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General Meeting of Shareholders and the Internet

I. Introduction

Little more than a decade has passed since the year 1991 when the World Wide Web-Service was set in operation. Today practically all major enterprises can be contacted through the internet. For investors, this means a chance for more transparency as to what is going on within the enterprise. It has become much easier to get information on current affairs. The internet has also significantly facilitated the exercise of shareholders´ rights of participation. Especially, we find very interesting possibilities for the use of the new information and communication technology in connection with the preparation and holding of stockholders´meetings.

The recent market crises have shown that there is a definite need for better control of enterprises and of their management. All over the world, experts are discussing questions of the so-called Corporate Governance. One possible approach to reforms consists in strengthening the position of shareholders and making the general meeting more effective. This has also been strongly recommended by such important institutions as the European Union and the OECD.

However, a comparison shows that even in the member states of the European Union, the competences and functions of general meetings have been shaped in very different ways. Although EU-legal harmonization has made substantial progress especially in the field of company law, the pertinent directives and regulations have left out this sector almost completely. The draft of the fifth company law directive which was intended to regu-

late questions concerning the structure of joint stock companies has failed and will never be passed.

But for the discussion on the legal and technical possibilities and limitations for the use of the internet for purposes of the general meeting, the differences in the national company laws are not that important. On the contrary, in this field, an exchange of experience is especially to be recommended, one only has to think of the growing number of cases of cross-border-voting. In the era of globalization and of mergers, investors often do not pay any attention to the seat of the company in which they are going to participate, and they are equally willing to invest in Citigroup, Daimler-Chrysler, Nokia, Sony or Vodafone, just to name a few examples, as long a profit can be expected. Under the conditions of cross-border-voting, however, it is often impossible, or economically unwise to take part in stockholders´ meetings in person. Still, the absentee shareholder should be able to exercise his membership rights as effectively as possible. To this purpose, the legislator must provide for corresponding mechanisms.

The shareholder should be able, without any restrictions, to let himself be represented in the vote-casting. The question is how to guarantee and organize this for him in the most effective way. In international comparison, different models are to be found. At the traditional stockholders´ meetings, the absentee shareholder had to give his instructions for the vote-casting well in advance and had no possibility of watching the general meeting from the distance directly and simultaneously and of reacting to the happenings there. The following contribution deals with new developments in German law for making use of the internet in connection with the stockholders´ meeting that are intended to solve these difficulties (and some others as well).

Obviously, the questions in connection with stockholders´ meetings, and especially those of listed companies cannot be treated in a satisfactory way on the national level alone. There is rather a clear need for unification of law, because essential points, like time-limits for the call to the meeting, admission to the meeting, modalities for the vote-casting through a representative are until now regulated in very different ways even in the EU-member states. It would be advisable to develop a common standard on which investors can rely without having to do difficult research work in foreign law.

II. Recent initiatives for company law reform on the level of the EU

In September 2001, the European commission has appointed a High level group of Company law experts assigning to it the task of developing proposals on a Modern regulatory framework for company law in Europe, including corporate governance. The group handed in its final report in Brussels on 4 November 2002[1)]. A substantial part of this report is devoted to questions of the possible use of modern information and communication technology for company law. The expert group inter alia has expressed itself in favour of

1. Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, see: http:europa.eu.int/comm/internal_market/en/company/company/modern/consult/report_en.pdf

requiring listed companies to maintain and continuously update a company information section on their websites, and maintain links with public registers and other relevant authorities. According to the experts´ report, shareholders should be able to find all infomations relevant for them on these websites, including all the essential materials for the stockholders´ meetings. Besides, this section should offer facilities for giving proxies or voting instructions on-line or for downloading and electronic transmission of proxy or instruction forms.

Other recommendations concern the general admissibility of electronic participation in meetings. According to the report, listed companies should be permitted, but not required, to allow absentee shareholders to participate in general meetings via eletronic means (online-general meeting).

However, the permission to abandon the physical meeting, in the opinion of the high level expert group, should be a member state decision. In this case of a virtual (cyberspace) general meeting, participation takes place exclusively via internet. The proposal says that such a decision should be taken by the general meeting of shareholders with an appropriate strong qualified majority.

