

## **Shareholder Rights Directive II/ARUG II**

- New obligations for intermediaries -

Implementation Guide for the German Market

### **Module 2: General Meeting Processes**

Version: 4.0<sup>1</sup>

Version dated: 2 August 2021

---

<sup>1</sup> Version 4 contains some additional comments on unlisted stock corporations in IV.5 and consequential amendments to IV indicating the addition.

## IV. General meeting processes for listed companies (Module 2)

The German Act Implementing the Second Shareholder Rights Directive (*Gesetz zur Umsetzung der zweiten Aktionärsrechterichtlinie – ARUG II*) fundamentally revises the process of convening general meetings. The key provision is Section 125 of the German Stock Corporation Act (*Aktiengesetz – AktG*), which sets out requirements for the content, format and notification deadline for general meetings and, with reference to AktG Sections 67(a) and (b), revises rules concerning the forwarding and transmitting of information. In conjunction with Implementing Regulation (EU) 2018/1212<sup>2</sup> (in the following: the Implementing Regulation), which supplements the Second Shareholder Rights Directive,<sup>3</sup> and has been directly applicable in member states since 3 September 2020, this results in a completely new organisational and information regime for listed companies. Established processes for convening and organising general meetings must therefore be fundamentally reviewed and adapted, as must current practices for registering for general meetings and issuing related instructions.

When it comes to practical implementation, it is particularly difficult to incorporate the very detailed provisions of the Implementing Regulation in the national legal framework, which is essentially provided by the AktG. Module 2 of this Implementation Guide aims to provide practical assistance by adding comments to the relevant tables from the Annex to the Implementing Regulation, as for Shareholder Identification (Module 1). Where fundamental questions arise, these are answered using (non-binding) practical recommendations. The specifications for ISO 20022 messages have been taken into account where possible (cf. IV.1.a.aa.).

The revised regulation of convening general meetings as part of implementing SRD II also affects unlisted stock corporations in Germany. As a result, intermediaries are also obliged to forward and transmit their notifications of general meetings. However, a number of special conditions and exceptions apply, which is why the following comments (IV.1. to 4.) only refer to listed stock corporations.<sup>4</sup> Issues relating specifically to unlisted stock corporations are covered in IV.5.<sup>5</sup>

---

<sup>2</sup> Commission Implementing Regulation (EU) 2018/1212 of 3 September 2018 laying down minimum requirements implementing the provisions of Directive 2007/36/EC of the European Parliament and of the Council as regards shareholder identification, the transmission of information and the facilitation of the exercise of shareholders rights.

<sup>3</sup> Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, see also the Introduction/General Part of this Implementation Guide in II.

<sup>4</sup> Societas Europaea (SE) and German partnerships limited by shares (*Kommanditgesellschaften auf Aktien – KGaA*) are also included in the term stock corporation.

<sup>5</sup> According to the legal definition in AktG Section 3(2), a listed stock corporation is one whose shares are traded on an organised market (within the meaning of Section 2(11) of the German Securities Trading Act [*Wertpapierhandelsgesetz – WpHG*]). Unlisted stock corporations therefore also include companies whose shares are traded on the open market in accordance with Section 48(1) of the German Stock Exchange Act (*Börsengesetz – BörsG*) or the SME growth market in accordance with BörsG Section 48a(1).

## **1. Convening the general meeting (company notice, forwarding and transmission)**

Informing shareholders of an upcoming general meeting is a key element in improving communication between a company and its shareholders and facilitating the exercise of shareholders rights. The starting point of the new information regime is, therefore, AktG Section 125, which obliges the company to inform shareholders of the convening of a general meeting. In the case of companies with bearer shares, shareholders are notified via the intermediaries that hold the company's shares in custody. In the case of companies with registered shares, notification is sent to all those entered in the share register and to intermediaries that have requested such notification (for further details, cf. IV.1.a.ee.). Intermediaries are responsible for forwarding this information along the chain of intermediaries (AktG Section 67a) to the shareholder (AktG Section 67b). The following considerations are based on this legal concept of the flow of information.

### **a. Company notice convening the general meeting (AktG Section 125)**

The company needs to inform the shareholders about the general meeting when it has been convened in accordance with AktG Section 121 and notice has been given in accordance with AktG Section 125(1) and (2). In terms of the content and format of the notice convening the general meeting, listed companies must comply with the minimum requirements in the Implementing Regulation (AktG Section 125(5), sentence 1). In particular, these include provisions contained in Article 4 and Table 3 of the Annex to the Implementing Regulation.

#### **aa. Notice format (Article 4 in conjunction with Table 3 of the Implementing Regulation)**

Article 2(2) in conjunction with (3) of the Implementing Regulation stipulates that issuers must notify the chain of intermediaries in an electronic, machine-readable format which enables interoperability and straight-through processing (STP), and which complies with internationally applicable industry standards, such as ISO. Accordingly, the European Task Force on General Meetings recommends in 2.7. of its Market Standards for General Meetings (from May 2020) using ISO standards for communications relating to general meetings.<sup>6</sup> As a result, the comments in Tables 3 to 7 of this Implementation Guide use ISO 20022 messages.

---

<sup>6</sup> Available at <https://www.ebf.eu/home/european-industry-standards/srd-ii-market-standards/>

## **Recommendation for the German market (2.1.):**

In accordance with the recommendations of the European Task Force on General Meetings, the recommended communication standard for Meeting Notice (Table 3), Confirmation of Entitlement (Table 4), Notice of Participation (Table 5) and Voting Confirmation (Tables 6 and 7) is ISO 20022. The ISO 20022 format is not expected to be used consistently during a transition phase. It can therefore be assumed that different formats will be used during this period.

## **bb. Notice content (Article 4 in conjunction with Table 3 of the Implementing Regulation)**

The minimum requirements for information about the convening of general meetings are set out in Table 3 of the Implementing Regulation and commented on below.

### **Table 3 and URL hyperlink (preliminary notes on Table 3)**

In the preliminary notes on Table 3 of the Implementing Regulation, issuers are given two options to pass on relevant information about the general meeting to the chain of intermediaries. Issuers can fill in either blocks A to F of Table 3 or alternatively, if all the information requested in Table 3 is available on the company's website, then only blocks A, B and C of Table 3. The latter presupposes that the information in blocks D to F can be retrieved from the URL hyperlink to be entered in field C.6, which is why there would seem to be no need to populate these blocks.

However, if intermediaries are to process the information automatically, they need to be provided with all the blocks in Table 3. So all the blocks (A to F) in Table 3 of the Implementing Regulation should be filled in, even if all this information can be retrieved from the company's website and only the completion of blocks A to C (including the URL hyperlink in field C.6) is legally required. This will ensure that the information can be processed and forwarded in an optimal manner.

In any case, only providing the information in blocks A, B and C of Table 3 and the URL hyperlink, in accordance with the preliminary notes on Table 3, is only permitted if all the information from blocks A to F can be found on the company's website and retrieved via the URL hyperlink.

However, even if all the information for blocks A to F is available there, it can and should still always be transmitted to the chain in structured form by filling in all the blocks in Table 3 in order to enable the required STP (Article 2(2) and (3) of the Implementing Regulation).

## Recommendation for the German market (2.2.):

Issuers should fill in all blocks A to F of Table 3, even if all the information for Table 3 of the Implementing Regulation can be found via the URL hyperlink to be entered in field C.6.

Table 3<sup>7</sup>

### Meeting Notice

In accordance with point (b) of Article 3b(1) and Article 3b(2) of Directive 2007/36/EC, where the information set out in this table concerning the convening of a general meeting is available to shareholders on the issuer's website, the Meeting Notice to be prepared by the issuer and transmitted by intermediaries shall only be required to contain blocks A, B and C, including the URL hyperlink to the website where the information can be found.

Type of information	Description	Format	Originator of data	<i>BdB interpretation guidance</i>
<b>A. Specification of the message</b>				
1. Unique identifier of the event	Unique number	[alphanumeric field]	Issuer or third party nominated by it	<i>Assigned by the issuer or its agent. See also recommendation 2.3.</i>

<sup>7</sup> As with all other tables in this document, Table 3 is taken from the Implementing Regulation. Only the last column, "BdB interpretation guidance", has been added.

2. Type of message	The type of message (such as meeting notice, cancellation or update to it)	[4 alphanumeric characters]	Issuer or third party nominated by it	<p><i>In line with ISO20022 standards, the characters should read as follows:</i>  <b>NEWM =&gt; New</b>  <b>REPL =&gt; Replacement</b>  <b>RMDR =&gt; Reminder</b></p> <p><i>A new ISO message seev.002.001.06 Meeting Cancellation should be sent if, for example, a general meeting is cancelled.</i></p> <p><i>Here, too, in line with ISO20022 standards, the characters should read as follows:</i></p> <p><b>WITH = Cancellation due to the meeting being cancelled by the issuer.</b></p> <p><i>See also recommendation 2.4.</i></p>
--------------------	--	-----------------------------	---------------------------------------	--

## Differences in the German translation of "Unique identifier of the event" (field A.1)

The English version of the Implementing Regulation uses the phrase "Unique identifier of the event" in Tables 3, 4, 5, 6 and 7, while the German version uses either "eindeutige Kennung des Ereignisses" (e.g. Table 3, field A.1 and Table 7, field 3) or "eindeutige Kennung der Veranstaltung" (e.g. Table 4, field A.3, Table 5, field A.3 and Table 6, field 3). This always refers to the event to which the unique identifier refers, namely the general meeting. This should be borne in mind when working with the German version of the Implementing Regulation.

It would be desirable for the unique identifier of the general meeting to be identical in all tables. As a result, all the information, such as Confirmation of Entitlement in Table 4 and Notice of Participation in Table 5, would at first glance be assigned to one and the same general meeting due to the identical unique identifier. However, the tables provide for different field lengths:

- Table 3, field A.1: no limitation
- Table 4, field A.3: limited to 4 alphanumerical characters
- Table 5, field A.3: limited to 4 alphanumerical characters
- Table 6, field 3: limited to 12 alphanumerical characters
- Table 7, field 3: limited to 12 alphanumerical characters.

This makes it somewhat difficult to use a single unique identifier.

## **Recommendation (2.3.):**

The issuer or commissioned third party can generate their own unique identifier for field A.1 (Table 3). Table 3, field A.1 does not specify how the identifier should be structured or how many alphanumeric characters it should have. The corresponding ISO format allows up to 35 digits for the unique identifier. It is vital that the identifier is unique and non-repeatable. The content of the identifier is not analysed.

## **Type of message (field A.2)**

“Type of message” refers to whether the message is an original meeting notice, an amendment to a meeting notice or a cancellation or similar. Table 3 of the Implementing Regulation allows four alphanumeric characters for this, as does the ISO 20022 message. As a result, field A.2 should be filled in according to ISO 20022 guidelines. The main codes are as follows:

NEWM => New

REPL => Replacement

WITH = Cancellation due to the meeting being cancelled by the issuer.

## **Recommendation for the German market (2.4.):**

It is recommended that the four-digit alphanumeric identifier in field A.2 corresponds with ISO standard 20022, e.g. REPL for an amendment/update to the meeting notice.

## Recommendation for the German market (2.5.):

If a meeting notice is cancelled because the general meeting will not take place, for example, a new message should be sent in ISO format (ISO seev.002.001.06 Meeting Cancellation). This message replaces the CANC message of ISO standard 15022.

If the agenda is changed in response to a request for an item to be added to the agenda in accordance with AktG Section 122(2), the modified agenda must be communicated (AktG Section 125(1), sentence 3). In these cases, the issuer should send an amended notice of the general meeting to all shareholders. Field A.2 of Table 3 should indicate REPL for replacement.

It is up to the company to decide whether or not to separately notify shareholders of countermotions and amended draft resolutions of the company. If notifications of countermotions are sent, they should be designated replacements (REPL).

### B. Specification of the issuer

Type of information	Description	Format	Originator of data	<i>BdB interpretation guidance</i>
1. ISIN	Definition. ISIN of the share for which the notice is launched Repeating field: in case of multiple classes, indicate all ISINs	[12 alpha numeric characters]	Issuer	<i>If several classes of share are issued, a separate notification can be sent for each ISIN or the repeating field can be used. If separate notification is sent for each ISIN, the unique identifier in field A.1 will remain the same. See also recommendation 2.6.</i>
2. Name of issuer		[140 alphanumeric characters]	Issuer	



**C. Specification of the meeting**

Type of information	Description	Format	Originator of data	<i>BdB interpretation guidance</i>
1. Date of the General Meeting		[Date (YYYYMMDD)]	Issuer	<i>If a meeting lasting several days is convened, only the first day is entered.</i>
2. Time of the General Meeting	Specification of the time of the commencement of the General Meeting, including applicable time zone	[UTC (Coordinated Universal Time)]	Issuer	<i>10:00 UTC</i> <i>See also recommendation 2.7.</i>
3. Type of General Meeting	Specification of the type of the General Meeting convened	[4 alphanumeric characters]	Issuer	<i>The characters should read as follows in line with ISO20022:</i> <i>XMET ⇒ Extraordinary</i> <i>GMET ⇒ General</i> <i>MIXD ⇒ Mixed</i> <i>SPCL ⇒ Special</i>
4. Location of the General Meeting	Specification of the address of the venue of the General Meeting, including the URL of the virtual venue, if applicable.  In case of multiple venues, the location shall be specified by each venue	[255 alphanumeric characters]	Issuer	<i>Should there be several venues for a general meeting, all venues should be specified, as well as the URL of the virtual venue, if applicable. The field should therefore be repeated for each venue.</i>
5. Record Date	Definition	[Date (YYYYMMDD)]	Issuer	<i>The term “record date” is translated in the German version of the Implementing Regulation sometimes as “Aufzeichnungsdatum” and sometimes as “Nachweisstichtag”. “Record date” is always meant. German companies are recommended to populate this field as follows in accordance with Article 1(7) of the Implementing Regulation:</i>  <i>Record date for bearer shares: 22 days (cob) before the date of the general meeting</i>  <i>See also recommendation 2.9.</i>

				<i>For registered shares, there is no statutory record date which issuers can use as a basis for setting the record date in accordance with Article 1(7) of the Implementing Regulation. Instead, the so-called technical record date, also known as the registration deadline, can be entered. Registration deadline in this context means the deadline for entry in the share register, not the deadline for registering for a general meeting.</i>
6. Uniform Resource Locator (URL)	URL hyperlink to the website where full information required to be provided to shareholders prior to the General Meeting is accessible, including procedures for participation and voting and exercise of other shareholders rights, such as putting items on the agenda.	[255 alphanumeric characters]	Issuer	<i>Mandatory entry of URL hyperlink to the issuer's website, where information about the general meeting must also be provided in English. See also recommendation 2.11.</i>

**Language of the notice**

The issuer has to make the information available in the language in which it publishes its financial information pursuant to Directive 2004/109/EC and in a language customary in the sphere of international finance (Article 2(2), subparagraph 2 of the Implementing Regulation). It is therefore to be expected that issuers domiciled in Germany will provide the information in Table 3 in German and English.

