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CORPORATE

VIRTUAL GENERAL MEETINGS – CHANGES TO THE STOCK CORPORATION ACT (AKTG) DUE TO COVID-19

On 23 March 2020, the Federal Cabinet introduced a law to mitigate the impact of the COVID-19 pandemic (retrievable [here](#)). It can be expected to be enacted by the German Federal Parliament and the Federal Council very soon. The planned changes to the AktG are meant to enable all stock corporations for a limited period in the year 2020 to conduct virtual general meetings. The management board and the supervisory board may exclude the physical presence of the shareholders. The statutory period within which ordinary general meetings must be held will be extended from 8 to 12 months. Interim payments towards the profit distribution may be made in 2020 even if the by-laws do not grant such authorisation. These rules apply also for partnerships limited by shares (KGaA) and – with a restriction – for SE's.

Enablement of online participation even if there is no basis for doing so in the by-laws

The management board may, with the approval of the supervisory board, allow **online participation** in general meetings in 2020, (written or electronic) **postal voting** and video and audio transmission of the meetings for shareholders and supervisory board members pursuant to section 118 AktG, even if no authorisation to do so is granted under the by-laws. In such a case the avoidability of resolutions due to technical disruption will be limited to cases in which *"the company can be proven to have acted intentionally"*.

Virtual general meetings without the physical presence of the shareholders

Of **particular importance for the practice** is the new authorisation of the management board, with the approval of the supervisory board, **to exclude the physical presence of the shareholders and shareholder proxies**. However, such an exclusion is subject to the following prerequisites:

- › the entire general meeting, with the general debate and voting, must be transmitted in video and sound,
- › the shareholders' voting rights can be exercised by means of electronic communication (postal vote or electronic participation), as well as by granting a power of attorney,
- › the shareholders must be granted the right to raise questions by means of the electronic communication,
- › the shareholders who have exercised their voting right must be granted the ability to object to a resolution of the general meeting.

With regard to the **shareholders' right to ask questions** in the virtual general meeting without being physically present, significant **facilitations** are planned for the companies. In derogation of 131 AktG, *"the management board shall decide according to its free and duly exercised discretion which questions it will answer and in what manner"*. According to the legislative notes on the bill, the officers of the company do not have to answer every question, but may summarise them and select those questions which are expedient in the interest of the other shareholders. They are to be permitted to give preference to shareholders' associations and institutional investors with significant voting shares. Moreover, the management board may require that questions be submitted electronically no later than two days before the meeting. According to the legislative notes on the proposed bill, it may limit the ability to ask questions to shareholders which have registered for the general meeting.

Resolutions of a virtual general meeting are only subject to **avoidance actions** due to technical disruptions such as

during the online participation if the company can be proven to have acted intentionally. Avoidability due to a violation of the right to information is restricted to cases in which it can be proven that the management board intentionally exercised its discretion as to which questions it would answer in breach of its duty.

Despite the facilitations for the conduct of general meetings without the physical participation of shareholders and shareholder proxies, the concept of a **general meeting at one meeting place**, with the presence of the chairperson and (subject to the expanded facilitations) the officers of the company pursuant to section 118(3) AktG, as well as a notarisation by a notary who is present at the meeting place, will remain intact.

Reduction of the period for convening a meeting and facilitation of the proof of the record date

A further facilitation will come with the **reduction of the period for convening** the general meeting. Instead of *"at the latest thirty days"* (section 123(1) sentence 1 AktG), the meeting is now to be convened *"at the latest on the 21st day"* before the day of the meeting. At the same time, the record date for bearer shares of listed companies will be postponed from the beginning of the 21st day to the beginning of the twelfth day and the deadline for its receipt by the company from *"at the latest six days"* (section 123(4) sentence 2 AktG) to *"at the latest on the fourth day"* before the meeting. However, no corresponding reduction of the registration deadline (cf. section 123(2) sentence 2 AktG) is provided for.

Permissibility of interim payments toward the net income even without a basis for doing so in the by-laws

One concern from the standpoint of the company and the investors is the fact that a postponement of the general meeting will result in a **delayed distribution of the dividends**. Up to now, an interim payment toward the net income after the end of a financial year had required an authorisation under the by-laws (section 59(1) AktG). This requirement will be set aside for 2020 so that the management board can decide on such an interim payment with the approval of the supervisory board. However, the **restrictions set out in section 59(2) AktG** remain unchanged.

Extension of the period within which ordinary general meetings are to be held

Completing the measurement package will be an extension of the period within which ordinary general meetings are to be held in 2020 from eight (section 175(1) sentence 2 AktG) to **twelve months**. This extension does not apply to SE's. The German legislature does not have the regulatory competence to derogate from Article 54(1) sentence 1 SE Regulation in this regard.

Reservation of consent in favour of the supervisory board, adoption of resolutions without a meeting

All of the decisions allocated to the management board on the use of the new abilities will require the **approval of the supervisory board**. In derogation of section 108(4) AktG, notwithstanding the provisions in the by-laws or the rules of procedure, the supervisory board may adopt resolutions **without the physical presence** of the members in writing, by telephone or other comparable forms.

Entry into force and period of application

The Federal Parliament and the Federal Council will take up this proposal very shortly. Accordingly, the possibility of changes in the text of the statute cannot be ruled out. The special regulations could enter into force already in March. They will apply, for now, **up to the end of 2020**. However, the draft bill contains an authorisation of the Federal Ministry of Justice and Consumer Protection (BMJV) to issue an order under which the application can be extended to 31 December 2021, at the latest, *"if this appears to be called for due to the continued impact of SARS-CoV-2 virus infections in Germany."*

Conclusion

Companies should examine whether a virtual general meeting for 2020 would be a realistic option and consult with their service providers to ascertain whether the needed infrastructure can be provided. If invitations to an ordinary general meeting have already been issued or the invitation is directly impending, according to general principles the management board may cancel the general meeting for the protection of the shareholders and officers of the company and, if appropriate, convene a normal or virtual general meeting according to the new rules, with a reduced period for convening a meeting, at a later point in time. Likewise, the possibility of an interim payment toward the net income should be examined.

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