The complicated and urgent questions of cross-border-voting have been investigated in advance by a special international group of experts appointed by the Dutch Ministry of justice[2)]. Since shares are nowadays normally emitted not as printed documents, and in some countries all shares have been dematerialized, it can be very difficult to determine who is the shareholder having the right to vote, because especially in cross-border cases, his right follows from a whole chain of stock-accounts resp. intermediaries. Questions have to be answered concerning the flow of information between enterprise and shareholder, the evidence of authority for shareholders and the exercise of voting rights. For the establishment of one single European capital market it is especially important to guarantee that shareholders in the member states shall in reality have the same chances of getting information and exercising their rights everywhere.

On all these points, the report contains a rich choice of proposals and ideas, based on a broad opinion poll, that will be of primary importance for the future development of European company law.

III. New developments in German law

1. Functions and competences of the general meeting

Before entering into our real topic, the German system of general meetings shall be briefly explained. Today, there are approximately 1.000 listed companies in Germany, 30 of which are comprised in the German index "DAX". Whereas in the year of 1998 on the average 61 % of the voting shares were represented in the general meetings, participation

2. See *Noack*, Erleichterungen grenzüberschreitender Stimmrechtsausübung – Bericht über eine Initiative der niederländischen Regierung und der Europäischen Union: Zeitschrift für Wirtschaftsrecht (ZIP) 2002 S. 1215-1216.

diminished down to litte more than 50 % in the year of 2002. By the way, this experience is not limited to Germany. Other countries also report similar diminutions in the active participation of shareholders.

Under German law, a joint-stock company must have three organs: management, supervisory board and the general meeting of shareholders. There is no established hierarchy among these bodies. Instead, the competences with regard to the company are divided among them. Namely, the management runs the company on its own responsibility (§ 76 I Aktiengesetz (AktG)). The general meeting can decide questions of management only on demand of the board of directors (§ 119 II AktG).

According to the law, the general meeting is the place where the shareholders´ interests in company matters are exercised (§ 118 I AktG). The general meeting is not open for the public. The ordinary general meeting must be convened every year during the first eight months of the business year (§ 120 I AktG), and that at least one month in advance (§ 123 I AktG). Extraordinary general meetings take place in cases determined by the law or the articles of association, or when necessary for the weal of the company (§ 121 AktG). The general meeting can be held in one single place only. E.g, as a consequence of the merger between Daimler-Benz and Chrysler to Daimler-Chrysler, the general meeting of the latter takes place in Berlin and there is no legal way of holding an additional meeting in the USA where many shareholders live, although from the technical point of view, two meetings could be electronically connected.

The competence of the general meeting includes, under the German system, inter alia the appointment of the members of the supervisory board. Besides this, the general meeting decides on the allocation of the profit, the formal approval of the actions of the managing board as well as of the supervisory board, the appointment of the auditors, alterations of articles of association, increase in share capital, capital reduction and specially arranged examinations (for details see § 119 AktG). (On the other hand, the members of the managing board are appointed by the supervisory board. The annual accounts are normally adopted by the managing board and the supervisory board). – For being able to take decisions, shareholders must have certain rights of information, like having the management render account, but also a general right to be informed (§ 131 AktG). Finally, the general meeting also serves the function of a central forum for communication.

As yet, Germany adheres to the requirement of a general meeting of shareholders as a physical meeting. A general meeting exclusively in the virtual space would de lege lata be forbidden. (However, new legislation allows a virtual passing of resolutions by the supervisory board, at least outside of board meetings. The articles of association can provide for this possibility even against the wish of individual board members, see § 108 IV AktG). – The Company Act specifies the following participants of the general meeting: Managing board and supervisory board (who "shall" participate), shareholders (res. their voting representatives) and the notary.

2. Survey of German reform legislation

Legislation promoting the use of the internet for purposes of the general meeting of shareholders consists of many individual changes in legal provisions. This contribution shall be confined to the most important innovations.