The technical implementation in ISO 20022 is currently based on the assumption that only one notice will be generated for each general meeting and that the information will be provided in both languages. This applies particularly to the repeating block on the agenda items in Section E of Table 3 of the Implementing Regulation (see also "Agenda (field E.2)" and recommendation 2.13.)

**ISIN (field B.1)**

If several share classes (e.g. ordinary and preference shares) have been issued, the Implementing Regulation allows a separate notice to be sent for each ISIN or use of the repetitive field. If a separate message is generated for each ISIN, the unique identifier in field 1 always remains the same. This can cause problems when providing information about and processing general meetings, especially if bearer and registered shares have been issued, since different processes will have to be set up. The ISO 20022 standard therefore assumes that a separate message will be generated for each ISIN.

**Recommendation for the German market (2.6.):**

If several classes of share are issued, a separate message should be generated for each ISIN.

**Time of the general meeting (field C.2)**

In field 2 of Table C, the time of the general meeting has to be given using coordinated universal time (UTC). The European Securities Market Practice Group (SMPG) has developed a common understanding that this means UTC without the so-called offset (difference between UTC and the local time zone). In other words, there is no need to follow UTC with an indication of the applicable national time, e.g. 10:00 UTC +2. Field C.4 should therefore be populated with the UTC only. The ISO regime usually calls this "Zulu time" (UTC with **zero** offset).

**Recommendation for the German market (2.7.):**

Field C.4 should be filled using coordinated universal time (UTC) without reference to the local time zone (offset). The ISO regime calls this Zulu time (UTC with **zero** offset).

German stock corporations sometimes convene an additional meeting directly after the ordinary general meeting if a measure such as a capital increase is proposed which will also affect preference shares. In this case, a separate meeting for the holders of preference shares will be held immediately after the ordinary general meeting. It is not possible to specify in advance exactly when this meeting will begin. In practice, the notice currently states that a separate meeting will start "at [12 noon] at the earliest" and will indicate that, depending on how long the ordinary general meeting lasts, the start of the separate meeting of preference shareholders may be delayed, possibly by several hours. Field C.2 of Table 3 only provides for the entry of a UTC: it is not possible to give any indication of a possible delay. It may be assumed that the earliest possible time will be entered in this field and that the issuer will provide further information in the invitation.

## **Recommendation for the German market (2.8.):**

If a separate meeting is convened immediately after the ordinary general meeting (because, for example, a capital increase is proposed which will also affect preference shares) and the exact time of this meeting cannot be specified in advance, field C.2 of Table 3 should indicate the earliest time at which the separate meeting may begin. Further explanation can be provided in the issuer's invitation.

## **Record date (*Aufzeichnungsdatum/Nachweisstichtag*) (field C.5)**

The German terms "*Aufzeichnungsdatum*" and "*Nachweisstichtag*" have the same meaning in the German version of the Implementing Regulation: in other words, they are used synonymously. The English version of the Implementing Regulation uses the term "record date" throughout (see also III.1.e.). In the context of the general meeting, these terms mean a specific date set by the issuer on which the rights associated with the shares, such as the right to participate in, and vote at, the meeting, are determined (Article 1(7) of the Implementing Regulation).

The decisive factor determining the rights attached to a share on the record date is the settled positions struck in the books of the issuer central securities depository (CSD) or other first intermediary by book entry at the close of business (Article 1(7) of the Implementing Regulation). This is not only how the term "record date" is defined in the Implementing Regulation but also corresponds to the international understanding of the term.

When German-domiciled listed companies issuing bearer shares set the record date within the meaning of Article 1(7) of the Implementing Regulation, the record date defined for bearer stock corporations in AktG Section 123(4), sentence 2 must be observed. This states that the confirmation of shareholding refers to the situation at the beginning of the twenty-first day before the general meeting. To reflect this legal requirement correctly in the logic of the Implementing Regulation, the record date as set out in Article 1(7) of the Implementing Regulation should be shown in Table 3, field C.5 (which has no provision for entering a time of day) as the twenty-second day before the general meeting. If the record date within the meaning of AktG Section 123(4), sentence 2 was entered instead, there would be a risk (especially if foreign intermediaries were involved) of determining holdings as set out in Article 1(7) of the Implementing Regulation at the close of business on the twenty-first day before the general meeting and not at the beginning of the day. If the twenty-second day before the general meeting is entered

in Table 3, field C.5, the positions at the beginning of the twenty-first day before the general meeting (record date) will be relevant, as required by law, because holdings are always determined at the close of business.

### **Recommendation for the German market (2.9.):**

The record date to be entered in field C.5 of Table 3 corresponds to the definition set out in Article 1(7) of the Implementing Regulation, i.e. the share positions conferring rights should always be determined at the end of the record date when settlement systems close (close of business, cob). Since the statutory record date for German companies issuing bearer shares is the beginning of the twenty-first day before the general meeting (AktG Section 123(4), sentence 2), two non-harmonised rules have applied since 3 September 2020. When populating field C.5 of Table 3, it is advisable to follow the requirements of the Implementing Regulation and enter the date of the twenty-second day before the general meeting as the record date within the meaning of Article 1(7) of the Implementing Regulation. This corresponds, to all intents and purposes, to the statutory record date (beginning of the twenty-first day before the general meeting) since holdings at cob on the twenty-second day before the general meeting will be the same as those at the beginning of the twenty-first day before the general meeting.

Another special feature of German stock corporation law is that there is no statutory record date for registered shares. Instead, stock corporations issuing registered shares decide themselves which date will determine the entitlement to participate in, and vote at, the general meeting. This so-called technical record date, also known as the registration deadline, means that changes to the share register will only be processed until close of business on the specified day. After that date, no further changes to the share register are possible. As a result, only shareholders who are recorded in the share register at the end of the technical record date are entitled to participate in, and vote at, the general meeting. This “freezing” of the share register is achieved with a transmission stop for re-registration and initial registration (so-called *Umschreibestopp*), which, under AktG Section 121(3), sentence 2 no. 1, must be indicated in the meeting notice. The technical record date can therefore be regarded as the record date within the meaning of Article 1(7) of the Implementing Regulation and the date to be entered in Table 3, field C.5. The ISO 20022 standard has two fields for this information: the entitlement fixing date and registration participation market deadline. The technical record date should be entered in both these fields.

The table below shows an anonymised example of a technical record date and corresponding implementing measures:

<b>ISIN/securities class description</b>	DEXXXXXXXXXX, company name
<b>Date of general meeting</b>	26 March 2020
<b>Last date to record a change of ownership/technical record date</b>	23 March 2020
<b>Registration deadline</b>	23 March 2020
<b>Fourth allocation run</b>	Open-ended
<b>Transmission stop (for changes of ownership and initial registrations)</b>	No; changes of ownership notified from 24 March 2020 to 26 March inclusive will become effective in the share register after the general meeting on 26 March 2020.
<b>ALU stop</b>	24 March 2020 to 26 March 2020
<b>Position transfers without relevance for registered holdings</b>	For orders up to and including 23 March 2020 with a value date of 25 March 2020; for orders placed from 24 March 2020 onwards with all value dates possible

**Recommendation for the German market (2.10.):**

Companies issuing registered shares subject to the German Stock Corporation Act should enter the technical record date (registration deadline) in field C.5 of Table 3.

## URL hyperlink (field C.6)

The issuer creates the URL hyperlink. It should be designed in such a way that it can easily be reused if, for instance, it has to be copied manually from a document. It should contain the name of the issuer and, where appropriate, a reference to the type of general meeting.

### Recommendation for the German market (2.11.):

The URL hyperlink (Table 3, field C.6) should be as concise and easy to reuse as possible and, if feasible, contain key information about the general meeting.

#### D. Participation in the general meeting (repeating block; to be repeated for each available alternative method of participation)

Type of information	Description	Format	Originator of data	BdB interpretation guidance
1. Method of participation by shareholder	Method of participation, such as: VI = virtual participation; PH = participation in person; PX = participation through proxy; EV = voting by correspondence.  Any other available modality should also be indicated in a standardized manner	[2 alphanumeric characters]	Issuer	<b>ISO standards require four-digit abbreviations.</b>  <b>If the company has appointed a proxy, this should be indicated as an “other available modality”. The abbreviation IX (issuer proxy) could be used, for example. In the ISO standards, this information is entered in an additional field indicating the identity of the proxy. See also recommendation 2.12.</b>
2. Issuer deadline for the notification of participation	Last day and time for the shareholder to notify the issuer of its participation.	[Date (YYYYMMDD); UTC (Coordinated Universal Time)]	Issuer	
3. Issuer deadline for voting	Last day and time to submit the votes by the shareholder to the issuer per method of participation, to the extent applicable.	[Date (YYYYMMDD); UTC (Coordinated Universal Time)]	Issuer	<b>If it is not possible to indicate the exact time of the deadline because it has not yet been set when the general meeting is convened, this field can be populated with the date only.</b>

**Method of participation by shareholder (field D.1)**

Field D.1 of Table 3 shows how the shareholder will participate in the general meeting. Possible methods include physical participation, virtual participation and participation by proxy. The Implementing Regulation envisages entering a two-digit alphanumeric code. The ISO 20022 standard, by contrast, requires a four-digit code, which provides important additional information that the two-digit code of the Implementing Regulation cannot show:

<b>Implementing Regulation code</b>	<b>ISO 20022 code</b>	<b>Description of field</b>
VI	VIRT	Virtual participation: the shareholder participates in the meeting and votes virtually via video/audio or multimedia conference, for example; in any event by web-based means.
EV	MAIL	Voting by correspondence: the shareholder participates and votes by means of a document (letter) sent by post.
EV	EVOT	Voting by correspondence: the shareholder participates and votes by electronic means, e.g. via SWIFT or a web-based application.
PH	PHYS	Physical participation: the shareholder participates in, and votes at, the general meeting in person.
PH	PHNV	Physical participation: the shareholder participates in the general meeting in person but has no voting rights.
PX	PRXY	Participation by proxy.



**Recommendation for the German market (2.12.):**

If possible, the four-digit ISO 20022 codes should be used as they provide more information than the two-digit codes envisaged by the Implementing Regulation.

**E. Agenda (repeating block; to be specified for each agenda item)**

Type of information	Description	Format	Originator of data	<i>BdB interpretation guidance</i>
1. Unique identifier of the agenda item	Unique number	[4 alphanumeric characters]	Issuer	<i>Each item of the agenda is assigned its own unique identifier.</i>
2. Title of the agenda item	Heading or brief summary or heading of the agenda item	[100 alphanumeric characters]	Issuer	<i>The title of the agenda item should be preceded by a code indicating the language, e.g. DE: title in German; EN: title in English. See also recommendation 2.13.</i>
3. Uniform Resource Locator (URL) of the materials	If applicable. Specific URL to the material pertaining to the agenda item. If there are no relevant materials, the field is to be left unpopulated.	[If populated: 255 alphanumeric characters]	Issuer	<i>URL to the relevant agenda item and supplementary material, if any (see also recommendation 2.11.).</i>
4. Vote	If applicable. Indication whether the agenda item is subject to a binding vote (BV) or an advisory vote (AV). If the agenda item is not subject to a vote, the field is to be left unpopulated.	[If populated: 2 alphanumeric characters]	Issuer	<i>BV or AV</i>  <i>The corresponding ISO format requires a four-digit entry.</i>

5. Alternative voting options	If applicable. Specification of all alternative voting options for the agenda item available for the shareholder such as vote in favour (VF); vote against (VA); abstention (AB); blank (BL) or other (OT).  If the agenda item is not subject to vote, the field is to be left unpopulated.	[If populated: 2 alphanumeric characters]	Issuer	<i>See “description”.</i>  <i>The corresponding ISO format requires a four-digit entry.</i>
-------------------------------	--	--	--------	---

## F. Specification of the deadlines regarding the exercise of other shareholders rights (repeating block; to be specified for each existing deadline)

Type of information	Description	Format	Originator of data	<i>BdB interpretation guidance</i>
1. Object of deadline	Specification of the shareholders right for which the deadline applies (such as tabling draft resolutions or putting items on the agenda)	[100 alphanumeric characters]	Issuer	<i>Description of the right</i>
2. Applicable issuer deadline	Specification of the deadline related to the exercise of the shareholders right specified in the field above.	[Date (YYYYMMDD); UTC (Coordinated Universal Time)]	Issuer	<i>Date and 00:00 UTC</i>

### Agenda (field E.2)

If the agenda is provided in two languages, it still has to be processed in one message. The message should be in the relevant language (in this case German) and list all agenda items. Other languages (in this case English) can be added to the message.

Different language versions are identified in the relevant field by two-digit language codes in accordance with the corresponding ISO format (ISO 639-1).

In good time before the planned switch to ISO 20022, Clearstream Banking Frankfurt will provide a detailed description of how the corresponding ISO message is to be structured (cf. recommendation 2.1.).

