

Digitalization of General Meetings of Stock Corporations (Part 1)

German Pre-Covid-19-Regulation

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Part 1 of this three-part essay explores the foundations of the lengthy process of the digitalization of general meetings of stock corporations. These foundations go back to the beginning of the Internet and form the basis for understanding the current Covid-19 regulations.

I. Introduction

Digitalization has had a tremendous impact on all aspects of our modern legal systems. Computerization started to influence corporate law as early as the advent of the Internet. Since then, there has been a constant move towards digitalization of general meetings of stock corporations. The Covid-19 pandemic has contributed its own share to this ongoing development. The risk of infection with the coronavirus has forced lawmakers around the world to allow stock corporations to take their general meetings online. These legislative measures are mostly of temporary nature. The question arises, however, whether the future of general meetings will be all-digital. In this context, various aspects need to be considered such as the exercise of shareholders' rights, the functioning of the stock corporation and cost-benefit considerations.

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II. The German Stock Corporation

Under German law, the most common forms for business entities are stock corporations (*Aktiengesellschaften; AG*), which are governed by the German Stock Corporations Act (AktG),¹ and limited liability companies (*Gesellschaften mit beschränkter Haftung; GmbH*), which are regulated in the German Limited Liability Companies Act (GmbHG).² In the following, a short overview will be provided on the basics of these two legal forms of

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¹ https://www.gesetze-im-internet.de/englisch_aktg/index.html.

² https://www.gesetze-im-internet.de/englisch_gmbhg/.

organization. This will enable readers who are not familiar with German corporate law to locate the *Aktiengesellschaft* or *Gesellschaft mit beschränkter Haftung* on the global map of corporations. It also forms the indispensable basis for understanding the process of digitalization of general meetings.

1. Basics of the German Limited Liability Company

The *Gesellschaft mit beschränkter Haftung* is the preferred form of organization for small and medium-sized companies. The minimum share capital of the *GmbH* amounts to EUR 25,000.³ If the *GmbH* is incorporated as an entrepreneurial company (*Unternehmergeellschaft*) the share capital may even be as low as EUR 1,00, however, is further restricted and regulated in particular with regard to the possibility to distribute profits to its shareholders.⁴ The number of shareholders (*Gesellschafter*) of the *GmbH* is usually straightforward and the list of shareholders is publicly available as it needs to be filed with the commercial register at the seat of the company. In addition, a transfer of shares in a *GmbH* requires by law a notarized contract. A *GmbH* usually has two corporate bodies, the shareholders' meeting (*Gesellschafterversammlung*) and the management (*Geschäftsführung*) comprising of the company's managing directors (*Geschäftsführer*). The managing directors are in charge of the company's everyday business and represent the company vis-à-vis third parties. The shareholders may issue binding instructions with regard to the conduct of business to the managing directors in accordance with Sec. 37 para. 1 GmbHG.⁵ Moreover, the shareholders exercise a controlling function vis-à-vis the managing directors of the company.⁶

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The shareholders in general act by way of passing shareholders' resolutions in shareholders' meetings,⁷ which are viewed as in-person meetings.⁸ The conducting of an in-person shareholders' meeting is not required, however, if all shareholders consent in textual form to the disposition in question or to submitting their votes in writing.⁹ As a general rule, there is a high degree of autonomy in drafting the company's articles of association. The articles of association (*Satzung*) of the *GmbH* may set provisions which deviate from Sec. 48 para. 2 GmbHG by disallowing or facilitating voting procedures outside of a shareholders' meeting.¹⁰ For example, the *Satzung* may provide that the passing of a resolution may be effected verbally, in writing, by phone- or video conference or by a combination of these different means.¹¹

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³ Sec. 5 para. 1 GmbHG.

⁴ Sec. 5a GmbHG.

⁵ *Baumbach/Hueck/Beuerskens*, GmbHG, 22nd edition 2019, sec. 37 rec. 35.

⁶ Sec. 46 no. 6 GmbHG.

⁷ Sec. 48 para. 1 GmbHG.

⁸ *Roth/Altmeyden*, GmbHG, 9th edition 2019, sec. 48 rec. 2; *Eickhoff/Busold*, DStR 2020, 1054.

