

## Digitalization of General Meetings of Stock Corporations (Part 3)

### General Meetings after the Covid-19 Pandemic

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Part 3 of this three-part essay deals with the question of how German lawmakers may regulate general meetings of stock corporations in terms of the use of digital technologies after the Covid-19 pandemic has ended. 1

#### I. Statute Stringency (*Satzungsstrenge*)

As mentioned earlier, shareholders are granted a high degree of autonomy (*Satzungsautonomie*) in drafting the articles of association (*Satzung*) of a German limited liability company (*GmbH*). The *Satzung* may provide that the passing of a resolution be effected verbally, in writing, by phone- or video conference, or by a combination of these means.<sup>1</sup> Moreover, the articles of association may permit the holding of virtual shareholders' meetings.<sup>2</sup> The German Act on Limited Liability Companies (*GmbHG*)<sup>3</sup> is firmly grounded in the principle of freedom of contract (*Vertragsfreiheit*). There is, therefore, no need to revise the *GmbHG* to authorize a higher degree of digitalization.<sup>4</sup> *Aktiengesellschaften*, however, are subject to formal statute stringency. This means that the articles of association of the *Aktiengesellschaft* may deviate from the provisions of the German Stock Corporations Act (*AktG*) only if expressly permitted under the *AktG*. The statutory provisions in the *AktG* on general meetings are to a large extent binding law (*zwingendes Recht*). Accordingly, the further digitalization of general meetings of stock corporations requires legislative changes to these statutory provisions.<sup>5</sup> 2

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<sup>1</sup> BeckOK-GmbHG/Schindler, 44<sup>th</sup> edition 2020, sec. 48 rec. 104.

<sup>2</sup> Eickhoff/Busold, DStR 2020, 1054, 1056.

<sup>3</sup> [https://www.gesetze-im-internet.de/englisch\\_gmbhg/](https://www.gesetze-im-internet.de/englisch_gmbhg/).

<sup>4</sup> Teichmann, ZfPW 2019, 247, 258.

<sup>5</sup> Teichmann, ZfPW 2019, 247, 258.

## II. Sources of Knowledge

The pre-Covid-19 regulations in the *AktG* and the temporary derogations in the Covid-19 Mitigation Act are the two main sources of knowledge of which lawmakers can take advantage when considering how to regulate general meetings after the current pandemic has ended. German lawmakers may decide to let the temporary derogations expire at the end of 2020 or 2021. This course of action would result in the reinstatement of the pre-Covid-19 legal regime. Such an approach, however, would mean closing one's eyes to findings from the Covid-19 legislation. Lawmakers could also turn the temporary derogations into permanent legislation. Due to its exceptional character, however, the Covid-19 legislation in its current state is not suitable for the permanent regulation of general meetings.<sup>6</sup> In order to achieve an acceptable outcome, German lawmakers should take advantage of both legal regimes, in addition to considering suitable approaches that are not part of either regime.

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## III. Use of Digital Technologies

The use of digital technologies in the general meeting can facilitate communication in the decision-making process of stock corporations. For example, stockholders who are located far away from the venue of the general meeting may actively contribute to its debate via the use of digital communication tools. These stockholders may otherwise – due to travel costs and time constraints – stay away from the general meeting altogether. At the same time, the character of the general meeting undergoes a notable change if the participants no longer congregate in person.<sup>7</sup> Electronic communication does not deliver the same results as face-to-face interaction. Some information gets lost when people rely on digital communication tools. Yet digitalization as a global trend has nevertheless turned electronic communication into a ubiquitous phenomenon that is widely accepted. Lawmakers should accordingly foster the use of digital communication in general meetings.