## **Recommendation for the German market (2.13.):**

If the agenda is provided in two languages, this should be processed in one message. Different language versions should be entered in additional fields indicating the corresponding language code.

## **Additional content of the meeting notice**

If the convening of the general meeting in accordance with AktG Section 121 contains a proposal for the election of supervisory board members, legal requirements (AktG Section 125(1), sentence 4) oblige listed companies to include information on the candidates' membership of other supervisory boards mandated by law. Information on their membership of comparable supervisory bodies of domestic and non-German companies should also be provided. Table 3 of the Implementing Regulation contains no fields for this information, however, although AktG Section 125(5), sentence 1 states that the "requirements of the Implementing Regulation apply to the content and format of the minimum information to be provided in notifications pursuant to [Section 125] paragraph 1, sentence 1."

## **Recommendation for the German market (2.14.):**

If information on membership of other supervisory boards has to be provided under AktG Section 125(1), sentence 4, issuers can include this information in the convening notice published in publications of record pursuant to AktG Section 121. Table 3 of the Implementing Regulation contains no field for transmitting this information to the chain of intermediaries. Shareholders could also access the information via the URL hyperlink to the issuer's website in field E.3, which can be populated with a link to the agenda and, if applicable, any supplementary material.

## **cc. Recipients of the meeting notice pursuant to AktG Section 125**

Companies issuing bearer shares are obliged to transmit the meeting notice to intermediaries which are custodians of shares in the company and to intermediaries which have asked to receive the notice (AktG Section 125(1) nos. 1 and 2). This ensures that the holders of bearer shares

will receive the information about the general meeting since the identity of bearer shareholders is not known to the company, so the information can only reach shareholders through the chain of intermediaries.

When it comes to companies issuing registered shares, the situation is different. In this case, those entered in the share register receive notification of the general meeting directly from the company (AktG Section 125(2)). This means that companies issuing registered shares are only obliged to inform intermediaries about the convening of a general meeting if the intermediaries have asked to be notified or if they exercised voting rights at the last general meeting. This does not reflect what happens in practice, however. Institutional clients, in particular, will normally have contractually agreed that they will be informed of all general meetings by their custodian banks in a machine-readable form such as an ISO message. Intermediaries can therefore only fulfil their contractual obligations if they always receive meeting notices from companies issuing registered shares without having to request the information. It would therefore be desirable to always transmit information about general meetings to the custodian chain irrespective of entries in the share register. This will enable all intermediaries to pass the information on to their clients.

### **Recommendation for the German market (2.15.):**

Irrespective of entries in the share register, companies issuing registered shares should always also transmit information on the general meeting to the chain of custodians in order to allow intermediaries to inform their clients themselves.

### **dd. Timing for informing intermediaries about meeting notices of companies issuing bearer shares**

The point in time at which the meeting notice enters the chain of intermediaries is determined by the company, which must nevertheless observe legal requirements, especially AktG Section 125(1) and Article 9(1) of the Implementing Regulation. Pursuant to AktG Section 125(1) no. 1 in conjunction with Section 125(5), sentence 3, companies must notify the chain of intermediaries at least 21 days before the general meeting. In addition to these national rules, Article 9(1) of the Implementing Regulation sets out a European requirement. This states that the issuer must provide intermediaries with the information about the corporate event – in this case a general meeting – in a timely manner and no later than on the same business day on which it announces the corporate event (general meeting) under applicable law.

A general meeting is announced with a convening notice, usually 37 days before the general meeting. This would mean that intermediaries should also be informed on the 37<sup>th</sup> day before the general meeting. The provisions of AktG Section 125(1) and Article 9(1) of the Implementing

Regulation therefore seem to be at odds with each other. To the extent that legal literature has addressed this question, there are three interpretations as to the point in time at which the issuer should inform intermediaries about the general meeting.<sup>8</sup> Without going into the legal arguments in detail, at least the following approaches are likely to be taken:

- **Approach 1**

Issuer informs intermediaries on the day of issuing the convening notice (normally the 37<sup>th</sup> day before the meeting) and again on the 22<sup>nd</sup> day<sup>9</sup> before the general meeting (Article 9(1) of the Implementing Regulation in conjunction with AktG Section 121(1), sentence 1 for the first notification and AktG Section 67a(1), sentence 2 in conjunction with AktG Section 125(1) for the second notification).

- **Approach 2:**

Issuer informs intermediaries when the deadline for adding items to the agenda has passed (AktG Sections 124 and 126).

- **Approach 3**

Issuer of bearer shares informs intermediaries no later than on the 22<sup>nd</sup> day before the general meeting (cf. AktG Section 125(1)).<sup>10</sup>

- **Approach 4**

Issuer informs intermediaries one time only no later than on the day of issuing the convening notice, normally the 37<sup>th</sup> day before the meeting (Article 9(1) of the Implementing Regulation in conjunction with AktG Section 121(1)).

It can therefore be assumed that issuers will inform the chain of intermediaries about the general meeting at different points in time and that these decisions will largely depend on the issuer's analysis and assessment of the legal position.

The same goes for situations with a cross-border dimension. Issuers from other European countries also decide when to provide the chain of intermediaries with information about the general meeting on the basis of the relevant requirements of their national company law. Intermediaries will therefore receive information about general meetings at different points in time before the meeting.

---

<sup>8</sup> Cf. in particular Noack, Neue Regularien für die Hauptversammlung durch das ARUG II und den Corporate Governance Kodex 2020, Der Betrieb 2019, 2785, 2786; Zetzsche, Aktionärsidentifikation, Aktionärslegitimation und das Hauptversammlungsverfahren nach ARUG II, AG 2020, page 1 and 13 f. (both in German only).

<sup>9</sup> The 22<sup>nd</sup> day before the general meeting for bearer shares is inferred from AktG Section 125(1), sentence 1 ("at the latest 21 days prior to") and AktG Section 125(1), sentence 2 ("the day of the notification shall not be included").

<sup>10</sup> The law sets another deadline for registered shares (entered in the share register at the beginning of the 21<sup>st</sup> day), so the special features of registered shares are dealt with separately under IV.1.c.cc. and the as yet unpublished section IV.2. of Module 2.

## ee. Practical implications for operational processes of the decision on when to inform the chain of intermediaries

The point in time at which the meeting notice enters the custody chain for forwarding and transmission is nevertheless not without practical implications for intermediaries because their legal obligations leave no scope for operational considerations. The meeting notice must be forwarded to the next intermediary in the chain without delay and no later than at the end of the business day on which the information was received. If the information is received after 16:00, it must be forwarded by 10:00 on the next business day at the latest (Article 9(2), subparagraph 2 of the Implementing Regulation). The last intermediary in the chain generally has to forward the meeting notice to the shareholder by the same tight deadlines (Article 9(3) of the Implementing Regulation).

In practice, this means that the earlier issuers transmit the meeting notice to the first intermediary, the earlier it will be forwarded and transmitted to shareholders. Due to the tight deadlines, intermediaries have no chance to offer ancillary services or to wait until the record date, for example, which is the basis for determining shareholders' voting rights and issuing confirmations of entitlement (see also IV.2.b.dd. and IV.2.c.).

Should the issuer decide to inform intermediaries on the day of issuing the convening notice and once again in unchanged form on the 22<sup>nd</sup> day before the general meeting, intermediaries have no legal obligation to forward and transmit this second notification. Article 9(2), subparagraph 3 of the Implementing Regulation merely requires intermediaries to monitor holdings and inform new shareholders.

As things stand, intermediaries usually inform shareholders about the convening of a general meeting after the deadline for adding items to the agenda. This practice avoids unnecessary duplicate transmission first of the agenda and then of the final agenda. In future, this will no longer be possible, especially in cases where the meeting notice is transmitted to the chain of intermediaries at an early stage, because the notification must in principle be forwarded on the same day to comply with Article 9(2), subparagraph 2 of the Implementing Regulation. Intermediaries will no longer be permitted to wait until the deadline for adding items to the agenda has passed. Intermediaries which forward the meeting notice in a timely manner will in future be obliged to forward it again if anything has been added to the agenda. Issuers will have to reimburse the resulting costs.

How the timing of transmission in accordance with AktG Section 125 will influence the operational processes of intermediaries and the services they offer issuers and shareholders is described below in the sections dealing with the individual processes and obligations of intermediaries, such as giving notice of participation in the general meeting. Where possible, the Implementation Guide shows how functioning processes and services can continue to be offered (see also IV.2.).

## **b. Forwarding the meeting notice along the chain of intermediaries (AktG Section 67a)**

In the case of listed companies issuing bearer shares, intermediaries are generally obliged pursuant to AktG Section 67a in conjunction with Article 9(2), subparagraph 2 of the Implementing Regulation to forward information about the general meeting without delay and normally on the same day as they receive the information pursuant to AktG Section 125(1) and (5), sentence 1, provided that the intermediary is not aware that the shareholder has received the information from another source.

The principle of same-day transmission is closely linked to that of straight-through processing set out in Article 2(3) of the Implementing Regulation, which states that transmissions between intermediaries should be made in an electronic and machine-readable format using internationally applied industry standards such as ISO. Intermediaries are therefore likely to transmit and process information about general meetings using ISO 20022, as recommended by the European Task Force on General Meetings. Communication in ISO format enables electronic, fully automated processing of the information, ensuring that it will normally be possible to forward it within the chain of intermediaries on the same day.

### **Recommendation for the German Market (2.16.):**

As recommended by the European Task Force on General Meetings, the ISO 20022 standard should be used for communicating information about the general meeting along the chain of intermediaries. Initially, however, cross-the-board use of the ISO 20022 format is unlikely. Different communication formats will probably be used during a transitional phase.

## **c. Transmitting the meeting notice from the last intermediary to the shareholder (AktG Section 67b(1))**

The principle of same-day transmission of information applies not only to forwarding information along the custody chain (Article 9(2), subparagraph 2 of the Implementing Regulation) but in principle also to the transmission of information from the last intermediary to the shareholder/securities account holder (Article 9(3) of the Implementing Regulation). The Implementing Regulation seems to assume that communication between the last intermediary and the shareholder/securities account holder is also electronic and fully automated and that STP can therefore be used.<sup>11</sup>

---

<sup>11</sup> Cf. Article 2(4) of the Implementing Regulation.

This is not what happens in practice, however. Only institutional clients can receive information in ISO formats, which, moreover, are always in English. Retail customers can neither read, evaluate, nor understand these formats, which are essentially made up of abbreviations and codes. For this customer group, the information from the ISO message must be converted into continuous text and thus into another format, such as a PDF file. This can then be used to inform the shareholder (retail customer) by post or via their electronic mailbox.

It is therefore not possible simply to forward the issuer's original meeting notice in a straight-through-processable format such as ISO. Translation into continuous text by the last intermediary cannot be avoided, regardless of whether this continuous text is then placed in an electronic mailbox or sent by post. This inevitably has an impact on the communication between shareholder, intermediary and company.

### **aa. Deadline for transmitting information from the last intermediary to the retail customer**

German lawmakers have expressly acknowledged that the time needed to send paper-based information does not constitute culpable delay and may therefore be deemed "timely".<sup>12</sup>

#### **Recommendation for the German market (2.17.):**

If the shareholder cannot be contacted by electronic means, the transmission of information from the last intermediary to the shareholder in written form with the typically associated delays this entails may be regarded as timely and not as culpable delay, even if it does not comply with the principle of same-day processing and forwarding.

German lawmakers have not explicitly expressed a view on the question of whether transmission may be considered timely if a delay is caused by converting ISO format to continuous text which is then sent not by post but electronically to the shareholder's electronic mailbox, for example. Once again, the delay initially results from the conversion of the ISO format to continuous text (e.g. a PDF file). The time then needed to transmit the text electronically by sending the PDF file to an online banking portal, for example, must also be taken into account. This is likely to take considerably less time than sending the information by post. Nevertheless, there may still be a short delay, though this does not mean delivery should be deemed late. When considering the question of the timeliness of transmission to the shareholder, lawmakers certainly seem to have thought primarily of postal delivery, which involves not only generating continuous text, but also printing the information, placing it in an envelope and then the actual postal delivery itself. But the generation of continuous text, as the logical preliminary step to notification

<sup>12</sup> Explanatory memorandum to AktG Section 67b, Bundestag printed matter 19/9739, page 63 f. (German only).



in writing, will always cause a delay, even if only a short one. Both this and the technical steps needed to enable electronic transmission should be borne in mind when assessing whether information has been forwarded without delay in a particular case.

The Implementing Regulation, too, recognises that STP cannot always be used for measures that require action on the part of the shareholder. In these cases, the intermediary is still obliged to transmit the information without delay and in good time, but same-day processing is not mandatory (cf. Article 9(4), subparagraph 2 of the Implementing Regulation). This is another reason why STP interrupted by the generation of continuous text could justify a deviation from the principle of same-day processing.

When assessing whether information has been transmitted in a timely manner, it is obvious that only a short delay can be justified when sending continuous text electronically. The manual steps required for sending paper-based information can plausibly justify a significantly longer delay in transmission.

### **Recommendation for the German market (2.18.):**

Even if the shareholder is informed electronically via an electronic mailbox to which a PDF file, for example, is uploaded, the necessary generation of continuous text from ISO format and its transfer to an online banking application may result in a delay. Transmission should nevertheless still be deemed to have occurred in a timely manner.

### **bb. Content of the information transmitted by the last intermediary to the retail customer**

The need to turn an STP format into continuous text when sending information from the last intermediary to retail customers influences not only the time required for communication, but also the information itself. While the last intermediary can simply transmit the company's original ISO message to institutional clients, it cannot inform retail customers in this way. It has to convert the raw data or codes it receives into a readily understandable text and will inevitably have to adapt the original message in the process.

The last intermediary has a wide margin of discretion when processing the data received in the form of either Table 3 completed in full, or blocks A to C only together with the URL hyperlink or, as recommended in IV.1.a.bb., all blocks of Table 3 plus the hyperlink. The intermediary may decide that transmitting some information with an embedded URL hyperlink will be just as useful as turning the information in all blocks into continuous text. What is important is that shareholders/retail customers obtain all the information they need in a form that is readily understandable.

