

## CORONAVIRUS RESOURCE CENTER

# COVID-19: Temporary Changes to German Corporate Law

April 1, 2020

**Overview of the temporary relief for the AG.** At the end of March 2020, the German government introduced a law that aims at mitigating the impact of the COVID-19 pandemic (COVID-19 Mitigation Act—"CMA"). It passed both Houses of Parliament with flying colors. The following note addresses—in landscape format—the changes in corporate law that we feel are of immediate importance to businesses, besides the possible financial support from the government: a statutory permission to hold electronic AGMs.

The planned changes affect primarily the German Stock Corporation Act and are meant to enable the management of stock corporations for a limited period within the year 2020 to:

- conduct virtual general meetings,
- exclude the physical presence of the shareholders,
- extend the statutory period within which ordinary general meetings must be held from 8 to 12 months and
- issue a prepayment of dividends towards the net profits even if the company's by-laws do not grant such authorization.

These rules apply also for partnerships limited by shares (KGaA) and with a restriction—for SE's.

Topic	Clause <sup>1</sup>	Description of the clause	In depth view	
<b>1. Enablement of online participation even if there is no basis for doing so in the by-laws</b>				
1.1	Online-Annual General Meeting (“AGM”)	Art. 2 § 1 Abs. 1 CMA § 118 AktG <sup>2</sup>	<p>The Executive Board can decide on</p> <ul style="list-style-type: none"> <li>(i) online participation of shareholders in the AGM (including voting),</li> <li>(ii) online voting of shareholders (outside the AGM),</li> <li>(iii) participation of members of the Supervisory Board by means of video transmission and</li> <li>(iv) online video transmission of the AGM.</li> </ul>	<p>The Executive Board may, with the approval of the Supervisory Board (the decisions can be made in writing, by telephone or in a comparable manner without the physical presence of the members), allow online participation in general meetings in 2020 (written or electronic) postal voting and video and audio transmission of the meetings for shareholders and Supervisory Board members pursuant to section 118 AktG, even if no authorization is granted under the by-laws.</p>
1.2	Virtual general meetings without the physical presence of the shareholders	Art. 2 § 1 Abs. 2 CMA	<p>The Executive Board can decide on holding the AGM without physical presence of the shareholders <u>if</u></p> <ul style="list-style-type: none"> <li>(i) the HV is transmitted online via video,</li> <li>(ii) online participation or voting (and -proxy) is possible,</li> <li>(iii) the shareholders are granted online questions and</li> <li>(iv) the shareholders may object online to an AGM resolution in accordance with § 245 No. 1 AktG.</li> </ul>	<p>Of particular importance is the new authorization of the Executive Board, with the approval of the Supervisory Board, to exclude the physical presence of the shareholders and shareholder proxies and hold a virtual AGM. According to the legislative notes on the Act, it is not a prerequisite that the transmission is technically undisturbed and in particular that it reaches every shareholder.</p> <p>With regard to the shareholders’ right to ask questions in the virtual general meeting without being physically present, significant facilitation is planned. In derogation of 131 AktG, the CMA states that <i>“the Executive Board shall decide according to its free and duly exercised discretion which questions it will answer and in what manner”</i>.</p> <p>According to the legislative notes on the Act, the Executive Board is not expected to address and answer each and every question but may summarize them and select those questions which are expedient in the interest of the other shareholders or give preference to shareholders’ associations and institutional investors with significant</p>

<sup>1</sup> Art. 2 § 1 CMA is only applicable to annual general meetings and pre-payments of the balance sheet profit that take place in 2020. Moreover, all of the decisions allocated to the Executive Board on the use of the new abilities will require the approval of the Supervisory Board. In derogation of section 108 (4) AktG, notwithstanding the provisions in the by-laws or the rules of procedure, the Supervisory Board may adopt resolutions without the physical presence of the members in writing, by telephone or other comparable forms.

<sup>2</sup> “AktG” refers to the German Stock Corporation Act (Aktiengesetz).