⁹ Sec. 48 para. 2 GmbHG.

¹⁰ *Wicke*, GmbHG, 4th edition 2020, sec. 48 rec. 7 with reference to sec. 45 para. 2 GmbHG.

¹¹ *BeckOK-GmbHG/Schindler*, 44th edition 2020, sec. 48 rec. 104.

2. Basics of the German Stock Corporation

The *Aktiengesellschaft* is the preferred legal form of bigger corporations with a larger number of stockholders (*Aktionäre*) and/or the wish for simpler transferability of shares. The minimum stock capital of the AG amounts to EUR 50,000.¹² The AG has three corporate bodies, the general meeting (*Hauptversammlung*), the supervisory board (*Aufsichtsrat*) and the executive board (*Vorstand*). According to Sec. 76 AktG the executive board (*Vorstand*) – on its own responsibility – is in charge of the direction (*Leitung*) of the stock corporation. The executive board also takes care of the overall management of the stock corporation. Whereas management (*Geschäftsführung*) means any factual or contractual activity for the stock corporation, the term *Leitung* refers to the fundamental course and politics of the stock corporation.¹³ The supervisory board (*Aufsichtsrat*) is in charge of supervising the management (*Geschäftsführung*) meaning the executive board of the stock corporation and each of its members.¹⁴ Unlike the shareholders of the *GmbH*, the stockholders of the *Aktiengesellschaft* do not directly exercise a controlling function vis-à-vis the executive board.¹⁵ The German regulations applicable to stock corporations are largely similar to the regulations in other jurisdictions on (stock) corporations. In any case, the issue of the transformation of an in-person meeting of a large number of stockholders into a virtual-only meeting remains the same.

3. Competencies of the General Meeting (Hauptversammlung)

According to Sec. 119 para. 1 AktG, the general meeting passes resolutions if statutory provisions or the articles of association require so, namely on the appointment of members of the supervisory board, the allocation of balance sheet profits, the compensation system of members of the supervisory board as well as of the members of the executive board – in publicly listed stock corporations –, the appointment of the statutory auditor, amendments to the articles of association, capital measures (e.g. capital increases and/or capital reduction), the appointment of certain auditors with regard to the company's formation or its management, and the dissolution of the company. The general meeting may only decide on questions of management if the executive board demands so.¹⁶

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¹² Sec. 7 AktG.

¹³ *BVerfG NJW* 2000, 349, 351.

¹⁴ Sec. 111 para. 1 AktG.

¹⁵ *Hölters/Weber, AktG*, 3rd edition 2017, sec. 76 rec. 8.

¹⁶ Sec. 119 para. 2 AktG.

4. Exercise of Stockholders' Rights

Stockholders exercise their rights in matters of the company in the general meeting unless the law stipulates otherwise.¹⁷ From the stock corporation's point of view, the stockholders' influence is directed into coordinated channels by means of the general meeting.¹⁸ Hence, not the collective stockholders but the general meeting is one of the corporate bodies of the stock corporation.¹⁹ Importantly, this corporate body is not superior to the other corporate bodies of the company, namely the executive board and the supervisory board.²⁰ The *Aktiengesellschaft* is characterized by a balance of power between the executive board, the supervisory board and the general meeting.²¹

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5. Convening of the General Meeting

The convening of the general meeting has to be published in the company's designated publication media (*Gesellschaftsblätter*).²² In accordance with Sec. 25 AktG the publication needs to be made in the Federal Gazette (*Bundesanzeiger*), which means electronic publication of the invitation to the general meeting on the website www.bundesanzeiger.de.²³ This shall ensure that all mandatory publications of the stock corporation are made available in a single source which is easily accessible and protected against subsequent tampering.²⁴ The coexistence of the printed and the electronic version of the Federal Gazette was terminated in 2012 leaving the electronic version the only remaining means of publication. The amendment of the German Stock Corporations Act in 2016 abrogated sentence 2 of Sec. 25 AktG, which had permitted stock corporations to resort to other means of publication in addition to the Federal Gazette.²⁵

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The mandatory nature of Sec. 25 AktG suggests that lawmakers assume that all stockholders should have access to the Internet. This assumption is correct given the ubiquitous nature of Internet access and terminal devices. The history of Sec. 25 AktG shows a certain transition phase from the analogue to the digital publication in matters of the stock corporation. This transition phase is a test on the feasibility of the computerization of a specific aspect of German corporate law. This test has been passed to the satisfaction of all stakeholders. In any event, digitalization is a lengthy process which requires a certain amount of time to be fully implemented.