In addition, it is likely that initially, at least, intermediaries will obtain information about general meetings from various sources. First, they will receive the legally required information pursuant to AktG Section 67a in conjunction with Article 4 of the Implementing Regulation through the chain of intermediaries. And second, they will continue to receive information about general meetings from service providers. German lawmakers expressly permit this in the explanatory memorandum to AktG Section 67a(2) so that tried and tested processes can be preserved.<sup>13</sup> Intermediaries will thus be free to choose which source to use when forwarding information on, and processing, general meetings.

At present, intermediaries generally process general meetings and corporate actions with the help of information, prepared by, and received directly from, service providers. This information comprises both technical details of the meeting as well as supplementary data that intermediaries require. These data cannot be obtained from Table 3. It is therefore likely that the statutory ARUG II information on corporate events will not be sufficient, especially for the last intermediaries in the chain, which will have to rely on additional sources when informing their clients and processing general meetings. Experience will show whether market practices and adjustments can compensate for these regulatory shortcomings in the medium term or whether the legal framework will need to be revised.

### **cc. Monitoring holdings and transmitting information to new shareholders**

Article 9(2), subparagraph 3 of the Implementing Regulation also needs to be observed. This requires intermediaries to monitor holdings and transmit the meeting notice to new shareholders until the record date. The earlier the meeting notice enters the chain of intermediaries, the more frequently new shareholders will have to be informed.

### **dd. Special features of registered shares**

When it comes to general meetings of companies issuing registered shares, those entered in the share register will receive notification direct from the company itself (AktG Section 125(2)). If shareholders are registered in the share register, intermediaries can therefore assume that they will receive the information about the general meeting from the company. Intermediaries are under no obligation in these cases to forward or transmit the information (AktG Section 125(5), sentence 3, clause 2). But if an intermediary is entered in the share register in place of the shareholder or as a nominee, it must inform the shareholder or the next intermediary in the custody chain about the general meeting. In such cases, the same considerations basically apply as for bearer shares (cf. IV.1.c.aa to bb.).

---

<sup>13</sup> Cf. Bundestag printed matter 19/9739, page 61 (German only).

In the revised version of AktG Section 125(1) and (2), German lawmakers have retained the concept of the registered share and given priority to direct communication between the registered share company and the shareholder named in the share register. This corresponds to the approach of Article 3b(3) of SRD II, according to which member states should not obligate intermediaries to forward or transmit information if companies already provide this information to shareholders directly. Pursuant to AktG Section 125(2), however, the meeting notice must be forwarded and transmitted only to those registered in the share register at the beginning of the 21<sup>st</sup> day before the meeting. Shareholders entered into the share register after the beginning of the 21<sup>st</sup> day before the meeting (00:00) would therefore no longer need to be informed – although these shareholders may also be entitled to take part in the general meeting. This “information gap” is nothing new. The old version of AktG Section 125(2) also specified a certain date after which companies with registered shares no longer had to notify a new shareholder that a general meeting had been convened. The regulations only differ in terms of where this date lies. According to the old version of AktG Section 125(2), this date was 14 days before the general meeting. In the new version, it is 21 days prior to the general meeting. According to the German government’s explanatory memorandum, the new rules are intended to standardise notifications about general meetings of companies issuing bearer shares and those issuing registered shares.<sup>14</sup> However, since registered share companies, unlike bearer share companies, do not have a statutory record date, different processes remain in place despite the attempted standardisation.

In the case of bearer share companies, all those entitled to participate in general meetings are informed of the convening of a general meeting according to the record date regulation in AktG Section 123(4), sentence 2. In the case of registered share companies, those entered in the share register after the beginning of the 21<sup>st</sup> day and therefore entitled in principle to participate in the general meeting are no longer informed since the transmission stop under AktG Section 125(2) cannot be considered a record date. In the case of registered shares, the right to participate in the general meeting results from the entry in the share register (AktG Section 67(2), sentence 1). It should therefore be considered whether registered share companies should continue to inform their shareholders on a voluntary basis after the 21<sup>st</sup> day before the general meeting – ideally by the technical record date. This way it could be ensured that all those entitled to participate in the general meeting are informed directly by the company via the usual means in order to simplify the exercising of voting rights (see IV.2.b.aa.aaa).

---

<sup>14</sup> The new regulation serves to standardise the differences in obligations placed on registered and bearer share companies to inform their shareholders of general meetings. Yet different deadlines are set for companies issuing bearer shares, on the one hand (AktG Section 125(1)), and those issuing registered shares, on the other (AktG Section 125(2)). While holders of bearer shares must be informed at least 21 days before the general meeting (= no later than on the 22<sup>nd</sup> day before the meeting (cob)), companies issuing registered shares must inform those entered in the share register at the beginning of the 21<sup>st</sup> day before the general meeting (= 21<sup>st</sup> day before the meeting at 00:00). This means those entered in the share register after the beginning of the 21<sup>st</sup> day before the general meeting (00:00) do not have to be informed about the meeting even though they are entitled to participate.

## **2. Simplifying the exercising of shareholders rights at the general meeting (notice of participation, participation, confirmation of entitlement, exercising of voting rights).**

The key provision for the “return flow” of information from shareholders to the company in order to simplify the exercising of their rights is AktG Section 67c. Accordingly, the last intermediary has to transmit the information received from the shareholder of a listed company on the exercising of their rights as a shareholder directly to the company or to an intermediary in the chain (AktG Section 67c(1), sentence 1) and, where necessary, issue a confirmation of shareholding and transmit this to the shareholder or the company (AktG Section 67c(3)). The provision is supplemented by specific requirements in the Implementing Regulation (Articles 5 and 6 in conjunction with Tables 4 and 5).

### **a. Confirmation of entitlement and notice of participation in accordance with the Implementing Regulation**

The Implementing Regulation, to which AktG Section 67c(2) and (3) refers when fleshing out the options for shareholders to exercise their rights, assumes that a confirmation of entitlement (Article 5 in conjunction with Table 4 of the Implementing Regulation) and, where applicable, a notice of participation in the general meeting (Article 6 in conjunction with Table 5 of the Implementing Regulation) will enable shareholders to exercise their rights at the general meeting. Intermediaries are therefore obliged to offer shareholders corresponding services.

#### **aa. Confirmation of entitlement**

In accordance with AktG Section 67c(3), shareholders have two options. They either have the last intermediary issue them a confirmation of entitlement or they have the confirmation of entitlement transmitted to the company. In both cases, the shareholder must request the confirmation of entitlement from the last intermediary. This usually occurs by post, especially for retail shareholders, since electronic mailboxes are currently only able to receive and store information and do not allow for a direct response. The last intermediary then confirms the entitled position indicated in its records (Article 5(1), sentence 1 of the Implementing Regulation). In doing so, it must ensure, within the chain of custody, that the entitled position in its records matches that of the first intermediary (Article 5(a), sentence 2 of the Implementing Regulation). This requirement is generally met because a comparison of the shareholdings is anyway conducted daily within and via the chain of custody.

In practice, the confirmation of entitlement is only relevant to bearer shares since in the case of registered shares, only the share register entry is considered proof of entitlement. For further details, see IV.2.b.aa.

For the format and content of the confirmation of entitlement, AktG Section 67c(3) refers to Article 5 of the Implementing Regulation, which in turn refers to Table 4 of the Implementing Regulation. Accordingly, a confirmation of entitlement must, in future, contain a number of minimum requirements, such as the name and the unique identifier of the shareholder. It does not need to be in table format.

**aaa. Minimum content requirements for the confirmation of entitlement in accordance with the Implementing Regulation**
*Table 4*
**Confirmation of Entitlement**

Type of information	Description	Format	Originator of data	<i>BdB interpretation guidance</i>
<b>A. Specification of the general meeting and the message</b>				
1. Unique identifier of the confirmation	Unique number	[12 alphanumeric characters]	Last intermediary	
2. Name of issuer		[140 alphanumeric characters]	Issuer	
3. Unique identifier of the event	Unique identifier of the general meeting as set by the issuer or third party nominated by it	[4 alphanumeric characters]	Issuer or third party nominated by it	<i>Same as Table 3. See also IV.1.a.bb.</i>
4. Type of message	The type of message (confirmation of entitlement)	[4 alphanumeric characters]	Last intermediary	
5. ISIN	Definition	[12 alphanumeric characters]	Issuer	
<b>B. Specification of the entitled position in shares (repeating block; to be presented for each securities account of the shareholder)</b>				
1. Record Date	Definition	[Datum (YYYYMMDD)]	Issuer	<i>Should be the same as field C.5 of Table 3. See also recommendation 2.9.</i>

2. Entitled position	Definition	[24 alphanumeric characters]	Last intermediary	<i>In accordance with Article 1(8) of the Implementing Regulation, an entitled position is as follows: “A position in shareholding on the “record date” with which the rights inferred by the shares are associated, including the right to participate in and exercise voting rights at a general meeting.”</i>
3. Number of the securities account		[20 alphanumeric characters]	Last intermediary	
4. Name of account holder		[140 alphanumeric characters. Format of Table 2, field C.2(a) or C.2(b)]	Last intermediary	<i>For natural persons, enter the forename and surname of the shareholder as specified in Table 2, field C.2(b).</i>  <i>For legal entities see Table 2, field 2(a).</i>  <i>For joint securities accounts, enter the names of all the securities account holders.</i>

**C. Specification about the shareholder, legal or natural person, as the case may be**

1. Name of shareholder	For legal or natural persons	[Format of Table 2, field C.2(a) or C.2(b)]	Last intermediary	<i>As in field 4.</i>
2. Unique identifier of the shareholder	For legal or natural persons	[Format of Table 2, field C.1(a) or C.1(b)]	Last intermediary	<i>Natural persons must be reported using the national identifier from Article 6 in conjunction with Annex II of Delegated Regulation (EU) 2017/590 of 28 July 2016. The CONCAT is used for German shareholders. The CONCAT identifier is 20 characters long. It consists of the ISO country code prefix and the customer ID, consisting of the date of birth (YYYYMMDD), the first five characters of the forename and the first five characters of the surname.</i>  <i>Enter the LEI for legal persons. For further details see Module 1, comments on Table 2, field C.1(b).</i>
3. Name of proxy or other third party nominated by shareholder	If applicable	[Format of Table 2, field C.2(a) or C.2(b)]	Last intermediary	<i>See also comments on fields C.3. and C.4. below Table 4.</i>
				<i>See also comments on fields C.3. and C.4. below</i>

4. Unique identifier of proxy or other third party nominated by shareholder	If applicable	[Format of Table 2, field C.1(a) or C.1(b)]	Last intermediary	<i>Table 4.</i>
---	---------------	---	-------------------	-----------------

## Record date (field B.1)

The record date in field B.1 should correspond to the record date already given in the meeting notice to convene the general meeting (Table 3, field C.5). As such, the two fields must be synchronised. The issues arising from the different regulations for the record date contained in the Implementing Regulation and the Stock Corporation Act are dealt with in IV.1.a.bb and recommendation 2.9.

### Recommendation for the German market (2.19.):

In the case of confirmations of entitlement for German bearer share companies whose statutory record date is no later than 21 days prior to the general meeting, in accordance with AktG Section 123(4), sentence 2, field B.1 should contain the date of the 22<sup>nd</sup> day prior to the date of the general meeting (close of business), in accordance with Article 1(7) of the Implementing Regulation.

The last intermediaries should enter the record date given by the issuer in Table 3, field C.5 in field B.4 of Table 4, the confirmation of entitlement.

## Name and unique identifier of proxy (fields C.3 and C.4)

If the shareholder instructs the last intermediary to issue a confirmation of entitlement for a proxy or nominated third party, the last intermediary may enter the name of the authorised party in field C.3. Where a proxy has been nominated, it must be assumed that the nominated party has been informed accordingly. There is no need to issue a notification in accordance with Article 14(1) and (2) of the General Data Protection Regulation (GDPR) (Article 14(5) of the GDPR). The same applies to field C.4 if the last intermediary knows the unique identifier of the nominated third party.

The disclosure of data about the third party nominated by the shareholder can also be permissible if the intermediary neither processes nor stores the data, but merely passes it on, acting as a kind of messenger. This could be the case, for example, if shareholders pass on a form,

which they have filled in, to the last intermediary that contains the data about the nominated third party to be entered in fields C.3 and C.4 and this is merely being passed on.

### **bbb. Format and deadline**

Shareholders can request that the last intermediary send the confirmation of entitlement to them or to the company. If it is transmitted to the company via the custody chain, this takes place as STP in ISO format. However, there are currently no corresponding ISO messages that meet the minimum requirements of Table 4 of the Implementing Regulation. Rather, the proof of entitlement is generally provided together with the instruction (ISO 20022 format: meeting instruction). As such, the transmission of a confirmation of entitlement as set out in the Implementing Regulation can only currently be achieved using alternative media, even within the custody chain.

Should the last intermediary transmit the confirmation of entitlement to a retail shareholder, the last intermediary must choose a format which the shareholder is able to receive. The format must be one that can be sent by post or to an electronic mailbox.

If retail shareholders send the confirmation of entitlement to the company/registration office as proof of their entitlement, the company/registration office may have to make enquiries with the last intermediary, which may lead to considerable additional manual effort both for the issuers and the last intermediary. In the absence of standardised security requirements for confirmations of entitlement in accordance with the Implementing Regulation, many issuers will want to verify with the last intermediary, which may not be known to them, whether the confirmation of entitlement actually originates from that intermediary.

In the case of German listed companies, the confirmation of entitlement must refer to the statutory record date (cf. AktG Section 123(2), sentence 2). It is therefore not possible for the last intermediary to issue the confirmation before this date in accordance with AktG Section 67c(3) (see also Article 9(4), subparagraph 1 of the Implementing Regulation: "...following a process allowing for compliance with the [...] record date."; see also Table 4.B.1 of the Implementing Regulation: holding as of record date can only be confirmed if the holding exists on this date).

