



# Update Capital Markets

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## Special Arrangements for the Ongoing Crisis: Emergency Legislation for Annual General Meetings 2021 - Update and Practical Advice

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On December 17, 2020, the Bundestag passed numerous amendments to the emergency legislation on the COVID 19 pandemic, which also affect some regulations governing virtual general meetings. Through the law regarding the further reduction of the residual-debt exemption proceedings, which has now been passed, the law on measures in company, cooperative, association, foundation and home ownership law to combat the effects of the COVID-19 pandemic dated March 27, 2020 [GesRuaCOVBekG], which was amended through Article 2 of the law dated October 28, 2020 (COVID-19 Law), has also been amended with regard to the rights of shareholders to ask questions and submit motions at virtual general meetings. In connection with the Corona pandemic, the COVID 19 Law created the possibility of a purely virtual general meeting, of which stock corporations have already made extensive use in the past year. Only recently, these regulations were extended by means of a decree until the end of 2021. In this article, we outline the most recent changes in the law and explain selected individual issues in connection with the preparation and conduct of virtual general meetings and provide practical advice on such matters.

The new legal provisions serve to strengthen the rights of shareholders in the virtual general meeting, but also create clarity in the case of previously ambiguous regulations. Instead of the previous possibility to ask questions, the shareholders are now also granted an explicit right to ask questions in the virtual general meeting. This is accompanied by a restriction of the discretion of the executive board regarding answering questions, which is now reduced to "how" to answer and thus no longer includes the "whether" to answer. This

### New legal provisions

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means that the shareholder has the right to have all the questions answered, insofar as they are permissible under the general provisions of stock corporation law. However, the executive board still has at its discretion the extent to which it can summarize answers if it deems it appropriate to do so. According to the legislator, this is intended, on the one hand, to strengthen the legal position of the shareholders, but also to continue to ensure that stock corporations are able to manage the right to ask questions in the pandemic situation. Another new feature is that questions may now be submitted by shareholders up to one day before the general meeting, at the latest. In 2020, a two-day deadline applied here.

The legislator has now created clarity with regard to the filing of counter motions and the submission of election proposals pursuant to Sections 126, 127 of the German Stock Corporation Act (AktG) by opting for the so-called "fiction solution". Here, there was previously uncertainty as to whether and under what conditions they were to be taken into consideration at the general meeting. Accordingly, such motions and election proposals shall automatically be deemed to have been made at the general meeting if they have been duly submitted beforehand, in particular in compliance with the 14-day notice period preceding the general meeting. In this way, the legislator explicitly clarifies that a (renewed) application at the general meeting is not required.

These new statutory provisions will come into force two months after promulgation in the Federal Law Gazette, most likely before the end of February 2021, and will thus be directly applicable to all general meetings held after that date. Consequently, the new regulations must be taken into account in all invitations to annual general meetings that are published from the beginning of January 2021.

The following regulations regarding the virtual general meeting remain unchanged:

The deadline for holding general meetings which was extended from eight to twelve months after the end of the financial year will also apply in 2021. It is therefore sufficient to hold the ordinary general meeting for the previous year by the end of the current financial year. The executive board's decision on an extension of the time limit is subject to the approval of the

#### **Extension/Reduction of Deadlines**

supervisory board. For European companies (SE), the deadline for holding general meetings has so far only been extended for the year 2020 to twelve months after the end of the financial year. It remains to be seen whether the European legislator will also grant this extension to the year 2021.

The COVID-19 Law further provides for the period for convening the general meeting to be shortened by nine days. According to the wording of the law, the meeting is to be convened on the 21st day before the general meeting. However, the pandemic legislation did not expressly waive the regulation that the day of convocation is not to be counted (Section 121 (1) sentence 2 AktG). However, according to controversial opinion in legal literature, this can be assumed. In view of this, we recommend, as a precautionary measure, that the notice of the annual general meeting be published in the Federal Gazette on the 22nd day prior to the annual general meeting if the shortened period is used.

In addition, the deadline for receipt of requests for additions to the agenda was shortened to 14 days before the meeting for listed and non-listed companies.

In the event that the shortened notice period is used, the COVID 19 Law requires that the proof of shareholding must refer to the beginning of the 12th day (instead of the regular beginning of the 21st day) before the general meeting. In this case, however, there is a risk of a purely practical nature, that, taking into account the regular postal delivery times, the required evidence cannot be provided in due time, especially in the case of shareholders resident abroad. Against this background, and also in the general interest of shareholders, it therefore appears advisable to make use of the standard time limit, unless there are compelling reasons for making use of the shortened time limits under the COVID-19 Law.