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¹⁷ Sec. 118 para. 1 S. 1 AktG.

¹⁸ Hüffer/Koch, AktG, 14th edition 2020, sec. 118 rec. 1.

¹⁹ Hüffer/Koch, AktG, 14th edition 2020, sec. 118 rec. 2.

²⁰ BVerfG NJW 2000, 349, 350.

²¹ Hüffer/Koch, AktG, 14th edition 2020, sec. 118 rec. 4.

²² Sec. 121 para. 4 s. 1 AktG.

²³ <https://www.bundesanzeiger.de/ebanzwww/wexsservlet>.

²⁴ Hölters/Solveen, AktG, 3rd edition 2017, sec. 25 rec. 2.

²⁵ Grigoleit/Vedder, AktG, 2nd edition 2020, sec. 25 rec. 1.

6. Attendance according to Sec. 118 Para. 1 S. 2 AktG

a. Online Participation

According to Sec. 118 para. 1 s. 2 AktG stock corporations may implement provisions in their articles of association or grant authority to the executive board to provide that stockholders are allowed to participate in general meetings without being physically present at the place of assembly and without a proxy agent. Stockholders' attendance is replaced by electronic communication which means an interactive two-way direct real-time connection that enables the active participation of stockholders.²⁶ In addition, stockholders may be allowed to exercise all or some of their rights, namely participation-, voting-, petition-, speaking-, question- and objection rights fully or partially by means of electronic communication.²⁷

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Sec. 118 para. 1 s. 2 AktG is based on Art. 8 para. 1 of the Shareholders' Rights Directive I 2007/36/EC (SRD I). This directive establishes requirements in relation to the exercise of certain shareholder rights attaching to voting shares in relation to general meetings of companies which have their registered office in a member state of the European Union and whose shares are admitted to trading on a regulated market situated or operating within a member state.²⁸ However, the applicability of Sec. 118 para. 1 AktG does not depend on a stock exchange listing of the company.²⁹ Stockholders of a smaller stock corporation also have a legitimate interest in being able to participate quickly and without travel expenses in a general meeting of the company.

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In case of electronic voting the stock corporation is obligated to confirm to the voter by electronic means the receipt of the electronically cast vote in line with the requirements according to Art. 7 para. 1 and Art. 9 para. 5 subpara. 1 of the implementing regulation (EU) 2018/1212.³⁰ Sec. 118 para. 1 S. 3 AktG was introduced in 2019 and implements Art. 3c para. 2 and subpara. 1 of the Shareholders' Rights Directive II 2017/828 (SRD II).³¹ The legislative purpose of the statutory provision in question is to inform the stockholder about his/her voting in the scenario of electronic voting as well.

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The stockholder who takes advantage of the possibility to participate online is considered as an actual participant of the general meeting.³² All online participants need to be registered in the stockholders' list according to Sec. 129 para. 1 s. 2 AktG. Given the fact that stockholders may be located in different countries of the world, the legislative purpose of Sec. 118 para. 1 s. 2 AktG is to enable stockholders to participate in a general

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²⁶ Hüffer/Koch, AktG, 14th edition 2020, sec. 118 rec. 10.

²⁷ Arnold/Carl/Götze, AG 2011, 349, 360.

²⁸ Art. 1 para. 1 SRD I.

²⁹ Noack, NZG 2008, 441, 444.

³⁰ Sec. 118 para. 1 s. 3 AktG.

³¹ Hüffer/Koch, AktG, 14th edition 2020, sec. 118 rec. 14a.