It remains to be seen whether confirmation of entitlement in accordance with Article 5 of the Implementing Regulation in conjunction with Table 4 of the Implementing Regulation will be important in practice. The current draft of market standards for general meetings<sup>15</sup> recommends in standard 3.9 submitting the confirmation of entitlement together with the notice of participation. This is in line with current practice for

---

<sup>15</sup> Available at: <https://www.ebf.eu/home/european-industry-standards/srd-ii-market-standards/>



general meetings in Germany, where a confirmation of entitlement is normally provided when an attendance card (*Eintrittskarte*) is ordered (see also IV.2.b.).

## bb. Notice of participation in the general meeting

If, in accordance with AktG Section 67c(1), the shareholder requests the transmission of a notice of participation in the general meeting as required by the issuer, the last intermediary must transmit such notice to the issuer (Article 6(1) of the Implementing Regulation). This may be done directly or via the chain of intermediaries.

## aaa. Minimum content requirements for notice of participation in accordance with the Implementing Regulation

The minimum content requirements for the notice of participation can be found in Table 5 of the Implementing Regulation.

Table 5

### Notice of Participation

Type of information	Description	Format	Originator of data	<i>BdB interpretation guidance</i>
<b>A. Specification of the notice</b>				
1. Unique identifier of the notice of participation	Unique identifier	[alphanumeric field]	Last intermediary	
2. Type of message	Specification of the type of message	[4 alphanumeric characters]	Last intermediary	
3. Unique identifier of the event	Unique identifier of the general meeting as set by the issuer or third party nominated by it	[4 alphanumeric characters]	Issuer or third party nominated by it	
4. ISIN	Definition.	[12 alphanumeric characters]	Issuer	<i>A separate notice of participation is required for each class of share.</i>

**B. Participation to be specified for each method of participation.**

1. Method of participation	Specification of the method of participation by shareholder to the extent applicable. If multiple methods are deployed, each method shall be specified, compatible with the available alternatives in Table 3, section D, such as participation in person, through proxy, or electronic voting		Last intermediary or shareholder	<i>To be completed as per Table 3, field D.1.</i> <i>ISO standards require an abbreviation that is four characters in length.</i> <i>If the company has appointed a proxy holder, this should be indicated as an available alternative. E.g. the identifier IX (Issuer Proxy) could be used in this case. In the ISO standards, an additional field is used to indicate the identity of the authorised representative. See also recommendation 2.12.</i>
2. Name of shareholder		[Format of Table 2, field C.2(a) or C.2(b)]	Last intermediary or shareholder	<i>For natural persons, enter the forename and surname of the shareholder, as specified in Table 2, field C.2(b).</i> <i>In the case of joint securities deposits, the names of all securities holders should be given.</i>
3(a). Unique identifier of shareholder in case of a legal person	See Table 2, field C, (1)(a)	[Format of Table 2, field C.1(a)]	Last intermediary or shareholder	<i>Enter LEI for legal persons. For further details see Module 1, comments on Table 2, field 1.</i>
3(b). Unique identifier of shareholder in case of a natural person	See Table 2, field C, (1)(b)	[Format of Table 2, field C, (1)(b)]	Last intermediary or shareholder	<i>Natural persons must be reported using the national identifier from Article 6 in conjunction with Annex II of Commission Delegated Regulation (EU) 2017/590 of 28 July 2016. The CONCAT is used for German shareholders. The CONCAT identifier is 20 characters long. It consists of the ISO country code prefix and the customer ID, consisting of the date of birth (YYYYMMDD), the first five characters of the forename and the first five characters of the surname.</i>
4. Name of proxy, or other third party nominated by shareholder	If applicable	[Optional. If populated: Format of Table 2, field C.2(a) or C.2(b)]	Last intermediary or shareholder	<i>See also comments on fields B.4 and B.5 below Table 5.</i>
5. Unique identifier of proxy or other third party nominated by shareholder	If applicable	[Optional. If populated: Format of Table 2, field C.1(a) or C.1(b)]	Last intermediary or shareholder	<i>See also comments on fields B.4 and B.5 below Table 5.</i>

**C. Votes, if applicable (repeating block; to be specified per each agenda item)**

1. Agenda item		Unique identifier of the agenda item, Table 3	[Format of Table 3, field E.1]		
Repeating block, to be filled in for each voting position	2. Voting position	Indication of voting position.	[Format of Table 3, field E.5]	Last intermediary or shareholder	
	3. Number of shares voted	Number of shares voted for the agenda point for each voting position. If the voting position applies to all shares, this field is to be left unpopulated.	[If populated: 15 numeric characters with, if applicable, a decimal separator]	Last intermediary or shareholder	

Block C of Table 5 must not always be filled in. In particular, the fields in block C do not need to be populated in cases where shareholders or their representatives participate in the general meeting, i.e. where an attendance card has been requested (see also IV.2.b.).

**Name and unique identifier of proxy (fields B.4 and B.5)**

If the shareholder instructs the last intermediary to issue a notice of participation for a proxy or nominated third party, the last intermediary can enter the name of the authorised party in field B.4. Where a proxy has been nominated, it must be assumed that the authorised party has been informed accordingly. There is no need to issue a notification in accordance with Article 14(1) and (2) of the GDPR (Article 14(5) of the GDPR). The same applies to filling in field B.5 if the last intermediary has the unique identifier of the nominated third party.

The disclosure of data about the third party nominated by the shareholder is also permissible if the intermediary neither processes nor stores the data, but merely passes it on, acting as a kind of messenger. This could be the case, for example, if shareholders transmit a form, which they have filled in, to the last intermediary that contains the data about the nominated third party to be entered in fields B.4 and B.5 and this is merely being passed on.

## **bbb. Registration of entitled positions**

If the shareholder requests a notice of participation, the last intermediary is obligated to ensure that the voting rights exercised are consistent with the entitled position (Article 5(1) and Article 6(2), sentence 1 of the Implementing Regulation). The usual current practice in Germany is to check this when the attendance card is ordered, thus combining notice of participation requirements with a confirmation of the entitled positions (see IV.2.b).

## **ccc. Format and deadline**

If the shareholder requests a notice of participation in a general meeting, the last intermediary is obligated to transmit this to the company or registration office. This can be done via STP within the custody chain in an ISO 20022 format. The ISO Meeting Instruction message (seev.004.001.06) contains the minimum content required by Table 5 of the Implementing Regulation.

Until all market participants communicate using the ISO 20022 standard, notice of participation will also be given in other formats. This also applies to those cases where notice of participation is transmitted directly to the company.

It remains to be seen to what extent shareholders will actually register for general meetings in accordance with Article 6 in conjunction with Table 5 of the Implementing Regulation. The procedure is likely to have little relevance in the German market since registration for the general meeting occurs when attendance cards are ordered or voting instructions are issued.

If a confirmation of entitlement is issued with the notice of participation in a general meeting, it seems possible to wait until the record date before transmitting the notice of participation since, according to Article 9(4) of the Implementing Regulation, intermediaries must transmit all information about shareholder actions to issuers directly on receipt, though also “following a process allowing for compliance with the issuer deadline or record date”.

## **cc. Conclusion and outlook**

It has already been mentioned in several places that it remains to be seen how general meetings will develop in practice under the regulations of SRD II. For example, it cannot be reliably predicted whether shareholders will request transmission of a confirmation of entitlement in accordance with AktG Section 67c(3) and then give notice of participation in a general meeting independently, or whether the current usual practice of ordering attendance cards will be retained, particularly in the national context (see also IV.2.b). However, it is clear that transmitting

confirmations of entitlement to the shareholder will lead to lots of queries. As no security standards have yet been developed for such confirmations, many issuers will want to verify with the last intermediary, which may not be known to them, whether the confirmation of entitlement really does originate from that intermediary. The consequence would be manual processes with corresponding additional work.

Registering for general meetings in the manner envisaged by Table 5 also raises some questions. It is unclear whether shareholders will merely request a notice of participation in a general meeting in accordance with Article 6(1) of the Implementing Regulation. Shareholders usually give notice of participation in a general meeting by ordering an attendance card with which they can attend the meeting in person, or they issue instructions so that their rights can be exercised by a nominated third party.

### **b. Practical experience of general meetings for German issuers under SRD II**

Since it currently cannot be predicted with certainty how the implementation of SRD II with regard to general meetings will take place in practice, it cannot be ruled out that the German market will retain its current procedures, e.g. use of attendance cards, if these are legally permissible and operationally feasible.

#### **aa. Notice of participation process in the case of registered shares**

In contrast to the bearer share, which identifies the holder as the entitled party for the purpose of exercising rights, a registered share is linked to the entry in the share register (AktG Section 67(2), sentence 1). When shareholders are entered in the share register, they are known to the company and, in principle, communication can take place directly without intermediaries. This fundamental difference between the two classes of share will have consequences for the notice of participation process.

For example, the confirmation of entitlement pursuant to AktG Section 67c(3) is not relevant in the case of companies issuing registered shares since the shareholder's entitlement to vote at the general meeting is based exclusively on their registration in the share register (AktG Section 67(2), sentence 1). This is explicitly recognised by the explanatory memorandum to AktG Section 67c(3).<sup>16</sup>

---

<sup>16</sup> Bundestag Printed Paper 19/9739, page 66 (German only).

## **Recommendation for the German market (2.20.):**

In the case of registered shares, a confirmation of entitlement in accordance with AktG Section 67c(3) is not required since the entitlement to exercise the shareholder rights comes exclusively from the entry in the share register.

### **aaa. Direct communication between company and registered shareholder**

If the shareholder is registered in the share register,<sup>17</sup> communication occurs directly between the issuer and the shareholder. This is generally the case for domestic retail customers. Shareholders decide whether they want to communicate by post or electronically, e.g. by e-mail, when they are registered in the share register or at a later date in communication with the company. Accordingly, shareholders receive the necessary documents for the notice of participation in the general meeting and the exercise of voting rights together with information about the convening of the general meeting electronically or in paper form by post directly from the company. It is also the responsibility of the company to ensure that information is communicated in English where required (Article 2(2), subparagraph 2 of the Implementing Regulation).

The company usually gives shareholders the following options to exercise their rights:

- ordering an attendance card,
- voting via the company's proxy,
- voting by correspondence,
- authorising a third party to exercise their voting rights.

These options are usually accompanied by a request to transmit the documents directly to the company. Only when a third party has been nominated should shareholders send them the documents.

Usually, shareholders who have been notified in paper form can then also contact the company again in paper form and by post and thereby exercise their rights, e.g. by giving notice of participation in a general meeting or casting their vote via the company's proxy. In some cases,

---

<sup>17</sup> An intermediary registered as third-party owner will also be considered a shareholder (nominee).

they are also given the opportunity to log in to the company or its service provider directly via an Internet link and exercise their rights there. In most cases, a stamped addressed envelope is enclosed.

Shareholders that are informed of a general meeting by e-mail are usually given the option of giving notice of participation and voting via an Internet link to the website of the company or its service provider. Clicking on the link usually offers shareholders the same options to exercise their rights as those shareholders informed by post.

This direct communication between shareholder and company will remain largely unchanged under ARUG II.

**Recommendation for the German market (2.21.):**

If the shareholder is registered in the share register, then communication on the notice of participation and voting process can continue to occur directly between the shareholder and company.

ARUG II also contains no changes to current procedures in cases where retail shareholders are entered in the share register but have granted their bank (last intermediary) a permanent power of attorney and their bank offers to exercise their voting right (proxy voting right). After the last date for giving notice of participation, in accordance with prior agreements, information about the power of attorney is then reconciled with the share register. The last intermediary then exercises the voting right based on the permanent power of attorney and in accordance with its voting proposals, if customers themselves have not given notice of participation and have also not issued any instructions.

## bbb. Communication via intermediaries

If communication takes place via intermediaries, a distinction needs to be made between the following situations:

- The shareholder is entered in the share register and obtains information from the company about the convening of the general meeting together with the documents needed to register for the meeting and exercise voting rights. This enables shareholders to exercise their rights as described above in IV.2.b.aa.aaa. In these cases, intermediaries can also enable shareholders to exercise their rights via the custody chain (see IV.1.a.cc. and recommendation 2.15. above).
- If, shortly before the deadline for registration, an intermediary enters a shareholder in the share register so that the shareholder can exercise voting rights in their own name, this intermediary will ensure that the rights can be exercised in practice.
- If the name of the “true beneficiary” is not registered, the intermediary registered on their behalf ensures that the shareholder can exercise their rights in accordance with legal requirements and contractually agreed service standards. It is important to note that it is not the “true beneficiary” but the intermediary who is deemed to be the shareholder in dealings with the company (AktG Section 67 (2), sentence 1).

These three alternatives reflect current practices, which can basically be retained under ARUG II and the Implementing Regulation.

If individual instructions of shareholders are transmitted through the chain of intermediaries in accordance with the requirements of Table 5 of the Implementing Regulation, ISO 20022 format will be used. Both Table 5 of the Implementing Regulation (fields B.3a and B.3b) and the relevant ISO message require entry of the LEI as the unique identifier of shareholders which are legal entities and of the CONCAT for shareholders who are natural persons in Germany.

The shareholder number recorded in the share register is not, by contrast, part of the minimum information required by law. This will give rise to difficulties and uncertainty when issuers try to match instructions to holdings in the share register, which does not show LEI or CONCAT codes. As things stand, therefore, issuers will have to match instructions to holdings on the basis of the shareholder’s name alone.

As long as the shareholder number is not part of the minimum requirements of the Implementing Regulation and the corresponding ISO message for transmitting instructions, issuers and intermediaries should endeavour to find a workable solution. This should accommodate the needs of issuers to match instructions to holdings and the need for straight-through processing of instructions by intermediaries.



