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II.5. THE REMOTE PARTICIPATION OF SHAREHOLDERS IN THE GENERAL MEETINGS OF PRIVATE COMPANIES AS A TOOL FOR MORE INCLUSIVE SHAREHOLDER ENGAGEMENT

Potential of company law to contribute to more inclusive shareholder participation in general meetings

The 2030 Agenda for Sustainable Development of the United Nations includes the 17 Sustainable Development Goals and their 169 related targets, and provides a new policy framework aimed at balancing three dimensions – economic, social, and environmental (profit, people, and planet) – and ensuring that no one is left behind (UN 2015, p. 3). With the view that companies could take on a bigger role in contributing to the overall progress of achieving the UN Sustainable Development Goals (EC 2019a, pp. 26–27; EC 2019b, p. 17; EC 2020, p. 6), and considering COVID-19-pandemic-related developments that witnessed increased debate on corporate sustainability, there are ongoing discussions over the corporate governance framework being more aligned towards sustainability objectives.

Shareholders can bring changes in corporate policies and practices in order to engage companies on sustainability issues, and the corporate governance framework has to be adapted in such a way as to encourage shareholder engagement for companies to better deliver sustainability. There is the potential for company law to contribute to more inclusive shareholder participation through the mechanism of the general meeting, as the principal venue for shareholder engagement. Although a number of legal tools that could produce desirable changes in the pursuit of these policy goals can be considered, digital solutions offering remote participation can make shareholders more participative in general meetings, and digitalization can produce positive effects on sustainability in more general terms. An example of this is converting to the online format in an emergency situation when, seeking to protect the public health, a physical gathering is not permitted, or this avoids travelling cross-border to the physical address where the general meeting would take place.

Assuming that shareholders can contribute to corporate sustainability, this article analyzes the company law rules that govern remote attendance and voting by shareholders at general meetings as a legal tool for more inclusive shareholder engagement in Lithuanian companies. There are divergent views as to the regulatory approaches that deal with the online and in-person participation of shareholders in general meetings in achieving the policy goals, and their effects in public and private companies. In Lithuania, the LSC provides for certain peculiarities on remote participation for listed limited liability companies, if compared with private limited liability companies (hereafter – private company). The focus of this article, however, is on private companies as the most popular legal form of company in Lithuania (Official Statistics, data for 2021), and a legal form which is not subject to harmonization under European company law.

Although the central role of the general meeting as a mechanism to anchor shareholders' democracy and to increase the accountability of corporate management is highlighted in public companies where ownership and control is separated (Nili and Shaner 2022, pp. 140–153; BETTER FINANCE-DSW 2020, p. 4), the notion of the general meeting as a forum for shareholders should not be overlooked in the context of private companies. This especially holds true in the light of the rulings of the Supreme Court of Lithuania in recent years, which upheld a wider discretion of shareholders-owners that can be exercised thought the medium of the general meeting by endorsing a broader mandate of the general meeting, as a primary corporate organ with the ultimate authority of the shareholders, in a private company (rulings of the Supreme Court of Lithuania of 24 November 2021 in civil case No. e3K-3-294-823/2021, and of 2 December 2021 in civil case No. e3K-3-300-313/2021).

The ease of online participation can also have a reverse side for minority shareholder to effectively interfere into management and affairs of a private company. Shareholders of private companies with partnership-type characteristics are often personally involved in the company's management and its affairs, and thus face-to-face interaction is likely to be more appropriate. Minority shareholders who are not part of the management group and have no similar interaction with the company outside of the general meeting, compared to their fellow majority shareholders, can demonstrate a willingness to be in-person at the meeting in order to be meaningfully engaged in the company's affairs and to influence decision-making as well as corporate policies and practices. Needless to say, striking a balance between the different interests of minority and majority shareholders can be challenging.

Having this all in mind, this article starts with a historical analysis of the Lithuanian legal framework on the remote participation of shareholders in general meetings, which was in force before and during the COVID-19 pandemic (from 2009 to 2022). For the purpose of inclusive shareholder participation, it also addresses the major drawbacks of the light regulatory approach in force at that time. The article then proceeds with an analysis of the Lithuanian case law to identify the key challenges in the light of inclusive shareholder participation that both companies and shareholders have faced in applying the legal regulations governing the attendance and voting of shareholders by electronic means in practice. Finally, on the basis of this analysis and referring to comparative examples, the article evaluates whether and how the new rules on shareholders' remote participation, as adopted in November 2022 by the Lithuanian Parliament, address the notion of shareholder participation in general meetings by electronic means under normal circumstances in the context of private companies.

Company law rules on remote attendance and voting at general meetings: before and during the COVID-19 pandemic

Legal framework since 2009

Since 2009, the Lithuanian legislation has provided a legal basis for shareholders' governance rights associated with general meetings to be exercised in an online format. According to Part 4 of Art. 21 of the Law on Stock Companies (hereafter – the LSC) enacted in July 2009, a company can enable shareholders to attend and vote at a general meeting by electronic means. This rule survived during the COVID-19 pandemic, and it was in force by the end of November 2022.

From the historical perspective, the rule on remote shareholder participation in general meetings was introduced into the LSC by implementing the provisions of Art. 8 of Directive 2007/36 on shareholders rights (hereinafter – the SRD or the directive), which required Member States to permit listed companies to offer to their shareholders any form of participation in the general meeting by electronic means (Arts. 1 and 8 of the LSC). The scope of harmonization was limited to listed companies alone, while the Lithuanian legislator when implementing the directive simultaneously enacted a broader personal scope and established an option for the shareholders of both private and public companies to engage remotely at general meetings.

