

March 25, 2020

Germany Introduces Online-Only Shareholders' Meetings in Response to COVID-19

New Law Applies to German Stock Corporations, German Partnerships Limited by Shares and European Companies (*Societates Europaeae*) Registered in Germany

SUMMARY

The new law allows online-only participation and voting by shareholders, shortens the period to convene both physical and virtual shareholders' meetings from 36 days to 21 days, and provides for questions to be asked by shareholders and responded to by management in advance of the meeting by way of FAQ posted to the company's website.

RAPID ADOPTION OF THE NEW LAW

On March 25, 2020, the German Parliament (*Bundestag*) resolved on the Act for the Mitigation of the Consequences of the COVID-19 Pandemic. The new law, among other things, allows German companies for the first time to hold online-only shareholders' meetings. The Council of the German Federal States (*Bundesrat*) is expected to approve the law on March 27, 2020, so that it may become effective as early as March 28, 2020. The legislative process will have been executed within less than ten days after the initial draft became public on March 20, 2020 and was agreed by the German Federal Government (*Bundesregierung*) on March 23, 2020.

The law includes the following key provisions:

Online Shareholders' Meeting

The management board may hold an online shareholders' meeting in which shareholders can only participate by means of electronic communication or vote via absentee ballot. While the management board itself should still attend in person, members of the supervisory board can dial in via video or audio transmission, even if the company's articles of association do not provide for this option.

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An online shareholders' meeting must comply with the following requirements:

- **Transmission:** The entire shareholders' meeting, including the general debate, voting and announcement of results, must be broadcast via a live video stream (e.g., on the Internet).
- **Voting rights:** Shareholders must be able to vote by electronic means of communication (absentee ballot or electronic participation) or through a proxy.
- **Information rights:** The company must provide shareholders with the opportunity to ask questions by electronic means of communication. The management board may, in the prudent exercise of its discretion (*pflichtgemäßes, freies Ermessen*), decide which questions to answer and how. Preference may be given to questions from major shareholders and shareholders' associations. The management board may also require shareholders to submit their questions electronically no later than two days prior to the shareholders' meeting, and may answer any or all of these questions in advance by way of FAQ posted to the company's website.
- **Limited right to object:** Shareholders who have voted their shares as described above must be given the opportunity to submit an objection to the notary public via electronic means of communication by the end of the meeting. However, the right to challenge any resolution adopted at the meeting by filing an action (*Anfechtungsklage*) with the competent court is limited. Technical disturbances affecting shareholder rights at the meeting as well as the management board's decision how to answer questions, and potentially which questions to answer, only allow a shareholder to challenge a resolution if he proves that the company acted willfully or intentionally – for certain affected shareholder rights gross negligence is sufficient. The legislator expressly points out that the risk of shareholder actions should not prevent companies from holding online shareholders' meetings. Nevertheless, the reliable technical implementation of the online shareholders' meeting will be one of the most important issues to address by any company wishing to make use of the flexibility provided for in the new law.

Online Access to Physical Shareholders' Meeting

As an alternative to an online-only shareholders' meeting companies may open up their traditional physical meeting for (additional) online participation by shareholders even if the company's articles of association currently do not provide for this opportunity.

Timing of Shareholders' Meeting

To increase flexibility, companies may decide to shorten statutory notice periods, and certain dates are moved closer to the meeting. Companies may also hold their annual shareholders' meetings at the end of the financial year.

- **Notice period:** The management board may decide to publish an invitation to a shareholders' meeting only 21 instead of 36 days prior to the meeting.
- **Record date:** Typically, a company's articles of association require shareholders to prove their shareholding as of a specific record date. For listed companies the record date will be the beginning of the twelfth (instead of the twenty-first) day before the meeting. For bearer shares, the required confirmation must be submitted to the company no later than by the fourth (instead of the sixth) day prior to the meeting, unless a later date is indicated in the invitation to the shareholders' meeting. No confirmation is required for registered shares.
- **Registration period:** Typically, a company's articles of association require shareholders to register at least six days prior to the shareholders' meeting. Unless the invitation sets forth a shorter period, this requirement remains unchanged. Therefore, shareholders still have to register at least six days in advance to participate in the meeting but, in the case of bearer shares, must submit a confirmation of their shareholding by the fourth day prior to the meeting (see above). Companies may set forth a later date to register for the shareholders' meeting in order to align these dates.

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- **Additional agenda items:** If the management board decides to shorten the notice period, shareholders requesting additional items to be added to the agenda must submit the request at least 14 days prior to the meeting instead of at least 30 days.
- **Shareholders' meeting may take place at the end of the financial year:** Currently, the annual shareholders' meeting of a German stock corporation (*Aktiengesellschaft*) or a German partnership limited by shares (*Kommanditgesellschaft auf Aktien*) must be held within the first eight months of a financial year; in the case of a European company (*Societas Europaea*) it must be held within the first six months. Under the new law, the management board of a German stock corporation or a German partnership limited by shares may decide to hold the annual shareholders' meeting instead during the last four months of the company's financial year, as long as the meeting still takes place in 2020. This extension does not apply to European companies (*Societates Europaeae*). However, the management board should only use this possibility if rescheduling is necessary due to COVID-19. Therefore, it should consider whether a physical shareholders' meeting can still be held within the eight-month period. At the same time, the management board does not have to refrain from holding an online meeting because a physical shareholders' meeting is still possible within the first eight months of the financial year.

Interim Dividends

German stock corporations may only pay dividends on the basis of a resolution of the shareholders' meeting or, prior to the annual shareholders' meeting, if the articles of association provide for limited installment payments on the basis of the (preliminary) net profit for the completed financial year. The new law makes the latter option available to any stock corporation regardless of the provisions set forth in its articles of association. However, the statutory restrictions on the amount of such payments apply unchanged, *i.e.*, payments may not exceed the lower of 50% of the net profit for the 2019 financial year after deducting the amounts that must be transferred to retained earnings under statutory law or the articles of association, and 50% of the net profit for 2018.

Supervisory Board Approval

Any decision of the management board outlined above must be approved by the supervisory board. The supervisory board may take this decision by written, oral or comparable resolution, even if the company's articles of association or rules of procedure for the supervisory board do not provide for this option.

Technical Set-Up

Companies should prepare any online shareholders' meeting in close coordination with their technical service providers. These service providers are currently preparing the necessary technical solutions for online meetings and expect to have them ready in a few weeks.

Temporary Rules

The above provisions apply only to shareholders' meetings taking place in 2020. If necessary, the German Federal Ministry of Justice and Consumer Protection (*Bundesministerium der Justiz und für Verbraucherschutz*) may extend the provisions of the law without further legislative approval until December 31, 2021.

CONCLUSION

Companies are not required to use the possibilities introduced by the new law. The management board should consider whether – depending on individual circumstances – it may be possible to hold a physical shareholders' meeting at a later date in 2020. At the same time, the management board does not have to refrain from holding an online meeting because a physical shareholders' meeting may still be or become possible.

To avoid legal uncertainties, companies that have already published invitations to their shareholders' meeting but want to take advantage of the possibilities of the new law should cancel their scheduled meeting and publish a new invitation.

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