

Virtual General Meeting (principally) also in 2022

Dr. Lutz Pospiech, Munich
Claus Christopher Schiller, Cologne

As a result of the COVID 19 pandemic, last year the German legislator introduced the – temporary – possibility for holding virtual general meetings, i.e. a general meeting without the physical presence of the shareholders (see our Legal Updates of [27 March 2020](#) and [29 January 2021](#)). This possibility was initially limited to the 2020 general meeting season (however up to and including 31 December 2020) and was extended to the entire calendar year 2021 in December 2020 in the context of the still ongoing COVID 19 pandemic.

Shortly before the election of the 20th German Bundestag, the possibility of holding virtual general meetings was yet again extended until 31 August 2022 by Art. 15 of the German Reconstruction Aid Act 2021 (*Aufbauhilfegesetz 2021*, BGBl 2021, p. 4147, 4153).

Amendment of the Law

Well hidden between regulations to fight the consequences of this summer's severe weather catastrophes the German Reconstruction Aid Act 2021 amended Sec. 7 of the Act on Measures in Company, Cooperative, Association, Foundation and Condominium Law to Fight the Effects of the COVID 19 Pandemic (*GesRuaCOVBekG*). Particularly Sec. 7 (1) and (3) *GesRuaCOVBekG* have been changed so that the words "*in 2020 and 2021*" were replaced by "*up to and including 31 August 2022*".

No other material changes have been made.

Purpose of the Amendment

With the extended possibility to hold virtual general meetings also in the upcoming 2022 season for general meetings, the legislator has reacted in particular to the common pressure and the still existing uncertainties regarding the COVID 19 pandemic. The clarity, that holding a virtual annual general meeting remains a possibility in 2022, is very much welcomed. However, in light of the unequivocal reasoning behind the law, the extension may not be mistaken

as *Carte Blanche* for holding virtual general meetings (see below).

The extension until 31 August 2022 generally seems consistent in view of Sec. 175 (1) sentence 2 of the German Stock Corporation Act (*AktG*). However, it should be noted that Sec. 1 (5) *GesRuaCOVBekG*, pursuant to which the executive board may decide that the company can also hold the general meeting within the fiscal year (i.e. within twelve instead of eight months) in derogation of Sec. 175 (1) sentence 2 *AktG*, continues to apply. Even if the general meeting may thus principally also be held at a later date, the possibility of holding a virtual general meeting – inconsistently (?) – is limited up to and including August 2022.

If the company has a fiscal year deviating from the calendar year and ending in spring or summer 2022, it should be determined in detail to what extent a virtual general meeting can be held or whether a general meeting should be planned.

Overview of Applicable Provision

Pursuant to Sec. 1 (1) and (2) *GesRuaCOVBekG*, the executive board may – still – decide on a general meeting to be held via electronic communication, the possibility of absentee voting and video and audio transmission without the articles of association or by-laws providing for any of this. The executive board may also decide that the general meeting is to be held completely without any physical presence (of the shareholders) at all, provided that (i) it is broadcast, (ii) electronic voting is secured, (iii) a right to ask questions ensured, and (iv) the possibility to object to the minutes is provided.

Additionally, it is possible to shorten the period for convening the general meeting from 30 days (Section 123 (1) sentence 1 *AktG*) to 21 days. The same applies to the proof of shareholding for stock-listed companies, which must then refer to the 12th day before the meeting rather than the 21st day (Sec. 1 (3) sentence 2 *GesRuaCOVBekG*).

Requests for additions to the agenda – in the case of the shortened notice period – must be received no later than 14 days before the meeting (Sec. 1 (3) Sentence 4 *GesRuaCOVBekG*).

The executive board continues to decide "*at its own discretion how to answer questions*" of shareholders; "if" a question has to be answered has to be evaluated in accordance with Sec. 131 *AktG*. The executive board may also determine that shareholders' questions must be submitted no later than one day before the meeting. Since it is not yet clear how the deadline is to be calculated, the most shareholder-friendly calculation should be applied (e.g.: GM on 30 June 2022; right to ask questions until 28 June 2022, 24:00 hours).

The executive board requires the approval of the supervisory board in order to make use of the relief provided by the *GesRuaCOVBekG*.

Discretionary Decision to Hold a Virtual General Meeting

The legislator continues to consider the virtual general meeting as an exceptional case and states that the extension until 31 August 2022 is a "*precautionary measure in view of the uncertain further development of the pandemic situation*" and that "*this instrument should only be used in individual cases if this appears necessary in view of the specific pandemic situation and the number of participants at the respective meeting*" (cf. BT-Drs. 19/32275, p. 30).

Thus, if the pandemic situation improves significantly in 2022 (hopefully and foreseeably) due to vaccinations and a general decline in the number of cases, the executive board may not simply decide to hold a virtual general meeting. Within its discretionary decision, the executive board must make an adequate evaluation and prognosis (from an *ex-ante* perspective). One will have to concede the relevant point in time for the executive board's decision (at least in the case of larger stock corporations) is probably not when the general meeting is convened, but when the actual planning/preparation of the general meeting takes place.

In this regard, the still limited right to challenge resolutions adopted pursuant to Sec. 1 (7) *GesRuaCOVBekG* is of course of great relevance.

Cases where the executive board evidently and intentionally is acting in abuse of the law set aside, the risk of a contestability of resolutions on the basis of a virtual general meeting convened allegedly in breach of duty is almost neglectable. The decision of the executive board and the approval of the supervisory board are business decisions, which – as the pandemic has shown – are related to the future and are subject to uncertainties. The corporate bodies will therefore probably have to be granted a large degree of discretion.

In any case, it is recommended that the basis of the decision to convey a mere virtual general meeting should be sufficiently documented.

Applicability to Other Legal Forms

The extension also applies to companies incorporated as SE, KGaA and (with restrictions) mutual insurance association, Sec. 1 (8) and (9) *GesRuaCOVBekG* (see our Legal Updates of [27 March 2020](#) and [29 January 2021](#)).

Conclusion

That the possibility to hold virtual general meetings has been extended until 31 August 2022 is generally a good thing. The extent to which this will be made use of remains to be seen and will depend on the development of the pandemic situation in the upcoming months. However, it may be a fair assessment to say that a number of general meetings, particularly of larger companies which require considerable advance planning, will also be held as virtual meetings in 2022.

Nonetheless, the decision for or against holding a virtual general meeting should be carefully examined and documented in each individual case.

It would be highly appreciated if, based on the generally positive experience – at least as perceived by the authors – with virtual general meetings of the past two seasons, the new German government was to introduce the virtual general meeting as a permanent option.

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the authors Dr. Lutz Pospiech by phone +49 89 3090667-45 or by email to lpospiech@goerg.de and Claus Christopher Schiller by phone +49 221 33660-604 or by email to cschiller@goerg.de For further information about the author visit our website www.goerg.com.

Our Offices

GÖRG Partnerschaft von Rechtsanwälten mbB

BERLIN

Kantstraße 164, 10623 Berlin
Phone +49 30 884503-0, Fax +49 30 882715-0

HAMBURG

Alter Wall 20 – 22, 20457 Hamburg
Phone +49 40 500360-0, Fax +49 40 500360-99

COLOGNE

Kennedyplatz 2, 50679 Köln
Phone +49 221 33660-0, Fax +49 221 33660-80

MUNICH

Prinzregentenstraße 22, 80538 München
Phone +49 89 3090667-0, Fax +49 89 3090667-90

FRANKFURT AM MAIN

Ulmenstraße 30, 60325 Frankfurt am Main
Phone +49 69 170000-17, Fax +49 69 170000-27