

A Lifeguard in Times of Pandemic: Electronic General Meetings in Joint Stock Companies

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Abstract

The general meetings of joint stock companies are mandatory and a platform established by law for shareholders, directors and other stakeholders in these companies to make decisions, share information and opinions to move the company forward. These meetings of joint stock companies were also affected from COVID-19 outbreak measures. Within this framework, the general meetings of joint stock companies planned to be held during the pandemic have been postponed or held electronically within the scope of these measures. In this study, it is discussed whether the holding of joint stock company general meetings electronically can be considered as a permanent solution in extraordinary circumstances such as pandemic that may occur in the future. For this purpose, it has been discussed whether the provision 118a, which was added to the German Stock Corporation Act in July 2022, would be taken as an example, and in this respect, the literature on German law has been reviewed and these studies have been referred to. Also, due to the American origin of electronic general meetings, the literature on American law has also benefited from. Since Turkish company law is influenced by German law, a comparison with Turkish law has also been made and Turkish doctrine on this subject has also been used.

Keywords

Joint Stock Company, General Meeting, Electronic General Meeting, Online General Meeting, Virtual General Meeting

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1. Introduction

The general meetings of joint stock companies are mandatory and a platform established by law for shareholders, directors and other stakeholders in these companies to make decisions, share information and opinions to move the company forward. These meetings of joint stock companies were also affected from COVID-19 outbreak measures. Within this framework, the general meetings of joint stock companies planned to be held during the pandemic have been postponed or held electronically within the scope of these measures.¹ In this study, it is discussed whether the holding of joint stock company general meetings electronically can be considered as a permanent solution in extraordinary circumstances such as pandemic that may occur in the future.

2. The usage of electronic platforms in general meetings

2.1. Advantages

Developments in technology have made it inevitable for the commercial life to keep pace with these advances. As a result of this, electronic platforms, which can be described as an alternative to classical shopping and marketing methods, have emerged with the possibility of electronic e-commerce. Technological developments have also affected corporate law, and it has been discussed whether the general meetings of joint stock companies should be held electronically. As a result of these discussions, general meetings started to be held electronically in various States, especially Delaware (in 2000),² and this was followed by EU countries with the effect of Directive 2007/36/EC.³ The reasons for pushing countries to hold general meetings electronically are various. One of the most important of these reasons is that if the shareholders are required to physically attend the general meetings, they will not be able to play an effective role in the

1 For detailed information on the situation before the pandemic and the measures adopted by various countries during the pandemic, also see: Dirk A. Zetzsche, Linn Anker-Sørensen, Roberta Consiglio and Miko Yeboah-Smith, 'COVID-19-Crisis and Company Law – Towards Virtual Shareholder Meetings – (2020) <<https://ssrn.com/abstract=3576707>> accessed on 8 February 2023, 10–25.

2 Lisa M. Fairfax, 'Virtual Shareholder Meetings Reconsidered' (2010) 40 *Seton Hall Law Review* 1367, 1368; Yaron Nili and Megan Wischmeier Shaner, 'Virtual Annual Meetings: A Path toward Shareholder Democracy and Stakeholder Engagement' (2022) 63 *Boston College Law Review* 123, 155.

3 Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies [2007] OJ L 184.

decision-making mechanism of the company due to the extremely low attendance and as a result, the possible power gaps in the company.⁴

The power gap is caused by the fact that shareholders, who have very little opportunity to influence the management of the company since the ratio of their shares to the capital is very low, do not want to participate in the management, expect only to gain profit from the investment and thus alienate themselves from the company.⁵ Indeed, since the non-attendance of the shareholders to the general meetings may cause them not to have an idea about the activities of the company, as well as not being able to express their opinions, criticise and vote, it is obvious that this situation will adversely affect the functioning of the company.⁶ By holding the meetings electronically, it is aimed to eliminate the expenses such as travelling and accommodation that shareholders will incur in order to attend the meeting and to prevent them from not attending the general meetings due to the time they will lose or because they are unaware of the meeting, and thus to ensure effective participation by establishing shareholder democracy.⁷