³² Noack, WM 2009, 2289, 2292.

meeting despite being physically absent.³³ Sec. 118 para. 1 AktG is not based on the idea of a virtual meeting but on the notion of an in-person meeting.³⁴ The in-person general meeting is supplemented (not replaced) by the possibility of online participation.³⁵ This type of meeting can be called a hybrid meeting. If all stockholders avail themselves of online participation, then the hybrid meeting envisaged in Sec. 118 para. 1 S. 2 AktG turns almost entirely into a virtual meeting.³⁶ Nevertheless, even in such case the preparation and conducting of the general meeting follows the rules and regulations set forth for in-person meetings.

b. Stock Corporations as Decisionmakers

Aktiengesellschaften are subject to formal statute stringency which means that the Articles of Association may only deviate from the provisions of the Stock Corporations Act if expressly permitted under this Act.³⁷ Sec. 118 para. 1 s. 2 AktG leaves the decision to implement clauses on online participation into the articles of association or the granting of authority to the executive board in this context to the individual stock corporation. Stock corporations are granted considerable room for discretion which allows for different degrees of online participation.³⁸ This means that the stock corporation may decide which particular stockholders' rights are to be exercised to which specific extent by electronic means.³⁹

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Before the Covid-19 pandemic, German stock corporations made little use of Sec. 118 para. 1 s. 1 AktG.⁴⁰ This reluctance emanated from the fear that the use of online participation could have exposed resolutions passed in general meetings to an increased number of challenges by stockholders.⁴¹ Many resolutions require registration with the commercial register (*Handelsregister*) in order to become effective such as in particular resolutions on capital measures, intercompany agreements or measures under the German Transformation Act (*Umwandlungsgesetz*).⁴² A challenge in court usually means that the resolution cannot be registered in the commercial register (*Registersperre*) until the court proceedings have come to an end either by settlement or by final adjudication, resulting in vast delays of the resolved measures becoming effective and some stockholders using such potential delays for extortion of the company. However, thanks to the introduction of release proceedings in Sec. 246a AktG, which allow under certain

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³³ *BT-Drs.* 16/11642, p. 26.

³⁴ *Hüffer/Koch*, AktG, 14th edition 2020, sec. 118 rec. 10.

³⁵ *Noack*, WM 2009, 2289.

³⁶ *BT-Drs.* 16/11642, p. 26.

³⁷ Sec. 23 para. 5 AktG.

³⁸ *Heidel/Krenek/Pluta*, AktG, 5th edition 2020, sec. 118 rec. 18.

³⁹ *Arnold/Carl/Götze*, AG 2011, 349, 360.

⁴⁰ *Simons*, NZG 2017, 567.

⁴¹ *Arnold/Carl/Götze*, AG 2011, 349, 360.

⁴² *Rubner/Leuring*, NJW-Spezial 2019, 527.

conditions the registration of resolutions despite pending court proceedings the extortion potential of stockholders has been reduced significantly.⁴³

In any case, most stock corporations have switched from casting paper ballots to electronic voting even though the latter procedure is more prone to error. Electronic voting – unless the articles of association provide otherwise – can simply be ordered by the chair of the general meeting (*Versammlungsleiter*).⁴⁴ The use of this digital procedure takes place within the in-present general meeting and is not subject to Sec. 118 para. 1 s. 2 AktG.

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c. Challenge of Resolutions by Online Participants

According to Sec. 243 para. 3 no. 1 AktG a challenge (*Anfechtung*) of a resolution passed in a general meeting cannot be based on the violation of stockholders' rights which have been exercised by electronic means according to Sec. 118 para. 1 s. 2 AktG if the cause of the violation is technical failure. This does not apply if there has been gross negligence or intention on part of the stock corporation. In this context, the burden of proof is upon the challenging stockholder.⁴⁵ The legislative purpose of Sec. 243 para. 3 no. 1 AktG is to prevent an increase in possibilities to challenge a resolution passed by the stock corporation in a general meeting. The exclusion of inadvertent technical failure as a ground for challenging a resolution demonstrates that lawmakers are serious about facilitating the online participation of stockholders in general meetings.

