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## 1. Objective of the New Provisions

At the beginning of the Covid-19-pandemic, the German law on relief from Covid-19-pandemic impacts (*Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz-, und Strafverfahrensrecht*; the “Covid-19-Act”) introduced provisions expressly permitting, for the first time in German history, virtual general meetings (*Hauptversammlung*). Unsurprisingly, almost all large German stock corporations held their 2020 and 2021 annual general meetings in virtual form. The subsequent extension of the Covid-19-Act through 31 August, 2022 enabled this trend to continue in the 2022 general meeting season.

German lawmakers have acknowledged and accepted the preference for virtual general meetings and consequently amended, effective with publication in the Federal Gazette, the German Stock Corporations Act (*Aktiengesetz, AktG*) (the “Amendment”), thus turning what was indented to be an exception during the pandemic into a permanent institution of the German Stock Corporation Act.

## 2. Implementation of New Articles of Association

To hold virtual general meetings, the articles of association of a stock corporation must either (i) directly stipulate that general meetings are to be held virtually, i.e. by default, or (ii) authorize the executive board (*Vorstand*) to resolve on holding virtual general meetings in individual cases.<sup>1</sup> In both cases, the corresponding provisions in the articles of association must be limited to a maximum of five years.<sup>2</sup> In consequence, shareholders attending the general meetings will be called upon to reassess the virtues of virtual general meetings on a regular basis. If a general meeting wishes to extend the provisions permitting virtual general meetings, the corresponding general meeting resolution (*Beschluss*) can also be obtained in a virtual general meeting.<sup>3</sup>

An amendment of the articles of association permitting virtual general meetings requires a general meeting resolution. To ensure that every stock corporation has a fair chance to amend its articles of association, even in the case that physical general meetings become difficult to organize or illegal due to governmental restrictions on public gatherings, the Amendment states that general meetings held by 31 August, 2023 may be held as virtual general meetings, provided that the executive board requests a virtual general meeting and the supervisory board (*Aufsichtsrat*) approves such request.

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<sup>1</sup> Sec. 118a para. 1 AktG.

<sup>2</sup> Sec. 118a para. 3 to para. 5 AktG.

<sup>3</sup> Government draft of the new law and respective reasoning dated May 10, 2022, BT Drs. 20/1738 (“RegE”), p. 27.

### 3. Requirements for Virtual General Meetings

The main requirements for virtual general meetings are listed in sec. 118a para. 1 sent. 2 No. 1 to No. 8 AktG:

1. The entire meeting must be broadcast with image and sound, e.g. via a livestream or videoconference service;
2. Shareholders may exercise their voting rights by means of electronic communication, in particular by electronic participation or electronic postal voting, as well as by issuing a power of attorney;
3. Shareholders connected electronically to the general meeting are granted the right to submit motions (*Anträge*) and election proposals (*Wahlvorschläge*) only by means of video communication during the meeting. The number of motions that can be submitted by the shareholders is not limited and may therefore also include counterproposals;
4. Shareholders are granted a right to information (*Auskunftsrecht*), pursuant to sec. 131 AktG, by way of electronic communication. The new sec. 131 para. 1a AktG enables the company to require shareholders to exercise their right to information prior to the general meeting (see below No. 5.);
5. If the Executive Board requests shareholders to exercise their right to information prior to the general meeting (Art. 131 para. 1a sent. 1, see below No. 5.), the management report (*Bericht des Vorstands*) or its essential contents must be made available to the shareholders no later than seven days prior to the general meeting. This requirement is based on positive experiences with best practices for virtual general meetings witnessed under the Covid-19-Act, where many large stock corporations pre-released the management report, thus enabling shareholders to provide questions in preparation for the general meeting. The pre-release of the management report also increases the shareholders' information basis;<sup>4</sup>
6. Shareholders shall be granted the right to submit comments regarding the agenda of the general meeting to the company in accordance with sec. 130a para. 1 to para. 4 AktG, i.e. prior to the general meeting, by means of electronic communication;
7. Shareholders connected electronically to the meeting are granted the right to speak during the general meeting by means of video communication in accordance with sec. 130a para. 5 and para. 6 AktG;
8. Shareholders connected electronically to the meeting are granted the right to object to a resolution of the general meeting by means of electronic communication. This could be achieved by a text field or by providing for an "objection"-button.

### 4. Physical Presence and Invitations to Virtual General Meetings

Even in the case of a virtual general meeting, the members of the executive board, the witnessing notary and the chairperson of the general meeting have to be physically present. While the members of the supervisory board also should (*sollen*) attend in person, the articles of association of the company may allow them to join only by broadcast of image and sound. Voting right proxies (*Stimmrechtsvertreter*) also may attend the general meeting in person. Shareholders will not be able to attend a virtual general meeting in person.<sup>5</sup>

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<sup>4</sup> RegE, p. 16, 25.