## **bb. Notice of participation for bearer shares (confirmation of entitlement, attendance card)**

Unlike registered shares, bearer shares entitle the holder, not a specific named person, to exercise the rights associated with the share. As a result, a bearer share is transferable without formalities and the name of the shareholder is not known to the company. Communication between issuer and shareholder therefore has to take place via the chain of intermediaries (cf., for example, AktG Section 125(1)). For this reason, most German companies issuing bearer shares already require shareholders to give notice of their participation in a general meeting (cf. AktG Section 123(2)). Shareholders normally do so by ordering an attendance card, authorising a proxy to vote on their behalf or requesting a postal vote (hereinafter collectively referred to as "ordering an attendance card"). In each case, a confirmation of entitlement is issued at the same time. The attendance card thus efficiently combines two steps that are regulated separately in the Implementing Regulation.

In consequence, there are basically two ways for shareholders of a company issuing bearer shares to ensure their ability to exercise their rights at a general meeting:

- registering via their bank (ordering an attendance card),
- registering themselves with a confirmation of entitlement.

For bearer shares, unlike registered shares, the proof of shareholding or so-called confirmation of entitlement plays a central role in the registration process since the right to participate in the general meeting depends in this case on demonstrating to the issuer that the holder owns the shares. The form of proof is generally specified in the issuer's by-laws (AktG Section 123(3)). Proof of share ownership at the beginning of the 21<sup>st</sup> day before the meeting in the form set out in AktG Section 67c(3) is in any event sufficient.

Making reference to Article 5 of the Implementing Regulation, ARUG II introduced AktG Section 67c(3), which requires the last intermediary, on request, to either issue the shareholder with a confirmation of their shareholding or transmit this confirmation to the company. The company may also agree to accept other forms of proof (see below), in which case the proof must also refer to holdings on the above record date.

As to the format and content of the confirmation of entitlement, AktG Section 67c(3) refers to Article 5 of the Implementing Regulation, which in turn refers to Table 4 of the Annex to the Implementing Regulation. In accordance with this table, a confirmation of entitlement must in future contain, at a minimum, a number of details such as the name and unique identifier of the shareholder (see also IV.2.a.aa.). It is not necessary to present this information in table format.

The new requirements governing the minimum content of a confirmation of entitlement in accordance with Table 4 do not reflect how attendance cards are currently ordered in Germany. The ordering of an attendance card, which simultaneously registers the shareholder for the general

meeting, usually merely confirms that the shareholder holds a certain number of shares on the record date for the general meeting in which the shareholder wishes to participate. Further information required in Table 4 of the Implementing Regulation, such as the shareholder's personal data, is not provided. It is therefore questionable whether the attendance card procedure commonly used today can be continued unchanged under ARUG II.

The answer is clearly "no" for companies whose by-laws specify that the form and content of the confirmation of entitlement must comply with AktG Section 67c(3). In these cases, the notification to the company needs to comply with the Implementing Regulation's minimum requirements for the content of the confirmation of entitlement (see IV.2.a.aa.aaa.). This will have to be taken into account when giving notice of participation in a general meeting.

### **Recommendation for the German market (2.22.):**

Companies whose by-laws explicitly refer to AktG Section 67c(3) with respect to form and content should note that the attendance card procedure commonly used today does not meet the requirements of the Implementing Regulation and that additional information, such as a confirmation of entitlement in accordance with the Implementing Regulation, may have to be provided.

Views in legal literature differ as to whether the amendments of ARUG II (AktG Section 67c(3) and Section 123(4), sentences 1 and 2) will require all company by-laws to specify compliance with AktG Section 67c(3).<sup>18</sup> It is therefore likely that the by-laws of some listed companies will continue to permit shareholders to register for a general meeting with a confirmation of entitlement that does not comply with the requirements of the Implementing Regulation. These companies could retain the current practice of ordering an attendance card as a means of registration if they so wish and provided that they inform intermediaries in good time in advance.

<sup>18</sup> Cf. Butzke, Bestandsnachweis für Inhaberaktien, AG RR, R57; Mutter, Zur Ehrenrettung des Nachweises nach § 67c Abs. 3 AktG, AG RR, R58; Zetzsche, Die Aktionärsidentifikation, Aktionärslegitimation und das Hauptversammlungsrecht nach ARUG II, AG 2020, 1, 7; Noack, Neue Regularien für die Hauptversammlung durch das ARUG II und den Corporate Governance Kodex 2020, DB 2019, 2785, 2789 f. (all in German only).

## **Recommendation for the German market (2.23.):**

If the by-laws of a German stock corporation permit registration for the general meeting with a confirmation of entitlement that does not comply with the requirements of the Implementing Regulation, today's usual practice of ordering an attendance card may be retained if the issuer so wishes, explicitly makes this clear and communicates the fact when transmitting the meeting notice.

For intermediaries, it may make sense in the interests of streamlining and standardising processes to always issue confirmations of entitlement in accordance with the requirements of AktG Section 67c(3) in conjunction with Article 5 and Table 4 of the Implementing Regulation.

For German listed companies, the confirmation of entitlement must be based on holdings on the statutory record date (cf. AktG Section 123(4), sentence 2). Further details can be found in IV.2.a.aa.bbb. and on the timing of transmission in IV.2.c.

### **cc. Voting instructions – duty to forward – no obligation to exercise voting rights**

If a shareholder informs the last intermediary of how they wish to vote, AktG Section 67c(1) requires the last intermediary to transmit this information either to the company direct, to a registration office designated by the company or to an intermediary in the chain. German stock corporations can make it easier for shareholders to exercise their rights if they offer either proxy voting by a proxy nominated by the company (AktG Section 134(3), sentence 5) or postal voting (AktG Section 118(2)). Otherwise, the shareholder's instructions, although forwarded, may not be implemented. Consideration should be given to the idea of whether German companies at least could reinterpret the shareholder's wishes as a request for an attendance card. Under no circumstances does the duty of the (last) intermediary to forward information give rise to an obligation to vote on the shareholder's behalf. This is explicitly stated in the explanatory memorandum to the government draft of AktG Section 67c(1) with respect to registered shares; companies issuing bearer shares are not subject to any differing requirements in this regard.

This means that AktG Section 67c(1) only obliges intermediaries to forward information and instructions received from shareholders to issuers. Since they are not themselves the addressees of these declarations of intent (exception: exercise of the proxy voting right of intermediaries), they are neither obliged nor entitled to check the completeness of, or to interpret, instructions.

## bankenverband

Even under the old legislation, shareholders (also of bearer shares) were able to communicate directly with the company with respect to their registration for meetings and the exercise of their voting rights. Some issuers offer Internet portals through which shareholders can register directly and cast their votes electronically (to the proxy appointed by the company/by postal vote). In addition, AktG Section 124a, sentence 1, no. 5 requires listed companies to publish on their website the forms to be used when voting by proxy or by post unless these forms are sent to shareholders direct, e.g. by post. These existing direct communication channels between issuers and shareholders save time and money for all involved and can be retained. It should nevertheless be borne in mind that, for bearer shares, at least a confirmation of entitlement on the record date is required together with any passwords provided by the company.

### **Recommendation for the German market (2.24.):**

If there is no direct communication between the shareholder and the company and shareholders send issuers their votes/instructions in written form via the chain of intermediaries, intermediaries are only obliged to forward the documents to issuers (either by post or scanned and electronically). If any points require clarification, the issuer (as the addressee of the declaration of intent) has to contact the relevant shareholder direct. The deadline regime in these cases is governed by Article 9(4) of the Implementing Regulation, meaning that the intermediary must inform the company of shareholder action without delay. "Without delay" means "without culpable delay" in this context, not on the same day.

### **dd. Proxy voting rights**

Intermediaries may undertake to vote on their clients' behalf at general meetings on the basis of contractual agreements. The requirements governing proxy voting then need to be observed (AktG Section 135), which include a requirement for the intermediary to provide shareholders with guidance on how to vote. The obligation under Article 9(2) and (3) of the Implementing Regulation to generally process information on the same day therefore also has implications for proxy voting rights.

Particularly in cases where issuers announce the convening of a general meeting and simultaneously transmit the meeting notice to the chain of intermediaries, it will be impossible for intermediaries to offer shareholders proxy voting services or it will only be possible at considerable expense. Currently, intermediaries use the time between the convening of the meeting, at which point the agenda is announced in the Federal Gazette, and the receipt of the meeting notice (Section 125 of the old version of the AktG) to prepare voting proposals and forms for issuing instructions. These are then sent to shareholders together with the meeting notice. This takes several bank working days. Same-day processing

is not feasible. So it will only be possible to offer proxy voting services if voting proposals are sent to the shareholder by separate mail after the meeting notice. This will be extremely expensive. It therefore remains to be seen to what extent proxy voting can still be offered if notification of the meeting occurs at a very early stage (approach 4 in IV.1.a.dd.).

### **c. Transmission of the shareholder's declaration of intent (confirmation of entitlement, notice of participation, voting instructions) to last intermediary**

It needs to be borne in mind that communication between the shareholder and the last intermediary will differ depending on whether the shareholder is a retail customer or an institutional client.

Communication with institutional shareholders is fully automated and uses STP, often in ISO formats. Shareholders which are institutional clients will send their notice of participation in the general meeting, which will also contain voting instructions, to the last intermediary in an ISO format in accordance with Article 6 in conjunction with Table 5 of the Implementing Regulation. The last intermediary will then forward this information by means of STP along the custody chain or to the company or its service provider (registration office). In some cases, communication also involves other service providers which record voting instructions electronically.

Communication between retail customers and the last intermediary is usually paper-based and by post. Communication using an electronic mailbox can currently take place in one direction only, namely to the holder of a securities account. This means no ISO format can be used. Retail shareholders can register for the general meeting and issue voting instructions using forms sent to them by the intermediaries together with the meeting notice. Additional services enabling voting instructions to be registered electronically are likely to be offered to retail clients as well.

The range of services offered to retail shareholders will depend, among other things, on when the meeting notice is transmitted to the custody chain (see IV.1.a.ee. and IV.2.b.dd.). Intermediaries will only be able to set up a structured process and offer wide-ranging services if there is sufficient time between the announcement of the general meeting in the Federal Gazette and the notification to intermediaries (AktG Section 125) to prepare these on the basis of the agenda. Otherwise, intermediaries are likely to offer only to transmit shareholder details to the company and order an attendance card (notice of participation pursuant to Article 6 of the Implementing Registration).

## **d. Transmission of shareholder information from the last intermediary to the company direct or along the custody chain**

Under AktG Section 67c(1), information received from shareholders of a listed company about how they wish to exercise their shareholder rights must be transmitted by the last intermediary either

- to the company or registration office direct or
- to an intermediary in the custody chain.

### **aa. Format**

Under AktG Section 67c(1), sentence 2, the intermediaries in the chain must also forward the information received from the last intermediary either to the company direct or to the next intermediary in the chain. If the information is forwarded via the chain of intermediaries, it should pass along the entire chain (no steps should be missed out).

Pursuant to AktG Sections 67c(2), sentence 2, 67a(2), sentence 1 and Article 2(2) of the Implementing Regulation, information passing along the intermediary chain should be transmitted in ISO 20022 format. Since 3 September 2020, therefore, issuers or their registration offices should have been able to process messages transmitted in ISO 20022 format. Until all market participants are in a position to process ISO 20022, the last intermediary may also, as an interim solution, communicate directly with the issuer/its registration office using alternative media that support ISO 20022.

If the last intermediary receives written instructions on forms from (retail) customers, it is not obliged to manually convert these responses into an ISO format. They are (in the case of postal voting and representation by company proxies) instructions addressed to the company and it is up to the company to interpret them if necessary. Customer responses that can only be processed manually may therefore be sent direct to the registration office.

### **bb. Deadline**

Article 9(4) of the Implementing Regulation requires intermediaries to transmit all information on shareholder action, such as voting instructions, to the issuer immediately upon receipt using a procedure allowing for compliance with the issuer deadline or the record date. This deviates from the principle of same-day transmission under Article 9(2) and (3) of the Implementing Regulation to enable the efficient processing of shareholder rights when national company law requirements, such as the record date, have to be observed. In addition, Article 9(4), subparagraph 2 of the Implementing Regulation takes account of the fact that information from retail shareholders, especially, cannot always

be processed in a machine-readable form and can therefore only be forwarded without delay, but not on the same day. This is reflected in the explanatory memorandum to AktG Section 67c(1), according to which it will generally be possible for intermediaries not only to transmit information by post, but also to collect shareholder information and forward it in consolidated form.<sup>19</sup> Furthermore, there are also situations in which formal requirements, such as the so-called written form requirement (*Schriftformerfordernis*) for certain actions of legal relevance, force intermediaries to obtain written signatures. In these cases, too, same-day processing is not possible.

Against this background, confirmations of entitlement should not be issued before the record date as shareholders can sell their shares at any time, including shortly before the record date, and would not then be entitled to vote at the general meeting. The same goes for ordering attendance cards and processing voting instructions. Under Article 9(4) of the Implementing Regulation, however, information about shareholder action has to be forwarded to the company without delay even though it is not clear before the record whether the shareholder will be entitled to vote at the general meeting. In cases where attendance card orders or votes have already been forwarded to the company prior to the record date, a confirmation of entitlement could be issued on the record date itself and sent to the company or to shareholders. This would allow shareholders to demonstrate their right to attend the general meeting. This procedure would cause a lot of additional work for both companies and intermediaries, however. It can therefore be assumed that more practicable solutions will become established.

The explanatory memorandum to AktG Section 67c(2)<sup>20</sup> permits intermediaries to wait until the record date before forwarding attendance card orders and/or votes to German stock corporations. As stated in the explanatory memorandum to AktG Section 67c(2), this will enable processes to be coordinated in order to speed up and facilitate the exercise of shareholder rights; the practice will not constitute culpable delay.

### **Recommendation for the German market (2.25.):**

Where German stock corporations are concerned, intermediaries are permitted to wait until the record date before forwarding attendance card orders and/or votes. This will enable processes ahead of general meetings to be coordinated in order to speed up and facilitate the exercise of shareholder rights.

<sup>19</sup> Bundestag printed matter 19/9739, page 65 f (German only).

<sup>20</sup> Bundestag printed matter 19/9739, page 65 f (German only).