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			<p>voting shares. Moreover, the Executive Board may require that questions be submitted electronically no later than two days before the meeting.</p> <p>Resolutions of a virtual general meeting are only subject to avoidance actions by stockholders due to technical disruptions, such as during the online participation, if the company can be proven to have acted intentionally. Avoidance due to a violation of the right to information is restricted to cases in which it can be proven that the Executive Board intentionally exercised its discretion as to which questions it would answer in breach of its duties. All other regular grounds for avoidance actions by stockholders are still in operation. In particular it must be possible for shareholders participating virtually to raise an objection to be recorded in the minutes even without being in the physical presence of the notary, thereby preserving the authority to bring an action for avoidance pursuant to section 245 no 1 AktG. To this end, the company must provide the option of filing an electronic objection with the notary.</p> <p>Despite the facilitations for the conduct of general meetings without the physical participation of shareholders, the concept of a general meeting at one meeting place, with the presence of the chairperson and the officers of the company pursuant to section 118 (3) AktG, as well as a notarization of the minutes by a notary who is present at the meeting place, will remain unchanged.</p>
<p><b>2. Reduction of the period for convening a meeting and facilitation of the proof of the record date</b></p>			
Shortening of the convening notice	Art. 2 § 1 Abs. 3 CMA § 122 f., 125 AktG	<p>The Executive Board can decide to convene the AGM with a notice period of 21 days. In this case</p> <p>(i) the record date for the proof of shareholding is now the beginning of the 12th day before the AGM and notice of attendance must be received by the company no later than the fourth day before the AGM for</p>	<p>The Act permits to reduce the period for convening the AGM. Instead of “at the latest thirty days” (section 123(1) sentence 1 AktG), the meeting is now to be convened “at the latest on the 21st day” before the day of the meeting. At the same time, the record date for bearer shares of listed companies will be postponed from the beginning of the 21st day to the beginning of the 12th day, and the deadline for the notice of attendance (receipt by the company) has been moved from “at the latest six days” (section 123(4) sentence 2 AktG) to “at the latest on the fourth day”</p>

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		<p>the bearer shares; the Executive Board can also provide for a shorter period,</p> <p>(ii) notice of the AGM must be given at least twelve days (not 21) before the AGM and</p> <p>(iii) the supplementary request (Ergänzungsverlangen) must be received by the company at least 14 days before the AGM.</p>	<p>before the meeting.</p> <p>Requests by shareholders for additional agenda items (section 122 (2) AktG) must be received by the company at least 14 days prior to the meeting instead of 24 or 30 days.</p>
<b>3. Extension of the period within which ordinary general meetings are to be held</b>			
AGM within entire financial year	Art. 2 § 1 Abs. 5 CMA § 175 AktG	The Executive Board can decide on the AGM to take place within the entire financial year (not only within the first eight months).	The period within which ordinary general meetings are to be held in 2020 is extended from eight (section 175 (1) sentence 2 AktG) to 12 months. <b>This time extension does not apply to SE's.</b> (The German legislature does not have the regulatory competence to derogate from Article 54 (1) sentence 1 SE Regulation in this regard). Companies in the legal form of an SE are therefore advised, due to possible extensions of the administrative prohibitions on holding events in Germany, to discuss in the near future with their legal advisors and technical service providers for the AGM the above-mentioned possibilities of a virtual AGM.
<b>4. Permissibility of interim payments toward the net income even without a basis for doing so in the by-laws</b>			
Prepayment towards the net income	Art. 2 § 1 Abs. 4 CMA § 59 AktG	The Executive Board can decide on a prepayment of a dividend from the balance sheet profit to the shareholders.	One concern from the standpoint of the company and the investors is the fact that a postponement of the general meeting will result in a delayed distribution of the dividends. Up to now, an interim payment toward the net income after the end of a financial year had required an authorization under the by-laws (section 59(1) AktG). This requirement will be set aside for 2020 so that the Executive Board can decide on such an interim payment with the approval of the Supervisory Board. However, the substantive limitations and restrictions in amount and percentage set out in section 59(2) AktG remain unchanged.

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Please do not hesitate to contact us with any questions.

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