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Amendment of the Law on Public Limited Companies, in the presentation of accounts and audit

Law on control and transparency in the corporate area (KonTraG) –
Corporate government– Law on transparency and publicity
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The regulations of the General Shareholders Meeting

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A. Introduction

By virtue of the Law on control and transparency in the corporate area (*Gesetz zur Kontrolle und Transparenz im Unternehmensbereich*, for short *KonTraG*) a new sentence has been inserted in § 129 paragraph 1 of the Law on Public Limited Companies (*Aktiengesetz*, for short *AktG*)¹. In accordance with this, the General Shareholders Meeting, by majority of at least three quarters of the capital stock represented in adopting the respective resolution, may issue a regulation with provisions relating to the preparation and holding of the General Shareholders Meeting.

The description of grounds² of the Law entails great expectations in the introduction of this regulation. From this, not only is it expected that it will provide the missing provisions in the Law on Public Limited Companies regarding the development and presidency of the General Shareholders Meeting, and will consequently give the Chairman of the Meeting greater legal security. It also aims at the provisions of a regulation “contributing to a revitalisation of the General Shareholders Meeting, that it be concentrated in the discussion of specific matters and, in short, for an improved control exercised by the owners”. These objectives are surprising, because they all coincide in the fact that the General Shareholders Meeting could previously be given a regulation³, but that no use had been made of such a possibility.

There are provisions in the Company’s Articles of Association relating to specific questions about the holding of the General Shareholders Meeting. Provided they respect the legal framework, these provisions in the articles of association that define or complete the legal standards are admissible⁴. Adopting a regulation of the General Shareholders Meeting does not enlarge this area of regulation, but the regulation is rather a source of Law of inferior rank to the Articles of Association, and consequently it is only lawful within the area of regulation of the Articles of Association and only in the framework of the current statutory provisions⁵. Given this subordinate nature to the Articles of Association, until now, and also following the addition to § 129 paragraph 1 AktG, the regulation of the General Shareholders Meeting has had little practical importance.

B. Legal Grounds on public limited companies

1. Legal regulations

A series of fundamental questions relating to the General Shareholders Meeting are ruled in the Law on Public Limited Companies. Such is the case, for example, of the notice of call for the General Shareholders Meeting (§ 121 and following AktG), the duty to participate by the Management Board, the Supervisory Board and the auditor (§ 118 paragraph 2, 176 paragraph 2 AktG),

¹ Cfr. in this respect, the study by Seibert on the KonTraG in this same volume

² Publications of the German Parliament (BT-Drs.)13/9712, pp.19 and following

³ Cfr. e.g. Eckardt (1973), *Preliminary observation* § 118, n° 32, and Hüffer (2002), § 129 numbers 1a and 17

⁴ § 23 paragraph 5 AktG

⁵ Cfr Hüffer (2002), § 129, n° 1a

keeping a list of participants (§ 129 paragraph 1 sentence 2 AktG), the drafting of minutes (§ 130 AktG), the shareholder's right to receive information and to cast his/her vote (§§ 131, 133 and following. AktG) and of certain complementary duties to provide information to the Management Board (Cfr. e.g.. §§ 175 paragraphs 2 and 3, 176 paragraph 1 AktG).

II. References to the Articles of Association

In the case of certain less fundamental questions, the Law expressly permits that a more detailed regulation be adopted in the Articles of Association. Among these are the competences to call the General Shareholders Meeting, the venue where it is held, the duration of the term of call, certain requirements for participation and exercise of the right to vote by shareholders (§ 121 paragraph 2 sentence 3 and paragraph 5, 123 AktG), the form of granting powers (§ 134 paragraph 3 sentence 2 AktG), the participation of members of the supervisory Board by means of image and sound transmission systems (§ 118 paragraph 2 sentence 2 AktG) and the form of voting (§ 134 paragraph 4 AktG). These regulation possibilities are used on most occasions. When the Articles of Association contain detailed rules, the regulations of the General Shareholders Meeting are linked with these rules, and at the most they may be repeated in a declaration⁶. In addition to the references to the Articles of Association, the Law only foresees in the new § 118 paragraph 3 AktG introduced by the Law on transparency and publicity⁷ that alternatively the Articles of Association or the regulations may allow the General Shareholders Meeting to be transmitted by means of sound and image systems.