Since the electronic participation to the general meetings will reduce the loss of time and enable shareholders to communicate with each other without requiring much expense, the attendance to these meetings will be extremely high.⁸ In this way, communication between shareholders will increase, and shareholders will be informed about the progress of the company by reviewing annual reports and meeting documents.⁹ In addition, since it is the duty of the general

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- 4 Ünal Tekinalp, *Halka Açık Anonim Ortaklıklarda Yönetime Katılma Sorunları* [1979] İstanbul University, 7; Mehmet Emin Bilge, 'Anonim Ortaklık Genel Kurul Toplantılarında Temsilci Aracılığıyla Oy Vermede İnternetin Kullanımı' (2003)7 Atatürk Üniversitesi Erzincan Hukuk Fakültesi Dergisi 341; Mustafa İsmail Kaya, 'Anonim Ortaklıkların Genel Kurul Toplantılarının İnternet Aracılığıyla Yapılması' (2003) 52 Ankara Üniversitesi Hukuk Fakültesi Dergisi 212.
 - 5 Işık Özer, 'Türk Ticaret Kanunu Tasarısına Göre Anonim Şirket Genel Kuruluna Elektronik Ortamda Katılım' (2009) 25/4 Banka ve Ticaret Hukuku Dergisi 621, 628.
 - 6 George Ponds Kobler, 'Shareholder Voting Over the Internet: A Proposal for Increasing Shareholder Participation in Corporate Governance' (1997-1998) 49 Alabama Law Review 673, 675-676.
 - 7 Lisa M. Fairfax, 'The Future of Shareholder Democracy' (2009) 84 Indiana Law Journal, 1259, 1260-1308; Özer (n 5) p. 627; Bilge (n 4) 341; Arthur R. Pinto, 'The European Union's Shareholder Voting Rights Directive From an American Perspective: Some Comparisons and Observations'(2008-2009) 32 Fordham International Law Journal, 489, 608; Kobler (n 6) 699-700; Daniel Adam Birnhak, 'Online Shareholder Meetings: Corporate Law Anomalies or 'The Future of Governance?'' (2003) 29 Rutgers Computer&Technology Law Journal 423.
 - 8 Caspar Rose, 'The New European Shareholder rights directive: Removing Barriers and Creating Opportunities for More Shareholder Activism and Democracy' (2010) Journal of Management & Governance 269, 277; Joanna Kulesza, 'International Internet Law' (2012) 24 Global Change, Peace&Security 351, 357-359.
 - 9 Ralf Isenmann and Christian Lenz, 'Customized Corporate Environmental Reporting by Internet-Based Push and Pull Technologies' (2001) 8 Eco-Management and Auditing 100, 101; Kobler (n 6) 677.

assembly to appoint and dismiss managers, by ensuring the effective participation of shareholders in the decision-making process, managers, who may be dismissed at any time, will play an active role in increasing the value of the company in the macro sense by managing the company better with this concern.¹⁰ One of the important contributions of electronic attendance to the general meetings is that it enables these meetings to be held in extraordinary periods such as pandemics, when it is not possible for shareholders to physically attend, and thus enables the company to continue its operations.

2.2. Disadvantages

It should be noted that there are some disadvantages as well as advantages of electronic participation in the general meetings. The biggest problem arising from the electronic participation in the general meetings arises from the fact that the shareholders cannot meet face to face. That is to say, shareholders who are not physically meet are deprived of the opportunity to influence each other with their opinions, gestures and mimics and gain favour by participating in the general meetings electronically.¹¹ Physical communication will be replaced by communication through computers, which will lead to the replacement of human relations with technology and a decrease in communication between individuals. In addition, although the shareholders who attend the general meeting electronically may have the opportunity to follow the meeting via technical means, they may also experience a trust problem towards the company with the belief that confidential relations are carried out behind closed doors.

The high level of participation desired through electronic attendance to the general meetings may also become a disadvantage. Namely, if the effective participation of shareholders in the decision-making mechanism of the company by expressing their opinions and votes exceeds the limits of proportionality, unnecessary discussions and contradictions of opinion may lead the company to the point of not being able to take decisions.¹² Therefore, in the context of ensuring effective participation and shareholder democracy, which is aimed by electronic participation in the general assembly, the balance of interests should

10 Chris Mallin and Andrea Melis, 'Shareholder Rights, Shareholder Voting, and Corporate Performance' (2012) 16 *Journal of Management & Governance* 171, 173; Kobler (n 6) 687, 697; Blake Smith, 'Proxy Access and The Internet Age: Using Electronic Shareholder Forums to Improve Corporate Governance' (2008) 3 *Columbia Business Law Review* 1111, 1118; Birnhak (n 7) p 424.