In this context, besides the uniform German Corporate Governance Code from the year 2002, three new laws must be pointed out expressly[3], namely: a) Act on personal shares and on facilitation of the exercise of voting rights (NastraG) of 18 January 2001[4]; b) Act on adaptation of the formal requirements of private law and other provisions to the modern dealings of legal transactions of 1 July 2001[5]; c) Act on further reform of company and balance law, on transparency and publicity (TransPuG) of 19 July 2002[6].

On the basis of NastraG, in Germany general meetings with electronic participation of absentee shareholders (online-meetings) were held first in 2001, and that for companies with personal shares as well as for companies with bearer shares. Meanwhile, especially for major companies, the use of the internet for the purposes of preparing and conducting general meetings has become a matter of course. But also among shareholders, using the companies websites´ has become very popular, whether for their personal information or for exercising their membership rights.

3. Using the internet for preparing and conducting general meetings

a) Announcement of the convocation of the general meeting and of the agenda. The Electronic Federal Gazette

(1) By virtue of the law, the convocation of the general meeting has to be made public in the Federal Gazette. This still holds true, but effective as of 1 January 2003, the announcement must be made in the electronic version of the "Bundesanzeiger". There is now no obligation whatsoever of a publication in the print-version.

(2) In addition to this, the articles of association may demand an announcement in other places, of late including the electronic information media (e.g. on the companies´ homepage), § 25 AktG. On the matter of additional publication, the company can decide freely. It has to be mentioned, however, that the German Corporate Governance Code expressly recommends for listed companies to announce the agenda of the general meeting (and indirectly: the convocation as such) on their homepage.

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3. See also *Zetzsche (Hrsg.)*, Die Virtuelle Hauptversammlung. Aktionärsbeteiligung via Internet aus juristischer und betriebswirtschaftlicher Sicht mit Erfahrungsberichten (Berlin 2002).
4. Gesetz zur Namensaktie und zur Erleichterung der Stimmrechtsausübung, BGBl. 2001 I S. 123.
5. Gesetz zur Anpassung der Formvorschriften des Privatrechts und anderer Vorschriften an den modernen Rechtsgeschäftsverkehr, BGBl. 2001 I S. 1542.
6. Gesetz zur weiteren Reform des Aktien- und Bilanzrechts, zu Transparenz und Publizität, BGBl. 2002 I S. 2681.

b) Due notice for shareholders

In cases when the management transmits certain notice to the shareholders (concerning convocation of the general meeting, the agenda, of motions and nominations for the elections), it is no longer obliged to do this per post. On the contrary, these notices must now be simply "made", which can be done also per e-mail (§ 125 II AktG).

As far as notice runs through banking institutions and shareholders associations (§§ 125 I, 128 AktG), electronic transmission is equally possible.

Every shareholder is entitled to receive the resolutions that have been passed in the general meeting. This can now be effected in any possible way, including electronically (§ 125 IV AktG).

c) Supplementation of the agenda on demand of a minority

This important right of minority shareholders can be exercised also via e-mail, if this is provided for in the articles of association (§ 122 II AktG).

d) Counter-motions of shareholders

Shareholders can bring forward their own counter-motions at any time, and if they wish also by electronic means[7)]. As long as the motions are transmitted to the company at the latest two weeks before the general meeting takes place, the company must make them "accessible" to the co-shareholders and other entitled parties (§ 126 I AktG). It is sufficient to make the motion public on the company´s website.

e) Transmission of the general meeting via internet

There is no legal obligation of transmitting the meeting. However, the law expressly states that the articles of association may grant leave for internet-transmissions (§ 118 III AktG). As was mentioned before, the stockholders` meeting is not open for the public, so that public transmissions would, without such a provision, require a general consent.

f) Joining in absentee members of the supervisory board to the general meeting via internet

Now as before, members of the managing board can only take part in the general meeting by being physically present, whereas companies have been given the opportunity of providing, in their articles of association, for members of the supervisory board to participate in the general meeting also via internet-transmission etc. (§ 118 II AktG).