The law provides that general meetings can continue to be held in 2021 using electronic media even if the required authorization in the articles of association or the rules of procedure for the general meeting is missing. The option of an audio and video transmission of the general meeting, usually via the Internet, is relevant on a practical level. As well as simply tuning in to (passively) watch the general meeting online, share-

#### **Record date**

#### **Online general meetings also permissible without a provision in the articles of association**

holders are also able to participate in the meeting and to exercise some or all of their rights, including their voting rights, via electronic media. In addition, the members of the supervisory board may be enabled to participate in the general meeting by means of audio and video transmission.

Contrary to the principle that the general meeting is a face-to-face event and therefore every shareholder must be allowed to physically attend, the executive board, with the consent of the supervisory board, may also instruct, on the basis of the COVID-19 Law, that the general meeting be held entirely virtually, i.e. without any presence of shareholders or their proxies. In such cases,

- and audio and video transmission of the entire meeting must take place,
- the shareholders must have the right to vote via electronic communication (via postal vote or electronic participation) as well as the granting of proxies,
- shareholders must be granted the right to ask questions by means of electronic communication and
- those shareholders that have exercised their right to vote via electronic communication must also be given the opportunity to object to a resolution of the general meeting.

According to the wording of the law, it is sufficient to grant a possibility to vote by means of electronic communication (postal vote) for the period until the beginning of the general meeting. Where both the exercise of the right to ask questions and the right to cast votes are restricted to the period before the meeting, the executive board may confine itself at the meeting to answering questions in accordance with its dutiful free discretion, even though the results of the voting have already been determined. This makes it much easier for general meeting service providers and the administration to conduct the general meeting. However, the connection between answering questions and voting has been entirely severed, which legislature has left unchanged by the recent amendments.

Furthermore, the law expressly stipulates that a challenge to a resolution of the general meeting which was held online can-

not be based, in particular, on a violation of the aforementioned provisions on virtually held general meetings, unless the company can be proven to have acted intentionally.

The executive board shall also be able to decide, without authorization by the articles of association but with the consent of the supervisory board, to make an advanced payment to the shareholders on the net earnings for the year. However, the legal and statutory restrictions on the amount of the advance payment must still be observed, i.e., the maximum amount that may be paid out as an advanced payment is half of the amount remaining from the net profit for the year after deduction of the amounts that must be allocated to revenue reserves according to the law or the articles of association. In addition, the advance payment may not exceed half of the previous year's net earnings.

Insofar as companies are considering applying for government support loans, i.e. KfW entrepreneurial loans, it should be noted that no dividends may be distributed during the entire term of the KfW loan. An exception is possible if a distribution is required by law. For stock corporations, there is a legal obligation to distribute dividends due to the regulations in Section 254 (1) German Stock Corporation Act (AktG), according to which at least the so-called guaranteed dividend amounting to 4 % of the share capital must be distributed. However, the German Stock Corporation Act provides for an exception to the obligation to distribute dividends precisely in the event that a transfer of the profit to reserves or its carryforward to new account is necessary, based on reasonable commercial judgment, to ensure the viability and resilience of the company for a period of time that is foreseeable in terms of economic and financial necessities. Accordingly, this exemption will presumably always apply to those companies that have run into financial difficulties due to the COVID 19 pandemic and, therefore, apply for government support loans. Appealing to the so-called guaranteed dividend of Section 254 (1) AktG would therefore presumably not suffice to avoid the contractual prohibition of distributions.

The necessary resolutions of the supervisory board approving the decision of the executive board to make use of the simplified regulations may also be passed in writing, by telephone or

**Advance payments on the net earnings for the year are also permissible without a provision in the articles of association**

**No distribution of profits when taking advantage of government support programs**

**Approval resolutions of the supervisory board**

in a similar manner without the physical presence of the supervisory board members, notwithstanding any regulations to the contrary in the articles of association of the company or the rules of procedure of the supervisory board. Objections by individual members of the supervisory board to this form of resolution are therefore irrelevant.

We would welcome the legislator adopting the regulations on the modernization of the general meeting into the Stock Corporation Act on a permanent basis, irrespective of the effects of the COVID 19 pandemic. In particular, it should be possible to hold purely virtual general meetings on a permanent basis. It will probably be necessary to fine-tune the regulations in order to find a balanced compromise between the interests of issuers in a practicable implementation of virtual general meetings and the participation interests of shareholders. Overall, the practical experiences of 2021 will certainly contribute to the appropriate contouring of the regulations.

This article is an update of our previous newsletters on the virtual general meeting of March 26, 2020 and June 5, 2020.

You can find more information on the Corona crisis on our topics page.

## **Prospects**



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