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## IV. Increasing Level of Digitalization

It is possible to identify different forms of general meetings with an increasing degree of digitalization. The in-present meeting is characterized by the fact that all participants congregate in person in a specific location. There is a low degree of digitalization in this type of meeting. The hybrid meeting provides the option for participants to attend the general meeting by electronic means, thereby significantly increasing the level of digitalization. The Covid-19 virtual general meeting excludes stockholders from being physically present whereas the physical attendance of some participants is still mandatory. This type of meeting relies even more on digitalization because stockholders are forced into the use of digital

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<sup>6</sup> *Herb/Merkelbach*, DStR 2020, 811, 817; *Wicke*, DStR 2020, 885, 889.

<sup>7</sup> *Teichmann*, ZfPW 2019, 247, 259.

communication tools. There is also the virtual general meeting whose participants do not congregate in a specific location,<sup>8</sup> thereby transforming the meeting into an all-digital event.

There is no inevitable development, however, towards the (all-digital) virtual general meeting that will eventually and completely replace other types of general meeting. Certain topics and issues are better discussed and handled in an in-person meeting than by means of electronic communication. Accordingly, a certain minority of stockholders should be granted the right to convene in-present extraordinary general meetings.<sup>9</sup>

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## V. Technical Failure

As pointed out earlier, 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 or para. 2 s. 1 *AktG* if the cause of the violation is technical failure.<sup>10</sup> This does not apply, however, if there has been gross negligence or intent on part of the stock corporation. This allocation of risk seems appropriate given the level of reliability of electronic communication technology. Inadvertent technical failure is a minor risk inherent to the use of digital communication. At the same time, stockholders must be protected from the actions or omissions of the stock corporation's management that contribute to technical failure. Accordingly, the current regulation of technical failure should be maintained for general meetings after the end of the Covid-19 pandemic.

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## VI. Curtailment of Stockholders' Rights

The Covid-19 regulation of general meetings inheres a curtailment of stockholders' rights. For example, the right to information (*Auskunftsrecht*) is reduced to a mere opportunity to ask questions (*Fragemöglichkeit*). One may argue that stockholders who participate in a general meeting by electronic means must be granted the same rights as stockholders who attend an in-present meeting.<sup>11</sup> Such an approach, however, is based on the assumption that the pre-Covid-19 arsenal of stockholders' rights requires no further adjustment. As a matter of fact, stockholders' rights under German corporate law are inflated. More often than not, stockholders use their rights to exert pressure upon the stock corporation in order to achieve certain goals. Despite the release proceedings (*Freigabeverfahren*) in Sec. 246a *AktG*, there is

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<sup>8</sup> *MüKo-AktG/Kübis*, 4<sup>th</sup> edition 2018, sec. 118 rec. 17; *Dubovitskaya*, NZG 2020, 647, 648.

<sup>9</sup> *Teichmann*, ZfPW 2019, 247, 263.

<sup>10</sup> Sec. 243 para. 3 no. 1 *AktG*.

<sup>11</sup> *Dubovitskaya*, NZG 2020, 647, 650.

still a certain need for further curtailment of stockholders' rights in order to ensure the functioning of the stock corporation. German lawmakers should therefore consider the findings from the temporary Covid-19 legislation for a reassessment of stockholders' rights.

## VII. Replacing General Meetings

On a final note, it seems worth considering whether the idea of general meetings might be outdated as a whole.<sup>12</sup> The general meeting could be broken down into its components, thereby making it easier to handle. Organizing and holding a general meeting of a listed company (*börsennotierte Aktiengesellschaft*) can be expensive. Such companies inform their stockholders about important developments by means of capital market publicity (*Kapitalmarktpublizität*). Questions of stockholders could be asked to and answered by the management of the stock corporation in an internet forum, for example on an ongoing basis. However, it may certainly be the case that such a move is too bold for the present moment. Lawmakers, stock corporations and stockholders may be resistant to such a radical change, given that the general meeting is a long-standing tradition. It is for this reason that experiments with the parameters of general meetings under the auspices of the temporary Covid-19 legislation may be seen as more manageable.

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<sup>12</sup> Teichmann, ZfPW 2019, 247, 263.