### 3. Confirmation of the receipt of the exercise of voting rights

If a voting right is exercised electronically, the company is required to confirm the receipt of the vote electronically (AktG Section 118(1), sentence 3).

#### a. Electronic exercise of the vote

The obligation to confirm the receipt of the vote is conditional on the vote being cast electronically (AktG Section 118(1), sentence 3, Article 7(1) of the Implementing Regulation). According to the explanatory memorandum, this means that the vote is cast electronically with no physical presence at the meeting.<sup>21</sup> This is likely to occur primarily when votes are cast using an online portal or other electronic application (such as an app). Voting thus takes place electronically without physical attendance of the general meeting. The same applies to electronic postal voting. In this case, too, the receipt of the vote must be confirmed (AktG Section 118(2)). By contrast, electronic voting by tablet at the general meeting is not covered by AktG Section 118(1), sentence 3 since the person voting is present at the general meeting. Nor does electronic authorisation of the company's proxy, for instance, constitute electronic exercise of voting rights, as the vote is cast at the general meeting in this case too (see also IV.3.c.).<sup>22</sup>

#### b. Electronic confirmation of the receipt of the vote

If shareholders exercise their votes electronically with the company direct using an online portal or a web-based application (app), for example, or by electronic postal vote, the company will send them a direct electronic confirmation of receipt. This may be an electronic message triggered by the portal or web application confirming that the vote has been received. Article 7(1) in conjunction with Table 6 of the Implementing Regulation sets out the minimum content of the confirmation of receipt.

If the confirmation is sent to an intermediary because, for example, the intermediary has exercised the vote electronically by proxy, the intermediary is required to forward the confirmation to the shareholder without delay (AktG Section 118(1), sentence 4). If the shareholder can access the confirmation transmitted to the intermediary because, for example, it is placed in an electronic portal to which the shareholder has access, separate transmission by the intermediary is not necessary.

---

<sup>21</sup> Explanatory memorandum to AktG Section 118(1), sentences 3 to 5, and 118(2), Bundestag printed matter 19/9739, page 91 (German only).

<sup>22</sup> Cf. Ziemons in: Schmidt, K./Lutter, AktG, 4<sup>th</sup> edition 2020, § 129 AktG, para 48 (German only).



## c. Electronic forwarding of electronic voting instructions – confirmation of receipt

In theory, this means that forwarding voting instructions electronically will not trigger a legal obligation to confirm receipt since the vote will be exercised by a proxy, who will be physically present at the general meeting. This does not reflect the needs of shareholders which are institutional clients, however.

Institutional clients usually cast their votes electronically via the proxy appointed by the company or another authorised representative. Voting instructions are also transmitted electronically to the proxy along the chain of intermediaries. Many institutional clients request and receive a confirmation of receipt. To facilitate the future automation of these processes, confirmation that the voting instruction has been received should always be provided in accordance with AktG Section 118(1), sentences 3 to 5 if the company receives the voting instruction via the custody chain by means of STP and thus electronically. The current draft of the European Market Standards for General Meetings contains a corresponding recommendation (standard 4.1).<sup>23</sup>

In the course of implementing ARUG II, it is likely that institutional investors will in future transmit their voting instructions along the chain of intermediaries in ISO 20022 format, i.e. fully electronically and using STP. In the chain of intermediaries, receipt of the voting instruction will be confirmed by each intermediary in the chain that receives and forwards the instruction. As a result, a large number of confirmations of receipt will be generated tracing the entire processing path from the shareholder's issuance of the voting instruction, via its forwarding along the chain of intermediaries, to its ultimate transmission to the company. This means that, in a chain of electronic transmissions of instructions in ISO 20022 format, each instruction will be answered with several status messages. The intermediaries in the chain can therefore only consider the process complete when they receive the "final" confirmation of receipt from the company and transmit this through the chain to the shareholder, with each receipt confirmed electronically. Until this happens, the process will remain "open" in their systems. For this reason, companies that receive voting instructions via the custody chain in ISO 20022 format should always transmit the "final" confirmation of receipt to the shareholder back along the chain of intermediaries.

### **Recommendation for the German market (2.26.):**

Companies that receive voting instructions from shareholders via the chain of intermediaries in ISO 20022 format should confirm the receipt of these instructions electronically. Ideally, the confirmation should use the corresponding ISO 20022 message, which will always be transmitted along the custody chain to the shareholder.

<sup>23</sup> Retrievable at [https://www.ebf.eu/wp-content/uploads/2020/07/2\\_GM-Market-Standards-2020.pdf](https://www.ebf.eu/wp-content/uploads/2020/07/2_GM-Market-Standards-2020.pdf)

Any change to the original instruction first triggers a cancellation of that instruction, which will be transmitted in a separate ISO 20022 message. Field 2 of Table 7 of the Implementing Regulation should be populated accordingly. In addition, the intermediary will transmit a new instruction, receipt of which will again need to be confirmed.

**Recommendation for the German market (2.27.):**

If the original instruction is changed, the intermediary should first transmit a cancellation in a separate ISO 20022 message. The receipt of the new instruction will also have to be confirmed.

**d. Minimum content of the confirmation of receipt**

The minimum requirements to be met when confirming receipt of the exercise of voting rights pursuant to AktG Section 118(1), sentence 3 are set out in Article 7(1) and Article 9(5), subparagraph 1 of the Implementing Regulation. The content of the confirmation of receipt is also governed by Table 6 of the Annex to the Implementing Regulation.

The table is only commented on if intermediaries are involved. In the event of direct contact, it will be the issuer’s responsibility to populate the table.

Table 6

**Voting Receipt**

Type of Information	Description	Format	Originator of data	<i>BdB interpretation guidance</i>
1. Unique identifier of the Receipt	Unique number	[12 alphanumeric characters]	Intermediary or confirming party	<i>The unique identifier used in field A.1 of Table 5 should be entered.</i>

2. Type of message	Specification of type confirmation	[4 alphanumeric characters]	Intermediary	<i>If a voting instruction is received after the deadline set by the issuer and the voting right cannot therefore be exercised, this should be indicated here. In the corresponding ISO message, the abbreviation Rjcta for “rejected” is used. See also the comments on this field immediately below the table.</i>
3. Unique identifier of event	Unique identifier of the general meeting event.	[12 alphanumeric characters]	Issuer/intermediary	
4. ISIN	Definition.	[12 alphanumeric characters]	Issuer	
5. Date of the general meeting		[Date (YYYYMMDD)]	Issuer	
6. Name of issuer		[140 alphanumeric characters]	Issuer	
7. Name of the confirming party		[140 alphanumeric characters. Format of Table 2, field C.2(a) or C.2(b)]	Party providing the receipt	
8. Name of the person that casted the vote		[140 alphanumeric characters. Format of Table 2, field C.2(a) or C.2(b)]	Confirming party	
9. Name of shareholder		[Optional field. If applicable, then populated: [140 alphanumeric characters. Format of Table 2, field C.2(a) or C.2(b)]	Intermediary or confirming party	

## Type of message (field 2)

If an ISO 20022 message is used to confirm the receipt of electronic voting instructions (see IV.3.c.), this field should if possible be populated with the corresponding ISO code. If, for example, voting instructions are received after the issuer deadline and cannot be exercised, they should be designated as “rejected (Rjcta)”.

## 4. Confirmation of the recording and counting of votes

New provisions of the German Stock Corporation Act give those voting the ability to verify whether their vote has been effectively recorded and counted by the company by requesting that the company confirm whether and how the vote was counted (AktG Section 129(5)). It does not matter how the vote was cast, i.e. the recording and counting of votes not cast electronically must also be confirmed on request.<sup>24</sup> Unlike under AktG Section 118(1), sentence 3, however, the company does not have to send the confirmation automatically, but only if the person voting submits a request within one month after the day of the general meeting. The company, for its part, has 15 days after receiving the shareholder’s request to send the confirmation (Article 9(5) of the Implementing Regulation). The minimum requirements are set out in Table 7 of the Implementing Regulation, to which AktG Section 129(5), sentence 2 makes reference.

### a. Person voting

Only the person voting can request confirmation of the recording and counting of votes (AktG Section 129(5), sentence 1)). The following qualify as “persons voting”:

- shareholders (for registered shares: the person entered in the share register),
- proxies.

#### aa. Voting by shareholder or standard proxy (*offene Stellvertretung*)

If the shareholder or a proxy nominated by the shareholder exercises voting rights with the company direct, e.g. in an online portal, the exercise of the rights and the receipt of the vote (see IV.3.) should be confirmed via the voting facility. The company is free to offer the voting party the

---

<sup>24</sup> Cf. Ziemons in: Schmidt, K./Lutter, AktG, 4<sup>th</sup> edition 2020, § 129 AktG, para 48 (German only).

option of requesting confirmation when the vote is cast; alternatively, it can decide to take action only in response to a subsequent request. As far as the content of the confirmation is concerned, it may be assumed that the company is bound by the minimum requirements of Table 7 of the Implementing Regulation. In any event, the company will determine the format of the confirmation and the way in which the voting party receives this confirmation. The confirmation that the voting right has been exercised can therefore also be sent directly via an online portal.

If the vote is cast via an intermediary and the intermediary requests confirmation that the voting right has been exercised, it would not be sufficient to send the confirmation only to the shareholder (proxy grantor). The intermediary acting as a go-between between the company and shareholder also needs a confirmation for technical reasons because ISO standards allow a process to be considered completed only if the sequence of messages concludes with a final message (see IV.3.c. above).

If a voting instruction by proxy, for example, is transmitted electronically from the last intermediary along the custody chain to the company in accordance with ISO 20022 ("Meeting Instruction" seev.004.001.06), the confirmation that the voting right has been exercised should therefore also if possible be transmitted along the chain of intermediaries to the shareholder (proxy grantor).

Furthermore, it will only be technically feasible to electronically evaluate confirmations of the exercise of votes of an institutional investor or asset manager if a uniform Europe-wide standard is used. In future, this will be ISO 20022, which can only be offered by intermediaries.

With these two aspects in mind, the European Market Standards for General Meetings<sup>25</sup> also assume in standard 5.2 that the exercise of a voting instruction should always be confirmed to the intermediary which transmitted the instruction and requested a confirmation. An additional confirmation may also be sent to the shareholder.

### **Recommendation for the German market (2.28.):**

If voting instructions are delivered through an intermediary and the instructions are transmitted from the last intermediary through the custody chain to the company in accordance with the ISO 20022 standard, the confirmation that voting rights have been exercised should, if possible, be sent not only to the shareholder but also to the intermediary which transmitted the instructions and requested the confirmation.

<sup>25</sup> The most recent draft is retrievable at [https://www.ebf.eu/wp-content/uploads/2020/07/2\\_GM-Market-Standards-2020.pdf](https://www.ebf.eu/wp-content/uploads/2020/07/2_GM-Market-Standards-2020.pdf)

## bb. Voting by undisclosed proxy (*verdeckte Stellvertretung*)

If voting is by way of undisclosed proxy, the proxy is deemed to be the person casting the vote because votes are cast not in the name of the proxy grantor, but in the proxy's own name. As a result, the company can only confirm to the proxy holder that the voting rights have been exercised; it does not know the proxy grantor. If the proxy has voted in an online portal, the portal should also be used to send the confirmation (see also IV.3.b.).

If the proxy is an intermediary which has transmitted the voting instructions to the company in ISO 20022 format, the intermediary should also receive the confirmation in ISO 20022 via the custody chain.

## b. Obligation of intermediaries to forward confirmations

If the voting party is an intermediary, the intermediary must forward the confirmation to the shareholder without delay (AktG Section 129(5), sentence 3). AktG Section 67a(2), sentences 1 and 3 applies mutatis mutandis.

## c. Minimum content of the confirmation of the recording and counting of votes

The table is only commented on if intermediaries are involved. In the event of direct contact, it will be the issuer's responsibility to populate the table.

Table 7

Confirmation of the recording and counting of votes

Type of Information	Description	Format	Originator of data	<i>BdB interpretation guidance</i>
1. Unique identifier of the confirmation	Unique number	[12 alphanumeric characters]	Issuer/Intermediary	
2. Type of message	Specification of type confirmation	[4 alphanumeric characters]	Issuer/intermediary	

3. Unique identifier of event	Unique identifier of general meeting event.	[12 alphanumeric characters]	Issuer/intermediary	
4. ISIN	Definition.	[12 alphanumeric characters]	Issuer	
5. Date of the General Meeting		[Date (YYYYMMDD)]	Issuer	
6. Name of issuer		[140 alphanumeric characters]	Issuer	
7. Name of shareholder	[Optional field, if the name of shareholder is indicated.]	[140 alphanumeric characters. Format of Table 2, field C.2(a) or C.2(b)]	Issuer	
8. Name of third party nominated by the shareholder	[Optional field, if the name of third party nominated by the shareholder is indicated.]	[140 alphanumeric characters. Format of Table 2, field C.2(a) or C.2(b)]		
9. Modality	Specification of the modality through which the votes that have been recorded and counted were received by the issuer, including whether this is ahead of the meeting or at the meeting.	[70 alphanumeric characters]	Issuer	
10. Date and time of receipt	[Optional field, only if votes have been cast ahead of the general meeting]. Specification of the date and, where available, time on which the votes that have been recorded and counted were received.	[Date (YYYYMMDD); UTC (Coordinated Universal Time)]	Issuer	
11. Unique identifier of votes	If available, unique identifier of the communication containing the votes recorded and counted by the issuer.	[12 alphanumeric characters]	Shareholder or third party nominated by the shareholder	

## 5. Issues relating exclusively to general meeting processes for unlisted stock corporations

The Act Implementing the Second Shareholders Rights Directive (ARUG II) completely overhauls the process of convening general meetings. The starting point is AktG Section 125, which regulates how shareholders are to be informed about a general meeting. Sections 125(1) and (2) differentiate between bearer shares and registered shares. For bearer shares, communication via intermediaries and shareholder associations is mandatory, whereas for registered shares, direct communication between the company and shareholder is preferred. Both provisions also apply in principle to unlisted stock corporations as defined in AktG Section 3(2), i.e. stock corporations whose shares are not traded on an organised market.<sup>26</sup> An exception to these rules is set out only in AktG 125(5), sentence 4. However, the scope of this provision is unclear. For example, it does not state unequivocally in what format and with what content unlisted stock corporations must notify shareholders that a general meeting is being convened. The following therefore takes a more detailed look at the legal framework governing the invitation process for unlisted stock corporations and the practical consequences for operational processes.