11 Kaya (n 4) 222. On the grounds that this would alienate the shareholders from each other, also see: Julian Redeke, 'Virtuelle Hauptversammlungen börsennotierter Aktiengesellschaften "Virtual Insanity"?' (2022) *Die Aktiengesellschaft* 98, 100.

12 For a similar view also see: Klaus J. Hopt, 'Corporate Governance and the Shareholders: The German Law on Virtual General Meetings 2022' (2022) <<https://ssrn.com/abstract=4240280>> accessed on 8 February 2023, 4.

be well considered, and the company should not be pushed into insolvency instead of being a solution for it.¹³

It is clear that the electronic environment will enable shareholders to avoid unnecessary bureaucratic procedures and stationery due to the speed it provides. On the other hand, it is also possible that the shareholders are not aware of technological opportunities or do not have the ability to use them. Moreover, even if the shareholders are well-equipped in the use of the technological tools, sometimes it may not be possible to carefully evaluate gigabytes of images, sounds and other documents, and this may lead to erroneous decisions.¹⁴ In addition to the excessive amount of data, in the event of some technical problems such as interruption of the internet network connection, the flow of data may not be possible and shareholders may consider electronic participation undesirable.

Another problem related to electronic participation in general meetings is the reliability of such attendance. The exercise of rights such as the right to participate in the general meeting and the right to vote, which have a direct impact on the investments of shareholders, through the internet network via computers and technical components causes various question marks in the minds of those who exercise these rights: is the person who uses a vote really a shareholder, and is he/she able to use his/her vote securely? The solution for determining whether the voter is actually a shareholder can be provided by issuing a PIN (personal identification number) to the shareholders. Although there is always the concern that unauthentic shareholders may vote by unlawfully obtaining the PIN, the possibility of identification through various biometric indicators will significantly reduce these concerns. The problem of secure voting is relatively more difficult to solve. Indeed, while the internet is extremely useful in some respects, it is also extremely vulnerable to cyber-attacks. In such a situation, it is possible to say that cyber-attacks can be greatly reduced, if not completely eliminated, by ensuring network security by experts.

3. Types of electronic participation

It is possible to classify the general meetings of joint stock companies in various aspects. Since this study is related to electronic meetings, the types to be examined under this heading differ depending on the extent to which the general meeting is held electronically. Namely, holding general meetings entirely in electronic environment is referred to as virtual general meetings, while the

13 Kobler uses digital cacaphony for such situations, (n 6) 696; Mehmet Emin Bilge, 'Pay Sahiplerinin Anonim Ortaklık Genel Kurullarına İnternet Aracılığıyla Katılımı', (2003) Bilgi Toplumunda Hukuk, Ünal Tekinalp'e Armağan 219, 223.

14 Kobler (n 6) 687.

ability of shareholders to attend physical general meetings also in electronic environment is referred to as online general meetings. Although holding general meetings virtually or online varies from country to country, it is seen that, especially after the pandemic, large countries such as Germany¹⁵ have started to hold their general meetings completely electronically in the form of virtual general meetings.

3.1. Virtual general meetings

In virtual general meetings, the general assembly is held entirely electronically.¹⁶ In other words, in a virtual general meeting, only the people who are obliged to attend for the administration of the meeting are required to attend, and shareholders are not required to be physically present at the location of these people. In fact, such general meetings are not general assembly in the classical sense, where shareholders physically come together at a specific time and place, but rather meetings that take place entirely electronically.¹⁷

Virtual general meetings are favoured because they are significantly less expensive in terms of time and cost. This is because such meetings allow shareholders to participate from wherever they are through their computers. It is clear that this situation will increase the participation of shareholders in the general assembly. However, this may always lead to undesirable results. In particular, as mentioned before, digital cacophony may occur and general meetings may become dysfunctional due to unnecessary interventions of shareholders.¹⁸ In such a case, limiting the rights of shareholders to actively participate in the meetings, such as expressing opinions and asking questions, for reasonable and certain periods of time, in a manner that does not violate equality among them, may be considered as a solution.¹⁹