g) Facilitation of exercise of voting rights by absentee shareholders, especially: Proxy appointed by the company

(1) At present, there is no possibility for direct voting, by the absentee shareholder himself. Therefore, a shareholder who is not physically present at the general meeting

7. See *Mimberg*, Schranken der Vorbereitung und Durchführung der Hauptversammlung im Internet – die Rechtslage nach dem Inkrafttreten von NaStrG, Formvorschriften-AnpassungsG und TransPuG -: Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2003, S. 21-58 (32 ff.).

needs a proxy who votes in his behalf. For this purpose, the shareholder can choose. Of course he can appoint an individual person to act for him, which also means that he has to bear possible costs. In order to avoid these, he can mandate the bank where his securities are deposited; however, banks become less and less inclined to take upon themselves such efforts – like everybody else, they also have to save money. Shareholders´ associations are an alternative only when the shareholder is in contact with such an association and has personal confidence in it.

There has been a reform for these kinds of proxy, in the sense of abolishing the requirement of written form. For the appointment of banking institutions and similar persons (§ 135 IX AktG) compulsory legal forms no longer exist, so that the proxy can be conferred also by electronic means. In all other cases, written form is still contained in the law, but the articles of association may dispense from it (§ 134 III 2 AktG).

By the way, the law orders for banking institutions to help the shareholder in his giving instructions concerning the exercise of voting right, e.g. by putting up form-sheets on their websites (§ 128 II 5 AktG). Written form will not be required for these instructions.

(2) The most interesting innovation, however, consists of the fact that companies can now appoint a proxy for their own shareholders. This function may be assigned to third persons, but normally the company appoints one (or better two) of its own employees to this task. The proxy acts on behalf of the shareholder, and free of charge for the latter. All decisions have to be made by the shareholder himself, which means that the shareholder´s instructions on the individual items of the agenda are binding to the proxy. Without express instruction on the item, the proxy is not allowed cast a vote. This new possibility has become popular in a very short time and is used extensively, because it is in the interest of all parties concerned. The companies, by offering this kind of proxy, prove their active support of shareholders, which is also good for their image. For the shareholder, the authorization of such proxy is a reliable, as well as a very simple method for exercising voting rights.

Authorization can be given electronically, the only requirement being that the company keeps the declaration, by which the authority has been given, for three years "in a verifiable way" (§ 134 III 3 AktG). The voting instructions may also be transmitted via e-mail. If the company has the necessary technical equipment at its disposal, a shareholder, who observes the general meeting live via internet, may during the meeting change his instructions in reaction to the discussions or revoke the proxy. It would be much more difficult to imagine banking institutions building up the necessary costly technical installations for the sake of shareholders who happen to be their clients.

h) List of participants of the shareholders meeting

The requirement of printing the list has been abolished. Until recently, it had to be "laid out" before the first voting, signed by the chairman and deposited in the commercial register. Now it suffices for the list of participants to be made "accessible" to all the participants before the first voting, including in the electronic form, the shareholders having a two years right auf inspection.

IV. Final observation

Experience shows even now that general meetings online, where absentee shareholders may participate via electronic means, are a good alternative to the general meeting in the style practised during the 20th century. German major companies calculate the cost of general meetings at an average of 500 _ per person! Whether the outcome currently justifies the expense is under dispute. In fact, the debates on Corporate Governance have led to higher expectations for the effective use of general meetings.

There can be no doubt that in future, modern information and communication technology will become even more important. The introduction of direct voting by the absentee shareholder himself, without any kind of proxy, is only a step away. This cannot be said with the same assurance for the abandonment of a physical meeting and shifting of meetings into virtual space, but sooner or later, this will also be possible. At present, only part of the shareholders have access to the internet, and the companies also must be given time for building up the necessary technical equipment and knowledge, which puts limits to the legislator´s scope of action. In any case, using modern technology for purposes of the general meeting of shareholders is a proper means for strengthening the investors´ trust in the company, attracting foreign shareholders and controlling the company more effectively. Foreign investors will take the use of such technology as a sign for good corporate governance.