III. Questions not regulated in the law

In accordance with the legislator's intentions, especially those questions that are not expressly regulated in the Law may be the possible object of a regulation by the General Shareholders Meeting. One of these questions is the designation of the person of the Chairman of the General Shareholders Meeting. The Law on Public Limited Companies only sets out that the General Shareholders Meeting should have a chairman (Cfr. § 129 paragraph 4, 130 paragraph 2 AktG). It leaves it an open issue as to how such a chairman should be designated. The Articles of Association provide in this respect that the Chairman of the Supervisory Board or another of its members will chair the General Shareholders Meeting. When the Articles of Association do not contain some provision on the matter, or the person foreseen by them is not available, it is a general opinion that the Chairman of the General Shareholders Meeting should be chosen by that same meeting⁸. Such a choice *ad hoc*, is not however very practical and consequently most Articles of Association contain precautionary measures about the person who should chair the General Shareholders Meeting when the

⁶ Hennerkes/Kögel (1999); pp.81 and following

⁷ Law on subsequent modification in the Law on Public Limited Companies and on balance sheets relating to their transparency and publicity (*Gesetz zur weiteren Reform des Aktien- und Bilanzrechts, zu Transparenz und Publizität*, for short TransPuG), of 19.07.2002, published in the Federal Legislative Bulletin (BGBl.)I, p. 2681, of 25.07.2002; cfr. in this respect also the study by Seibert published in this same volume

⁸ Eckardt (193), *Preliminary observation* § 118 n° 33; Hüffer (2002), § 129 n° 18; Semler (1999), § 36 n° 34; Zöllner (1985), § 119, n° 46.

person foreseen to chair it is in principle impeded from doing so. Consequently, in most cases, there is no need for this item be ruled by a regulation.

The Law does not contain any rule either regarding the development and management of the General Shareholders Meeting. In accordance with case law and common law, the adoption of the necessary measures for a suitable development of the General Shareholders Meeting is competence of its Chairman⁹. This Chairman in principle has all the management and order attributions necessary to comply with his task. Among them, the adopting of general management measures relating to the opening, adjourning and closure of the General Shareholders Meeting. The Chairman of the General Shareholders Meeting may, in certain cases, establish a general or individual limitation in the time for taking the floor. If necessary he may withdraw the right to speak, close the list of speakers and rule the end of the discussion. Finally, he is authorised to call to order those who are disrupting it and expel them if necessary from the room.

To adopt the decisions that fall within his competencies, the Chairman of the General Shareholders Meeting does not need the approval of the Meeting, the General Meeting cannot decide in lieu of its Chairman¹⁰. There are different concepts regarding the definition of competences only in view of questions, such as, for example, determining the order in which the items of the agenda are discussed. In this respect, the supposition of an exclusive competence of the chairman of the General Shareholders Meeting is mandatory for practical reasons¹¹. On the other hand, the power to decide on certain fundamental issues is reserved to the General Shareholders Meeting. Thus and in particular, it is the exclusive task of the General Shareholders Meeting to decide on the withdrawal of specific items from the agenda or to resolve the deferment of adopting resolutions on specific matters, or of the General Shareholders Meeting as a body.

The grounds of § 129 paragraph 1 sentence 1 AktG¹² also cites other items that are not ruled in the law and which may be object of a regulation. Among them, it mentions the establishment of safety controls and tape recording of the General Shareholders Meeting. Both matters have been clarified from a legal outlook¹³, and consequently in practice it is not considered they need to be regulated.