Another argument put forward by opponents of virtual general meetings is whether the technology is suitable for this. However, considering the practices in almost all of the world between 2020 and 2022, it is possible to say that almost all areas of life have been moved to the electronic environment. The needs that emerged during the pandemic, when the physical relationship between people was minimised, paved the way for the development of new technologies. With the effect of this situation, systems that ensure the smooth

15 Recent developments in German law will be discussed in detail below.

16 Elizabeth Boros, 'Virtual Shareholder Meetings' (2004-2005) 3 *Duke Law&Tech Review* 1.

17 Bilge (n 13) 224.

18 Fatih Bilgili, 'İnternet ve Anonim Ortaklık Genel Kurul Toplantısı' (2004) Necip Kocayusufpaşaoğlu İçin Armağan 565, 584.

19 In such cases, shareholders who wish to exercise their indispensable rights arising from shareholding, such as the right to speak and ask questions may be restricted to shareholders having a minimum share capital amount of 100,000 euros or 1% of the share capital, Hopt (n 12) 6. Other conceivable limitations include limiting the number of words or the duration of the videos uploaded to the electronic general meeting system.

transmission of video and audio transmission have been created, and it has been facilitated for people to come together remotely.

Another criticism of virtual general meetings is that they limit the indispensable right of all shareholders to participate in the general meetings by obliging them to participate electronically. The proponents of this view argue that not all shareholders may have the necessary equipment (computer, internet, etc.) to participate in these meetings electronically, and that expecting them to cover these costs would prevent them from attending the general meetings. Similarly, it is claimed that the fact that not all shareholders have the necessary computer and internet usage skills may eliminate the right to participate in the general assembly.²⁰ However, these criticisms are not at a level that requires concern today. Because the use of computers and the internet has become quite widespread and almost everyone has the ability to use them.²¹ Moreover, it is possible to say that these criticisms can be eliminated by the company providing these technical facilities to the shareholders who demand and by providing training on participating in the electronic general assembly system to the shareholders who request it.

3.2. Online general meetings

Unlike virtual general meetings, online general meetings do not take place entirely electronically. In addition to (and simultaneously with) a physical meeting, such meetings offer shareholders the opportunity to participate in the general assembly electronically if they wish. In other words, online general meetings require a physical meeting, but shareholders may also participate in these physical meetings electronically if they demand. For this reason, online general meetings are also referred to as combined model or internet-supported general meetings.²² However, although such meetings provide shareholders with the opportunity to participate electronically, they have not been convenient for the smooth holding of general meetings during the pandemic period, as they require a physical meeting. The general meetings that should have been held during the quarantine periods, especially during the peak of the pandemic, could not be held due to the shareholders' inability to leave their homes. Therefore, it is difficult to characterize online general meetings as an absolute solution that can be applied during extraordinary periods.

20 Stefan Hanloser, 'Proxy-Voting, Remote-Voting und Online HV: § 134III 3 AktG nach dem NaStraG' (2001) *Neue Zeitschrift für Gesellschaftsrecht* 355, 358; This would be contrary to the principle of equal treatment, Bilge (n 13) 225. Also see: Redeke (n 11) 99–100.

21 Redeke (n 11) 100.

22 Bilge (n 13) 225 ff.

4. Situation after COVID-19 outbreak

First of all, the OECD has identified 45 countries that authorized the holding general meetings virtual or hybrid as a consequence of the COVID-19 pandemic.²³ The record attendance at the 2020 and 2021 general shareholders' meetings is a natural consequence of these meetings being held electronically.²⁴ This is in line with the objective of ensuring the desired shareholder democracy by holding general meetings electronically. This high level of participation requires a discussion on whether virtual general meetings can be used more frequently after the pandemic. However, it should be noted immediately that the frequent use of virtual general meetings does not mean making these meetings compulsory. In other words, companies should not be obliged to hold their general meetings virtually, but they should not be prevented from holding these meetings virtually, provided that it is stated in their articles of association. What is meant here can be better understood from the figure²⁵ below:



Figure 1. Source: OECD Publishing (2021 Paris) at <<https://doi.org/10.1787/0fe52016-en>>.