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According to Sec. 245 no. 1 AktG only stockholders who have attended the general meeting and declared their objection to the official record may challenge a resolution passed in the general meeting. This statutory provision applies to online participants as well. Therefore, a resolution may only be challenged if the challenging stockholder is allowed to do so according to rules of online participation.⁴⁶ This might deter stockholders from taking advantage of online participation. However, that does not affect the idea of the hybrid meeting in Sec. 118 para. 1 s. 2 AktG. Stockholders may opt for physical attendance in the general meeting to retain their right to declare their objection to the record.⁴⁷

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7. Voting by Correspondence according to Sec. 118 Para. 2 AktG

Stock corporations are also authorized to implement provisions in their articles of association or grant authority to the executive board to provide that stockholders without

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⁴³ *MüKo-BGB/Wagner*, 7th edition 2017, sec. 826 rec. 193.

⁴⁴ *Simons*, NZG 2017, 567, 568 with reference to sec. 134 para. 4 AktG.

⁴⁵ *BT-Drs.* 16/11642, p. 40.

⁴⁶ *Hölter/Drinhausen*, AktG, 3rd edition 2017, sec. 118 rec. 17.

⁴⁷ *Arnold/Carl/Götze*, AG 2011, 349, 361.

participating in the general meeting may cast their votes in writing or by means of electronic communication (*Briefwahl*).⁴⁸ *Aktiengesellschaften* may take advantage of voting by correspondence instead of online participation or use both procedures at the same time.⁴⁹ Despite the misleading German term *Briefwahl* Sec. 118 para. 2 S. 1 AktG does not only refer to elections (*Wahlen*) but to any kind of voting (*Abstimmung*). Moreover, *Briefwahl* includes voting in writing as well as by electronic means.

Sec. 118 para. 2 AktG came into effect in 2009 and is based on Art. 12 SRD I, according to which member states shall permit companies to offer their shareholders the possibility to vote by correspondence in advance of the general meeting. Similar to Sec. 118 para. 1 s. 2 AktG and despite Art. 1 SRD I the statutory provision of Sec. 118 para. 2 AktG also applies to stock corporations which do not have a stock exchange listing. Stockholders who avail themselves of voting by correspondence are not considered as participants of the general meeting.⁵⁰ Hence, they are not registered in the stockholders' list according to Sec. 129 para. 1 s. 2 AktG.⁵¹ In addition, voters by correspondence do not have an objection- or challenge right according to Sec. 245 no. 1 AktG.⁵²

Voting by correspondence enjoyed popularity among German stock corporations and their stockholders well before the Covid-19 pandemic.⁵³ One of the reasons for the widespread adoption of voting by correspondence is that the introduction of this procedure comes with fewer legal and technical challenges than online participation. In addition, voting by correspondence can be carried out by analogous as well as electronic means. Sec. 118 para. 2 AktG allows for the written form according to Sec. 118 German Civil Code (BGB) without the requirement of a wet signature. Electronic communication is an umbrella term which includes the electronic form,⁵⁴ textual form⁵⁵ and any other form of unilateral electronic declaration of will, in particular by using an Internet form provided by the stock corporation.⁵⁶

8. Participation of Board Members according to Sec. 118 Para. 3 AktG

a. Attendance Requirement for Board Members

Members of the executive board as well as of the supervisory board shall attend the general meetings of the stock corporation according to Sec. 118 para. 3 s. 1 AktG. Despite

⁴⁸ Sec. 118 para. 2 s. 1 AktG.

⁴⁹ *Grigoleit/Herrler*, AktG, 2nd edition 2020, sec. 20 rec. 20.

⁵⁰ *BT-Drs.* 16/11642, p. 26.

⁵¹ *Heidel/Krenek/Pluta*, AktG, 5th edition 2020, sec. 118 rec. 58.

⁵² *BT-Drs.* 16/11642, p. 26.

⁵³ *Wettich*, NZG 2011, 721, 725.

⁵⁴ Sec. 126a BGB.

⁵⁵ Sec. 126b BGB.

