR 2020, 811, 812.

²⁶ Herb/Merkelbach, DStR 2020, 811, 813.

²⁷ BT-Drs. 19/18100, p. 26.

would appear to be conducting an experiment in order to ascertain whether or not the weaker form of the stockholders' right can be justified in practical terms.

8. Right to Submit Motions (*Antragsrecht*)

Stockholders have the right to submit certain motions in the general meeting, such as counter motions (*Gegenanträge*)²⁸ or voting propositions (*Wahlvorschläge*),²⁹ for members of the supervisory board or for annual auditors. The existing regulations on the submission of motions by stockholders also apply to virtual general meetings under the Covid-19 Mitigation Act.³⁰ Accordingly, stockholders cannot submit motions in the virtual general meeting in the case of voting by correspondence.³¹ The same applies to electronic participation which is combined with the exclusion of the right to submit motions. These points are confirmed by the explanatory memorandum to the Covid-19 Mitigation Act, which states that stockholders do not have a right to submit motions in a virtual general meeting in case of voting by correspondence.³² In addition, the right to submit motions is not mentioned as part of the minimum requirements of a virtual general meeting in Art. 2 Sec. 1 para. 2 s. 1 no. 1 – 4 Covid-19 Mitigation Act.³³

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The curtailment of the *Antragsrecht* with regard to the virtual general meeting highlights that digitalization is part of a process of change that is by no means restricted to the replacement of analog technologies by digital ones. Digitalization appears therefore to accelerate processes that are already under way, such as the erosion of stockholders' rights. In this context, it is to be noted that most stockholders buy stocks merely as an investment within a stock corporation, and with the intention of making a profit by dividend payouts and/or by changes in the stock exchange quotation, and therefore have little or no interest in attending general meetings.

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9. Right of Objection (*Widerspruchsrecht*)

The capacity of a stockholder to challenge a resolution according to Sec. 245 no. 1 AktG (*Anfechtungsbefugnis*) is premised on his/her attendance (*Erscheinen*) in the general meeting and the declaration of his/her objection for the record. Art. 2 Sec. 1 para. 2 no. 4 Covid-19 Mitigation Act stipulates that stockholders who have exercised their voting rights by electronic participation or by voting by correspondence must be granted – in deviation from Sec. 245 no. 1 AktG by waving the requirement of attendance in the general meeting – the opportunity to object against a resolution of the general meeting. In this context, the difference between voting by correspondence and voting by electronic participation is

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²⁸ Sec. 126 AktG.

²⁹ Sec. 127 AktG.

³⁰ Herrler, GWR 2020, 191, 193.

³¹ Herb/Merkelbach, DStR 2020, 811, 813f.

³² BT-Drs. 19/18100, p. 26.

³³ Herrler, GWR 2020, 191, 193.

levelled out.³⁴ Hitherto, stockholders who voted by correspondence were not entitled to a right of objection. The technical infrastructure for lodging an objection may be provided by setting up an objection button for registered stockholders or by providing an email address.³⁵ The executive board is obligated to provide the opportunity of objection with the acting notary public.³⁶ The objection must be lodged by the end of the general meeting, which applies to the case of voting by correspondence as well.³⁷

A stockholder's objection lodged by electronic means is easier to handle for the stock corporation than an objection lodged in an in-present general meeting. The stock corporation is – without the face-to-face contact, the personal presence of the objecting stockholder and the disturbance of the general meeting by an in-person objection – faced primarily with the handling of a legal, rather than political, task. By the use of electronic means, the right of objection is reduced to its essence. Stockholder activists may of course disagree with this course of action due to an inherent belief in the value of stockholders' rights in themselves. Digitalization, however, is a global trend which transforms every aspect of our modern legal system including the holding of general meetings of stock corporations.

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10. Exclusion of the Right to Challenge (*Anfechtungsausschluss*)

According to Art. 2 Sec. 1 para. 6 Covid-19 Mitigation Act, the challenge of a resolution adopted in the general meeting cannot be based on a violation of Sec. 118 para. 1 s. 3 - 5, para. 2 s. 2, para. 4 AktG, nor on the violation of form requirements for notices according to Sec. 125 AktG, nor on a violation of Art. 2 Sec. 1 para. 2 Covid-19 Mitigation Act unless intent (*Vorsatz*) on the part of the stock corporation can be proven. Lawmakers have decided to implement this exclusion of the right to challenge a resolution in order to ensure that the easements of the Covid-19 Mitigation Act are not taken advantage of by German stock corporations for fear of actions for annulment.³⁸ The fundamental decision of the stock corporation to hold a virtual general meeting shall not be subject to an action for annulment. The *Anfechtungsausschluss* has greatly encouraged German stock corporations to make use of the opportunity to hold virtual general meetings. In this context, lawmakers have clearly given priority to the digitalization of general meetings over stockholders' rights.

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³⁴ *Dubovitskaya*, NZG 2020, 647, 652.

³⁵ *Herb/Merkelbach*, DStR 2020, 811, 814, *Herrler*, GWR 2020, 191, 194.

³⁶ *Dubovitskaya*, NZG 2020, 647, 652.

³⁷ BT-Drs. 19/18100, p. 26.

³⁸ BT-Drs. 19/18100, p. 27.