With regard to them all, the regulations of the General Shareholders Meeting may only establish rules to the extent that such questions are the competence of the actual General Shareholders Meeting. There are only few questions, which if necessary may also be ruled in the Articles of Association. On

⁹ Cfr. resolution of the Federal Court of Justice BGHZ 44, pp245 and following.; Banz (1972), § 119 note; Hüffer (2002), § 129 numbers 19 and following.; Martens (1981), p. 1010; Stütze/Walgenbach (1991), p. 516.

¹⁰ Hüffer (2002), § 129 n° 1c; Mülbart (1999a), before §§ 118-147 n° 182 with more references

¹¹ Mülbart (1999a), before §§ 118-147 n° 108; Stütze/Walgenbach (1991), p. 529; of another opinion is Hüffer (2002), § 129 n° 19

¹² See note 2.

¹³ Cfr. on safety measures Schaaf (1999), numbers 534 and following and Official Court of Munich (1995), and also on tape recording e.g. Hüffer (2002), § 130 n° 33; Federal Court of Justice (BGH), sentence of 19.09.1994, published in *Neue Juristische Wochenschrift* (NJW), 1994, pp 3094 and following and Superior Territorial Tribunal (OLG) of Karlsruhe, sentence of 18.12.1997, published in *Der Betrieb* (DB) 1998, p. 411

the other hand, the powers of management and order of the Chairman of the Shareholders Meeting are precisely held by the Chairman, and cannot be restricted by the Articles of Association or by the regulation¹⁴. Consequently, the provisions contained in the Articles of Association or in the regulations may only describe the powers of the Chairman of the General Shareholders Meeting, without these rules at any time being able to restrict the margin of discretion held by the Chairman.

C. Adoption of a permanent regulation

1. Resolution of the General Shareholders Meeting

By virtue of its autonomy for the purpose of organisation, the General Shareholders Meeting may issue a regulation that is in force as permanent regulation for all future General Shareholders Meetings. This was already previously supposed, and has been expressly confirmed in § 129 paragraph 1 sentence 1 AktG. This permanent regulation may be adopted both as an integral part of the Articles of Association and in the form of a separate regulation that does not form part of the Articles of Association¹⁵.

When the regulation is adopted as modification of the Articles of Association, the general provisions will be applied. The respective resolution of the General Shareholders Meeting must especially be adopted apart from by simple majority of votes (§ 133 paragraph 1 AktG), by majority of three quarters of the capital (§ 179 paragraph 2 sentence 1 AktG). This majority may be reduced in the Articles of Association to a simple majority (§ 179 paragraph 2 sentence 2 AktG). The Articles of Association of at least those companies that are officially listed, usually contain the respective reduction clauses¹⁶. In the event that, on the other hand, in accordance with § 129 paragraph 1 sentence 1 AktG, the regulation is adopted as a separate rule of the Articles of Association, in order to adopt the respective resolution – apart from the simple majority of votes – a non-reducible (“at least”) majority of three quarters of the capital (§ 129 paragraph 1 sentence 1 AktG) will be needed. This leads to the singular result that to adopt a regulation, a majority of capital that is higher than a mere modification in the Articles of Association is required.

When the regulation is resolved as a separate regulation, the proposal to adopt the respective resolution should be notified in the notice of call of the General Shareholders Meeting just as if this were a modification in the Articles of Association; at least the essential contents of this regulation should be published on this occasion (§ 124 paragraph 2 sentence 2 AktG)¹⁷. There is no ruling however about whether and how a regulation on the fringe of the Articles of Association should be made public once the respective resolution has been adopted. The minutes with the respective resolution should be filed at the Trade Registry (§ 130 paragraph 5 AktG), but the regulation as such is not recorded at

¹⁴ Cfr., 352 and 358 and following.; Hüffer (2002), § 129 n° 1c; Dietrich (1998), p. 923.

¹⁵ Cfr. Bezenberger (1998), p. 363

¹⁶ Cfr. the formulation proposals of Hölter (2000), V. 35 § 9 paragraph 2, V.36 § 11 paragraph 2 and V. 38 § 25 paragraph 1.