Considering this figure, it is possible to say that there is a tendency towards 'permitted under certain conditions' and 'encouraged' options in the process after the pandemic. Due to the criticisms regarding the electronic general meeting system, it is possible to say that it is more accurate that virtual general meetings should not become 'mandatory'. Indeed, as the title of this study suggests, virtual general meetings should be considered as a lifeguard in extraordinary periods, and it may be more appropriate for companies that can hold their meetings physically to continue these meetings in the classical method for themselves and their shareholders.

It is difficult to predict whether making these meetings mandatory will be more beneficial for the company and shareholders in the long run. However, it is possible to say that holding general meetings virtually in the presence of certain conditions, as in the amendments made in German law in 2022, is the most appropriate procedure in the short term. In German law, virtual general

23 OECD, *The Future of Corporate Governance in Capital Markets Following the COVID-19 Crisis*, Paris, 30 June 2021, 72 table 3.3.

24 Hopt (n 12) 3.

25 Emeline Denis and Daniel Blume, *Using digital technologies to strengthen shareholder participation* [2021] OECD Going Digital Toolkit Notes, No. 9, OECD Publishing, Paris <<https://doi.org/10.1787/0fe52016-en>> accessed on 8 February 2023, 13.

meetings are not mandatory and companies are given freedom to choose the meeting method.²⁶

Since art 118a, which was added to the German Stock Corporation Act in July 2022,²⁷ stipulates strict conditions for virtual general meetings, this regulation may be taken as an example by other countries in the post-pandemic period. According to the first paragraph of this provision, the articles of association may stipulate that the general meetings shall be held virtually or the board of directors may be authorized to do so. In other words, in the first case, the general meetings are held virtually in accordance with the articles of association, while in the second case, the board of directors decides whether or not these meetings should be held virtually. In the absence of a provision on virtual general meetings in the articles of association of the company, it is not possible to hold the general meeting of that company virtually.²⁸ Virtual general meetings can be prescribed for only a limited period of time of no more than five years in accordance with the articles of association.²⁹ When this period expires, it is possible to extend it by adding a new provision to the articles of association.³⁰

According to art 118a of the Stock Corporation Act, after this precondition that virtual general meetings are allowed, there are eight other conditions that must coexist in order for the general meetings to be held virtually. These conditions are as follows:

1. Transmission of the entire meeting by video and audio,
2. Exercise of shareholders' voting rights by means of electronic communication as well as by proxy,
3. Right to submit motions and voting proposals by video communication,
4. Electronic right to information,
5. Making the report of the board of directors or its main contents available no later than seven days before the meeting, but only if the managing board decides that questions of shareholders must be asked electronically before the virtual general meeting.
6. Electronic right to comment,
7. Possibility to speak at the meeting by means of video communication, and
8. Electronic possibility to object to a resolution of the general meet-

26 Stefan Mutter, 'Gekommen um zu bleiben – der Referentenentwurf des Bundesministeriums der Justiz zur Einführung virtueller Hauptversammlungen von Aktiengesellschaften' (2022) *Die Aktiengesellschaft* 57.

27 Stock Corporation Act of 6 September 1965 (Federal Law Gazette I, p. 1089), as last amended by Article 7 of the Act of 22 February 2023 (Federal Law Gazette 2023 I no. 51).

28 Alexander Walch and Stephanie Häuslmeier, 'Die "neue" virtuelle Hauptversammlung' (2023) *Deutsche Notar-Zeitschrift* 106, 109.

29 Art 118a(3) of the Stock Corporation Act.

30 This is intended to give shareholders the chance to terminate the virtual general meetings if the shareholder structure changes or if shareholders no longer wish to hold a virtual general meeting, Walch and Häuslmeier (n 27) 110.

ing.³¹.

As a final remark, it is possible to say that these conditions in German law can be implemented in other countries and the virtual general assembly application may be made permanent in the post-pandemic period.

31 Hopt (n 12) 4.