These comments refer exclusively to unlisted stock corporations (hereinafter also referred to as “companies”) based in Germany, as companies based in other member states of the EU or EEA are not subject to the German Stock Corporation Act.

### a. Notification of a general meeting convened by a company issuing bearer shares (AktG Section 125(1))

Notification of shareholders is initiated by the company when it convenes the general meeting in accordance with AktG Section 121 and gives notice of the meeting in accordance with AktG Section 125(1).

#### aa. Recipients of the meeting notice

In accordance with AktG 125(1), sentence 1, the following must be notified about the convening of a general meeting at least 21 days before the meeting takes place:

- intermediaries holding shares of the company in custody (no. 1),
- intermediaries and shareholders that have requested notification (no. 2) and
- shareholder associations that have requested notification or exercised voting rights at the previous general meeting (no. 3).

---

<sup>26</sup> According to the legal definition of set out in AktG Section 3(2), companies are deemed listed if their shares are traded on an organised market (within the meaning of WpHG Section 2(11)). Companies deemed unlisted therefore include those whose shares are traded on the open market in accordance with BörsG Section 48(1) or the SME growth market in accordance with BörsG Section 48a(1).



If all or some of the shares in an unlisted stock corporation are held in custody at a central securities depository within the meaning of Section (1)(3) of the German Safe Custody Act (*Depotgesetz – DepotG*) and Article 1(2) of the Implementing Regulation,<sup>27</sup> AktG Section 125(1), no. 1 requires the company to notify the CSD of the meeting in its capacity as the first intermediary in the custody chain (Article 1(9) of the Implementing Regulation). The CSD, which in Germany is Clearstream Banking Frankfurt (CBF), transmits the meeting notice to the chain of intermediaries, which forward the information along the chain to the shareholder. This is done in accordance with AktG Sections 67a and 67b, which, owing to the reference in AktG Section 125(5), sentence 4 in conjunction with sentence 3, also apply in principle to notifications of general meetings of unlisted companies, albeit with the proviso that such notifications will not be subject to the provisions of the Implementing Regulation (see IV.5.c.). This means all shareholders can be informed provided that all the company's shares are held in custody at a central securities depository such as CBF.

But this legal requirement only applies to unlisted bearer-share issuing companies established after 31 December 2015.<sup>28</sup> AktG Section 10(1), no. 2 requires these companies to exclude the right to individual certification and to deposit a global certificate with a CSD. This new rule was introduced under the 2016 amendment to the German Stock Corporation Act<sup>29</sup> – but without retroactive effect.<sup>30</sup> For the foreseeable future, therefore, it will probably not be possible to reach a considerable number of shareholders via the intermediary chain since they hold bearer shares which are not kept in collective custody. Companies issuing registered shares are subject to no requirement comparable to that under AktG Section 10(1), no. 2.<sup>31</sup> Some or all of the shares in unlisted stock corporations may consequently be held in the form of individual or global certificates at a CSD, or alternatively in a securities account or in jacket (*Streifband*) custody, in a safe deposit box, at a notary's office or at any other location.

Unless all a company's shares are entrusted to a CSD for safekeeping, however, it will not be possible to notify all shareholders of a general meeting via the chain of intermediaries. This naturally applies all the more if no shares are held at a CSD. On top of that, the company may not know whether its shares are held via an intermediary and, if so, which one. Intermediaries with clients who have shares in their securities account that are not held at CBF or another CSD may therefore have to ask the company to notify them of a general meeting in accordance with AktG Section 125(1), no. 2 or take other steps to ensure that their clients can be informed. The current practice of requesting meeting

---

<sup>27</sup> Both DepotG Section 1(3) and Article 1(2) of the Implementing Regulation refer in their definition of "central securities depository" to point 2 of Section A of the Annex to Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257 of 28.8.2014, p. 1).

<sup>28</sup> Full immobilisation of shares at a CSD pursuant to Article 3 of Regulation (EU) No 909/2014 (CSDR) has only been mandatory since 1 January 2016.

<sup>29</sup> Federal Law Gazette 2015, 2565 ff.

<sup>30</sup> Cf. Section 26h(1) of the Introductory Act to the German Stock Corporation Act (*Einführungsgesetz zum Aktiengesetz – EGAktG*).

<sup>31</sup> See IV.5.b. for requirements concerning the notification of general meetings of companies issuing registered shares.

notices from the company is likely to be retained. Intermediaries can ask either to be notified about the next general meeting or to receive notifications on a permanent basis.<sup>32</sup>

### **Recommendation for the German market (2.29.):**

Intermediaries with clients whose securities account contains shares in unlisted companies that are not held in custody through CBF or another CSD should check whether they need to request notification of the general meeting from the company pursuant to AktG Section 125(1), no. 2. The request may refer either to the next general meeting or be open-ended.

### **bb. Format and content of the meeting notice (AktG Section 125(1))**

As regards the minimum content and the format of notifications pursuant to AktG Section 125(1), AktG Section 125(5), sentence 1 refers to the requirements of the Implementing Regulation – the explanatory memorandum makes particular mention of Article 2(2) and Article 4 of the Implementing Regulation<sup>33</sup> – and does not differentiate between listed and unlisted companies. When it comes to listed companies, this reference is merely declaratory since the Implementing Regulation applies directly.<sup>34</sup> The few items of legal literature to have addressed the requirements of unlisted stock corporations under ARUG II mainly take the view that the reference in AktG Section 125(5), sentence 1 also applies to unlisted companies, arguing that the exception for unlisted companies set out in AktG Section 125(5), sentence 4 refers only to AktG Section 125(5), sentence 3, which concerns the obligations of intermediaries to forward information.<sup>35</sup> If the reference to the Implementing Regulation in AktG Section 125(5), sentence 1 also applies to unlisted companies, it may be concluded that these, like listed companies, must in principle meet the requirements of the Implementing Regulation concerning the format and minimum content of the meeting notice.<sup>36</sup>

<sup>32</sup> BeckOGK/Rieckers, AktG (Ed. Spindler/Stilz), 1.2.2021, § 125 para 15; Grigoleit/Herrler, AktG, 2<sup>nd</sup> edition 2020, § 125 para 5; Hüffer/Koch, AktG, 21<sup>st</sup> edition 2021, § 125 para 4 (all German only).

<sup>33</sup> Explanatory memorandum, Bundestag printed matter 19/9739, page 96 (German only).

<sup>34</sup> Explanatory memorandum, Bundestag printed matter 19/9739, page 96 (German only).

<sup>35</sup> For example BeckOGK/Rieckers, AktG (Ed. Spindler/Stilz), 1.2.2021, § 125 para 25; Grigoleit/Herrler, AktG, 2<sup>nd</sup> edition 2020, § 125 para 13; this is also the conclusion of Hüffer/Koch, AktG, 21<sup>st</sup> edition 2021, § 125 para 20 (all in German only).

<sup>36</sup> This is the conclusion, for example, of BeckOGK/Rieckers, AktG (Ed. Spindler/Stilz), 1.2.2021, § 125 para 37. Less clear, by contrast, are Grigoleit/Herrler, AktG, 2<sup>nd</sup> edition 2020, § 125 paras 13, 18; Hüffer/Koch, AktG, 21<sup>st</sup> edition 2021, § 125 para 20, who take the view that the reference in AktG Section 125(5), sentence 1 also applies to unlisted companies but infer that, although the notification has to be sent electronically, the requirements of the Implementing Regulation do not apply. What this means in concrete terms is not explained (all texts in German only).

This suggests that unlisted companies also have to provide notification of a general meeting in accordance with Article 2(2) of the Implementing Regulation, namely in a format, such as ISO, that allows for straight-through processing if information is transmitted along the chain of intermediaries.<sup>37</sup> The Implementing Regulation does not envisage transmission in an electronic format other than ISO, such as email. This conclusion also reflects what occurs in practice. Only STP formats (e.g. ISO 15022 or 20022) are used to transmit meeting notices within the custody chain. These messages cannot be exchanged between intermediaries by email.

### **Recommendation for the German market (2.30.):**

If the notification of a general meeting (AktG Section 125(1)) is transmitted along the chain of intermediaries, unlisted companies are also required by Article 2(2) of the Implementing Regulation to make the information available in a format which allows straight-through processing, such as ISO.

However, information can only be communicated along the chain of intermediaries if the company has entrusted its shares to a CSD for safekeeping (see IV.5.a.aa. above). Unlisted companies that do not have any or all of their shares held in custody at a CSD do not communicate information via the CSD and the custody chain, or do not do so exclusively. As a rule, they send the meeting notice direct to intermediaries which have requested the notification pursuant to AktG Section 125(1), no. 2. Since the possibility cannot be ruled out that these intermediaries will in turn forward the meeting notice along the custody chain, an STP format should generally be used in these cases too (Article 2(2) of the Implementing Regulation).

If the requesting intermediary is a last intermediary, a different format may be agreed. It would seem logical to transmit the information in the same way as the information will be sent to the shareholder. Retail shareholders normally receive information in paper form by post, or possibly electronically in the form of a PDF.

Another question that cannot readily be answered is what requirements unlisted stock corporations must meet when it comes to the content of the meeting notice. The legal academics cited above who conclude that the reference in AktG Section 125(5), sentence 1 also applies to unlisted companies mostly argue – to the extent that they comment at all on requirements concerning the content of the notification pursuant to AktG

---

<sup>37</sup> This is the view, in any event, of BeckOGK/Rieckers, AktG (Ed. Spindler/Stilz), 1.2.2021 § 125 para 25.

Section 125 – that the requirements of the Implementing Regulation also apply to the minimum content of the meeting notice.<sup>38</sup> This means that, under AktG Section 125(5), sentence 1 in conjunction with Article 4 of the Implementing Regulation, unlisted companies should at least provide the minimum content specified in Table 3 of the Annex to the Implementing Regulation.<sup>39</sup>

If the meeting notice is transmitted along the chain of intermediaries, this minimum content required by Table 3 of the Implementing Regulation must, just like the meeting notice of a listed company, enter the chain in an ISO message which allows for straight-through processing in accordance with Article 2(2) of the Implementing Regulation. See IV.1 for further information such as guidance on how to populate individual fields.

### **Recommendation for the German market (2.31.):**

If a meeting notice of an unlisted stock corporation is transmitted along the chain of intermediaries, the minimum content required by Table 3 of the Implementing Regulation should be delivered into the custody chain in an ISO message in the same way as meeting notices of listed companies. The guidance on populating the fields set out in IV.1 should be followed.

### **b. Notification of a general meeting convened by a company issuing registered shares (AktG Section 125(2))**

If they are entered in the share register, shareholders in a company issuing registered shares receive notification of the general meeting from the company direct (AktG Section 125(2)). So provided that a shareholder's name is in the share register, intermediaries can assume they will obtain information about the general meeting from the company. In such cases, intermediaries are under no obligation to forward or transmit information (AktG Section 125(5), sentence 3, clause 2). If, however, an intermediary is entered in the share register in place of the shareholder or as a nominee, it must inform the shareholder or the next intermediary in the custody chain about the general meeting. In these cases, the company should also deliver the information into the custody chain in an STP format (cf. Recommendation 2.15.) or come to an agreement with last intermediaries on how to make information available.

<sup>38</sup> BeckOGK/Rieckers, 1.2.2021, AktG § 125 para 25; Grigoleit/Herrler, AktG, 2<sup>nd</sup> edition 2020, § 125 para 13 (German only).

<sup>39</sup> Hüffer/Koch, AktG, 15<sup>th</sup> edition 2021, § 125 para 17; Grigoleit/Herrler, AktG, 2<sup>nd</sup> edition 2020, § 125 paras 13 und 18; BeckOGK/Rieckers, AktG, 1.2.2021, § 125 para 28 (all in German only).

### **c. Forwarding and transmitting the meeting notice (AktG Section 125(5), sentence 4 in conjunction with Section 125(5), sentence 3)**

Under AktG Section 125(5), sentence 4, the obligation of intermediaries to transmit and forward information in accordance with AktG Sections 67a and 67b also applies to unlisted stock corporations. This sentence also states that unlisted companies are not subject to the requirements of the Implementing Regulation, however. As a result, the references to the Implementing Regulation in Sections 67a and 67b have no relevance. In particular, intermediaries do not need to comply with the deadlines specified in Article 9 of the Implementing Regulation.

### **d. Proof of entitlement (AktG Section 123(3))**

AktG Section 67c(3) also applies to unlisted stock corporations.<sup>40</sup> This is supported by the wording of the provision, which does not limit the requirement to listed companies. Furthermore, the resolution recommended by the Bundestag Legal Committee explicitly states in the justification for amending AktG Section 67a that AktG Section 67c(3) is also intended to apply to unlisted companies.<sup>41</sup> The scope and purpose of AktG Section 67c(3) nevertheless remain unclear for unlisted stock corporations since AktG Section 123(3), clause 1 simultaneously gives them unrestricted freedom to determine in their by-laws how proof of entitlement is to be submitted.

#### **Recommendation for the German market (2.32.):**

Last intermediaries which receive a request from a shareholder in an unlisted stock corporation to obtain proof of entitlement pursuant to AktG Section 67c(3) should advise the shareholder that in many cases such proof is neither necessary nor sufficient to safeguard their rights.

<sup>40</sup> BeckOGK/Cahn, 1.2.2021, AktG, § 67c para 2, § 67a para 7 with reference to the resolution recommended by the Bundestag Legal Committee (German only).

<sup>41</sup> Bundestag printed matter 19/15153, page 54 (German only).