¹⁷ Cfr. Eckhardt (1973), *Preliminary observation* § 118 n° 32; Zöllner (1985), § 124 n° 11; Werner (1993), § 124 n° 95.

the Registry. Wherefore, for the sake of necessary transparency, it might be mandatory to refer to the existing regulation in any future notice of call for a General Shareholders Meeting, and to publicly display the regulation for examination by the parties concerned before and during the General Shareholders Meeting¹⁸. At the request of any shareholder, a copy should be issued¹⁹. In the case of officially listed companies it might in addition be recommendable to publish the address on the *homepage* of the company for general information²⁰.

In the event that later, the regulation is to be modified, a majority of three quarters of the capital will likewise be needed for the respective resolution by the General Shareholders Meeting. It is doubtful whether that same rule should apply to a complete elimination of the regulation. The Law does not foresee such a case, such that, in accordance with § 133 paragraph 1 AktG, the simple majority of votes seems sufficient²¹. However, when the regulation contains rules aimed at extending or reinforcing certain rights of the shareholders, it seems appropriate to demand a qualified majority of capital in order to eliminate such a regulation.

II. Contents of the regulation

Also a permanent regulation on the lines of § 129 paragraph 1 sentence 1 AktG is linked with the criteria prefixed by the Law and the Articles of Association. Consequently, if this is adopted it cannot extend the powers of the Chairman of the General Shareholders Meeting or limit the rights of the shareholders²². Essentially, the regulation can only be a descriptive summary of provisions or principles of the Law already in force in all events. In the regulation it is indeed possible to define fundamental principles of the Law, but this will only be feasible to a certain degree. Thus, for example, when the time for taking the floor is reduced, apart from the requirement of equal treatment (§ 53a AktG), the principle of proportionality should also be respected. What this signifies in each specific case is a question that cannot be generically determined in advance, but only in consideration of the specific situation to which it refers.

There could be doubts about such a valuation, because in the recital of grounds of the Government draft²³ it states that the majority for modifying the Articles of Association is foreseen in order to give the regulation a broad base in the overall body of shareholders and to legitimise an ample margin of freedom of configuration in accordance with § 23 paragraph 5 AktG. With this, it states, the autonomy of organisation is clearly reinforced. Obviously the core rights of shareholders cannot be limited.

If the adoption of a regulation should really be understood in this sense as opening clause in accordance with § 23 paragraph 5 sentence 1 AktG, with the possibility of limiting the shareholders' rights, such as, for example, the right to information, the Law should expressly have to regulate from what legal provisions

¹⁸ See also Bezenberger (1998), p. 363

¹⁹ Cfr. e.g. §§ 175 paragraph 2 sentence 2, 179a paragraph 2 sentence 2, 293 paragraph 2 AktG

²⁰ Cfr. also item 2.3.3 of the German Corporate Government Code (*Deutscher Corporate Government Kodex*), according to which companies should facilitate shareholders the personal exercise of their rights.

²¹ See Hüffer (2002), § 129 n° 1e; Butzke (2001), p. D 98.

²² Cfr. Bezenberger (1998), p. 364.

²³ Cfr. BT-Drs13/9712, p. 19.

the regulation may be separated. This however has not occurred, nor does the recital of grounds mention any provision of the AktG from which the regulation could be separated. Hence it follows that adopting a regulation does not really open any additional margin of freedom of configuration. It is therefore not possible to limit the rights of the shareholders in this respect, for example and especially the rights to voice their opinion and to receive information, not even marginally, compared with what the recital of grounds of the Law makes one presume.

On the other hand, a bigger field of regulation is opened when the rights of the shareholders are to be extended. In this respect, it has for example been proposed that the regulation be used to reinforce the rights of small shareholders. It especially states, under the regulation that the administration should be obliged to draw up minutes of all General Shareholders Meetings in a tape recording and to issue a full copy of that tape recording to any shareholder who so requests²⁴. Such concessions that extend beyond the legal obligations²⁵ may of course be included in a regulation, but to do so no regulation is legally necessary. The administration may also reach the same objective in a more simple form, e.g. making the respective declaration at the General Shareholders Meeting.