⁵⁶ *Hüffer/Koch*, AktG, 14th edition 2020, sec. 118 rec. 17.

the misleading German word “*sollen*”, the members of the board are under an obligation to attend the general meeting.⁵⁷ There is no statutory option to ease the attendance requirement for members of the executive board. Their personal attendance in the general meeting is – subject to good reason for absence such as sickness⁵⁸ – considered to be of high importance. This is due to the fact that according to Sec. 131 para. 1 s. 1 AktG each stockholder in the general meeting needs to be provided upon his/her request with information by the executive board on matters of the stock corporation insofar as the information is necessary for the adequate assessment of an item of the agenda of the general meeting. It may be argued, however, that members of the executive board may provide that information also by the use of video- and audio transmission without any loss of quality to the stockholder.

b. Statutory Option to Ease the Attendance Requirement

According to Sec. 118 para. 3 s. 2 AktG the articles of association of the stock corporation may allow for certain cases in which the attendance of members of the supervisory board may be complied with by means of video- and audio transmission. This statutory option to ease the attendance requirement for members of the supervisory board was introduced in 2002. It should be noted that the chairman of the supervisory board usually takes the position of the chair of the general meeting (*Versammlungsleiter*), whereas the other members of the supervisory board assume a more passive role in the general meeting.⁵⁹ In light of this passive role lawmakers decided to ease the attendance requirement.⁶⁰ Another consideration in the law-making process was to facilitate the virtual attendance of foreign members of the supervisory board of German stock corporations. The enactment of Sec. 118 para. 3 s. 2 AktG can be seen as an experiment. Lawmakers were unsure whether easing the attendance requirement for board members could be enabled by the use of digital technologies. As a first step, they decided to allow video- and audio transmission in lieu of personal attendance for members of the supervisory board with a more passive role in the general meeting.

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9. Transmission of the General Meeting according to Sec. 118 Para. 4 AktG

According to Sec. 118 para. 4 AktG the articles of association or the rules of procedure (*Geschäftsordnung*) may permit or authorize the chair of the general meeting to permit the video- and audio transmission of the general meeting. This statutory provision is based on the idea of an in-present general meeting as well,⁶¹ hence the articles of association or rules of procedure cannot permit a virtual-only general meeting. Sec. 118 para. 4 AktG

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⁵⁷ *Grigoleit/Herrler*, AktG, 2nd edition 2020, rec. 118 sec. 30.

⁵⁸ *Hölter/Drinhausen*, AktG, 3rd edition 2017, sec. 188 rec. 33.

⁵⁹ *Koch/Hüffer*, AktG, 14th edition 2020, sec. 118 rec. 22; *Wicke*, NZG 2018, 161.

⁶⁰ BT-Drs. 14/8769, p. 19.

⁶¹ *Henssler/Strohn/Liebscher*, Corporate Law, 4th edition 2019, sec. 118 AktG rec. 21.

was introduced in 2002 and amended in 2009.⁶² In contrast to the two-way communication in case of online participation⁶³ the transmission in the sense of Sec. 118 para. 4 AktG is only a one-way communication.⁶⁴ The general meeting may be broadcasted in sound and vision, for example via the Internet, corporate television or otherwise. The transmission may be accessible for anyone who is interested or only to a restricted group of people.

Individual stockholders cannot object to the recording of their speech during the general meeting if the stock corporation's articles of association permit the video- and audio transmission.⁶⁵ Sec. 118 para. 4 AktG does not infringe stockholders' rights but allows stockholders to pass a resolution on the amendment of the articles of association so that the general meeting may be transmitted via video and audio. In addition, the video- and audio transmission of general meetings in today's age of communication is in line with the stock corporation's interest to maximize publicity and transparency. It also serves the proprietary protection of the stockholding.⁶⁶ Finally, there has always been a certain publicity at general meetings of stock corporations due to the usual presence of admitted representatives of the press and the media.

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⁶² *Hüffer/Koch*, AktG, 14th edition 2020, sec. 118 rec. 30.

⁶³ Sec. 118 para. 1 s. 2 AktG.

⁶⁴ *Heidel/Krenek/Pluta*, AktG, 5th edition 2020, sec. 118 rec. 78.

⁶⁵ *LG Frankfurt a.M.*, NZG 2005, 520; *Henssler/Strohn/Liebscher*, Corporate Law, 4th edition 2019, sec. 118 AktG rec. 22.

⁶⁶ *LG Frankfurt a.M.*, NZG 2005, 520, 521.