<sup>5</sup> RegE, p. 15.

The invitation to the virtual general meeting must include details on how the shareholders can join the meeting electronically. Furthermore, it must be stated expressly in the invitation that participation in person is not permitted. For listed companies, additional information, such as details on the procedure for casting shareholder votes, may be required.<sup>6</sup>

## 5. Shareholder Rights

With the Amendment, German lawmakers are attempting to establish virtual general meetings as the default option, while at the same time providing shareholders with all relevant shareholder rights of “traditional” physical general meetings.

For registered shareholders, the new sec. 130a AktG establishes the right to issue statements prior to the general meeting<sup>7</sup> and comment during the general meeting itself<sup>8</sup> (*Stellungnahme- und Rederecht*). Shareholders may issue statements regarding the agenda items of the general meeting up to five days prior to the meeting. These statements have to be made available to the other shareholders at least four days prior to the general meeting and shall only be shared with shareholders properly registered for the general meeting. Comments during a virtual general meeting shall be issued by way of video communication only.<sup>9</sup> In the case of a comment issued by video communication, the company may check the respective shareholder’s connectivity prior to their participation and deny such shareholder the right to issue the comment if their connectivity cannot be ensured (sec. 130a para. 6 AktG).

In addition to the above, sec. 131 AktG will be supplemented with six new paragraphs (para. 1a to 1f). These paragraphs include provisions on the shareholders’ essential right of information (*Auskunftsrecht*), i.e. the right to ask questions.<sup>10</sup> Under the general rule of sec. 131 para. 1 sent. 1 AktG, every shareholder may demand disclosure of facts from the management in the course of the general meeting. In the case of a virtual general meeting, the executive board may resolve that questions have to be posted at least three days prior to the general meeting.<sup>11</sup> The extent of questions, e.g. number of characters per question or number of questions per shareholder, may be restricted to ensure an adequate and reasonable general meeting timeframe.<sup>12</sup> Questions have to be made accessible to all shareholders and answered in writing by the executive board one day prior to the general meeting.<sup>13</sup> If the management decides to allow advanced submission of questions according to sec. 131 para. 1a AktG, the shareholders’ right to ask questions in the course of the general meeting will be limited. In such case, only the following questions will be admitted during the virtual general meeting: (i) follow-up questions (*Nachfragen*) to the answered questions and (ii) questions regarding facts which became public after the deadline for advanced submission of questions.<sup>14</sup>

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<sup>6</sup> Sec. 121 para. 4b AktG.

<sup>7</sup> Sec. 130a para. 1 and 4 AktG.

<sup>8</sup> Sec. 130a para. 5 and 6 AktG.

<sup>9</sup> Sec. 130a para. 5 AktG.

<sup>10</sup> RegE, p. 33.

<sup>11</sup> Sec. 131 para. 1a AktG.

<sup>12</sup> Sec. 131 para. 1b AktG.

<sup>13</sup> Sec. 131 para. 1c AktG.

<sup>14</sup> Sec. 131 para. 1d and 1e AktG.

The chairperson may decide that questions and follow-up-questions will only be admitted by way of video communication.<sup>15</sup>

## **6. Right of Appeal (*Anfechtungsrecht*)**

A resolution by the general meeting may be invalid if the invitation to the virtual general meeting is held to be insufficient. In this regard, the relevant provisions for invalidation of resolutions have been amended to include virtual general meetings.<sup>16</sup>

To protect stock corporations from excessive appeals (*Anfechtung*) by shareholders, the Amendment exempts certain rights for appeals in cases of infringement of shareholder rights due to technical malfunctions. An appeal may be based on technical malfunctions only in cases of gross negligence or intent by the stock corporation. In cases where a professional service provider has been engaged in the technical conduction of a general meeting, it will most likely not be possible to assume gross negligence or intent.<sup>17</sup>

Furthermore, the Amendment clarifies that only shareholders who have participated electronically in the virtual general meeting are entitled to exercise their right of appeal. Accordingly, it is not sufficient to just submit a question in preparation of the general meeting and then not participate in the meeting itself.

## **7. Outlook**

As stock corporations continue to hold virtual shareholder meetings during the Covid-19-pandemic based on the provisional Covid-19-Act, recent amendment of the German Stock Corporations Act provides all stakeholders with planning security regarding future virtual shareholder meetings. However, some aspects of this Amendment, such as the decision to make certain shareholders' rights exercisable either only prior or only during the general meeting, have been widely criticized. It remains to be seen whether the given legal framework for virtual shareholder meetings in Germany is sufficient to satisfy the needs and demands of shareholders, in particular institutional investors. It is probably safe to predict that the future will hold further amendments as the practice of virtual general meetings develops not only in Germany, but worldwide.

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<sup>15</sup> Sec. 131 para. 1f AktG.

<sup>16</sup> Sec. 241 No. 1 AktG.

<sup>17</sup> RegE, p. 38.