D. Is a regulation needed?

As we have shown, it is not legally necessary to adopt a regulation of the General Shareholders Meeting nor is it observed that this is needed for practical reasons²⁶. Although various models of regulations of the General Shareholders Meetings²⁷ have already been published, until now there are only few examples where a text of this kind has really been agreed²⁸. In addition to the legal reasons already cited, this is also due to the following practical considerations.

All questions that may be regulated in a regulation can be ruled in the Articles of Association. And also their regulation in the Articles of Association has the advantage that the questions of procedure ruled by the actual General Shareholders Meeting are not contained in two documents, but in a single text. In most cases, the Articles of Association are readily accessible to the shareholders. They may be consulted not only at the Trade Registry but generally also during the General Shareholders Meeting, and at present they are also published by many companies on their *homepage*.

²⁴ Cfr Dietrich (1998), pp 926 and following

²⁵ Cfr. in this respect, the resolution by the Federal Court of Justice (BGHZ 127, pp 107 and following(BMW) in accordance with which shareholders, when – voluntarily – a tape recording has been made, will only have the right to be provided those parts of the tape recording that contain their questions and addresses and the answers they have received to them

²⁶ Criticism in this respect also the study of DAV (1996), p. 167 and Baums (1997a), p. 30.

²⁷ Cfr Schaaf (1999a), pp 1342 and following.; idem (1999), pp 449 and following.; Höllers (2000), form V. 82; proposal of the German Bar Institute (DAI) for the General Shareholders Meeting regulation

²⁸ Cfr. for example, the regulation of VBH Holding AG, Körntal-Münchingen (1998) and the regulation of the General Shareholders Meeting of Value Management & Research Aktiengesellschaft Gesellschaft für Vermögensmanagement, Beteiligungs- und Vermögensberatung, Schwalbach

The proposal that an agreement be adopted about a regulation of the General Shareholders' Meeting may in certain cases lead to lengthy discussions at the General Shareholders Meeting and when the regulation does not exclusively contain provisions favourable to the shareholders, it is possible that this may also provoke demands of objection.

When there is a regulation, there is the danger of encounters occurring regarding its application at all the General Shareholders Meetings. This, contrary to the legislator's expectations, would not signify an improvement in the contents of the debates maintained at the General Shareholders Meeting, but only an disproportionate prolongation of the meeting. And even more so because the provisions of the regulation may be infringed without prior notice²⁹. This is why, in certain cases, the General Shareholders Meeting will have to handle *ad hoc* applications of variances in what is ruled in the regulation.

The praxis pursued until now to issue the Chairman of the General Shareholders Meeting written rules of procedure by which he may reliably lead the development of the Meeting and also confront possible special situations, can be more easily adapted to the modification in the legal requirements.

E. A look at the future

The scepticism that has until now been maintained towards the regulations of the General Shareholders Meeting could be modified if, by this means, it is possible not only to discover but also to modify the contents of the shareholders' rights. Thus, the governmental Commission "Corporate Government", under the presidency of professor Baums, has proposed, among other questions, that the Articles of Association or the regulations limit the number of questions that a shareholder may formulate at the General Shareholders Meeting³⁰. In addition, the Articles of Association or the regulation should be able to suitably define the exercise of the right to make use of the floor or to formulate questions also from the point of view of time dedicated to them³¹. Regarding this entire second proposal it seems fully suitable to put an end to the abuse in the right to formulate questions perpetrated by genuine professionals in the demand for objection³². The companies would then specially have the possibility of suitably limiting the exercise of the right to formulate questions without this restricting the core issue of such a right. By doing so, it has still to be seen whether a regulation should be agreed to adopt rules of this kind, or whether the Articles of Association would not be the best place to locate them.

²⁹ See Hüffer (2002), § 129 numbers 1 and following, with critical attitude to this Bachmann (1999), pp 214 and following

³⁰ Cfr Baums (ed (2001), n° 106

³¹ Cfr Baums (ed.) (2001), n° 113

³² Cfr. Marsch-Barner (2001b), p. 130