The LSC embeds the following shareholder governance rights associated with the exercise of the general meeting by electronic means, while the right to attend and the right to vote at the meeting are to be exercised at the discretion of the company, the remaining rights are determined by law:

1. the shareholder's right to attend the meeting may be exercised by electronic means. This right also includes two other components – the right to participate in discussions and the right to ask questions at the meeting (Parts 1 and 4 of Art. 21 of the LSC);
2. the shareholder's right to put items on the agenda may be exercised by electronic means (Part 3 of Art. 25 of the LSC);
3. the shareholder's right to table draft resolutions may be exercised by electronic means (Part 4 of Art. 25 of the LSC);
4. the shareholder's right to vote at a general meeting may be exercised by electronic means (Part 4 of Art. 21);
5. the shareholder's right to vote by correspondence (written ballot) may be exercised by electronic means (Part 3 of Art. 21 of the LSC).

There are no specifically designed rules on the shareholder's right to information when the corporate meeting is organized in a virtual form. The general rule is that a company has to answer or indicate in writing the reasons for the refusal to provide an answer to the shareholder's questions submitted to the company that are related to the items on the agenda of the general meeting, if the company received the questions no later than 3 business days before the meeting. In principle, the company can refuse to provide corporate information if it is considered confidential or related to the company's commercial (industrial) secrets (Art. 16^1 of the LSC).

Among other essential aspects related to remote participation it should be mentioned that following the spirit of the SRD (Part 2 of Art. 8), the use of electronic means for the purpose of enabling shareholders to attend and vote at a shareholders' general meeting is allowed, subject only to such requirements and constraints that are necessary in order to ensure the identification of the shareholder and the security of the electronic communication, and only to the extent that these constraints are proportionate to achieving those objectives (Part 5 of Art. 21 of the LSC and Part 6 of Art. 21 of the current version of the LSC)).

As regards the procedures, the LSC requires that a notice on the forthcoming shareholders' general meeting (or alternatively – information on the company's website) includes a description of the order on attendance and voting at a shareholders' general meeting by electronic means (Item 9 of Parts 2 and 3 of Art. 26 of the LSC).

Regulatory challenges for more inclusive shareholder engagement at general meetings

An overview of the legal framework in force in the 2009–2022 period concerning remote shareholder participation in the general meetings of private companies enables the following conclusions.

Firstly, the focus of the legal rule providing that companies can enable their shareholders to attend and vote at a general meeting by electronic means was on the private autonomy of companies in holding the general meeting through remote participation. Participation in the meeting by electronic means was not an entitlement for shareholders by law, but rather a tailor-made decision at the discretion of the company.

Secondly, by permitting companies to enable remote shareholder participation in general meetings the LSC did not address which corporate body had to decide on this issue. According to the provisions of the LSC, the board of directors (or the managing director if the board is not formed) was responsible for holding the general meeting, and the decision on shareholder participation by electronic means does not fall under the exclusive competence of the general meeting (Parts 2 and 3 of Art. 23 and Part 1 of Art. 20 of the LSC). Further, the LSC had no requirement that remote participation should have been envisaged in the articles of association of the company. It follows that corporate directors alone were able to decide on the issue, unless the articles of association of the company provided that the general meeting should have dealt with it. It is worth mentioning that this issue is not self-explanatory, and, as demonstrated on a comparative basis, there were different regulatory approaches as to who should decide on remote shareholder participation (e.g., the decision on the purely virtual format of the meeting is made by shareholders though the medium of articles of association in Denmark, while the same decision is made by the board of directors in Ireland; ICLEG 2022, pp. 9–10).

Thirdly, by allowing companies to opt for remote shareholder participation in the general meeting the LSC did not provide clarification as regards its hybrid or exclusively virtual format. Furthermore, as is relevant in a private company context, company law rules have not tackled the protection of shareholders disadvantaged by the change to the exclusively virtual format of the meeting. Although

participation by electronic means is not a shareholder right under the SRD (EC 2022, pp. 2, 9), national laws on the possibility to hold a purely virtual general meeting vary (ICLEG 2022, pp. 7–9; VUTT and VUTT 2022, p. 445). There was no legal certainty on whether a general meeting where in-person participation is unavailable should be permissible for Lithuanian companies.

Fourthly, these light regulations presupposed wide discretion of corporate directors in enabling shareholders to participate remotely in these meetings. Therefore, the leeway of corporate directors should have met the standards of good faith and reasonable behavior.

Although the legislative approach enabling the remote participation of shareholders at corporate meetings in force in the 2009–2022 period was rather general and abstract, it can be assumed that these company law rules built the necessary prerequisites for more inclusive shareholder engagement.

Having said that, it should also be acknowledged that light regulations on remote shareholder participation in general meetings – raising uncertainties for companies on how to properly translate general and abstract rules into concrete corporate practices on the one hand, and failing to adequately protect minority shareholders in a private company affected by such corporate practices on the other – can pose challenges to inclusive shareholder participation. The case law discussed below evidences the fact that the courts had to dealt with the interpretation and application of the provisions of the LSC concerning remote shareholder participation in annual general meetings during the COVID-19 pandemic. Although difficulties were experienced by companies and their shareholders in these extraordinary circumstances, the case law also provides valuable insights to forecasting the challenges that can be encountered in relation to the remote participation of shareholders under usual circumstances.

Annual general meeting of shareholders during the COVID-19 pandemic

Duty to hold annual general meeting

Although the legal rule on shareholders' remote participation in general meetings has been in force for more than 10 years, an online format for the use of shareholders' governance rights at the annual general meeting deserved special attention during the COVID-19 pandemic, when legal restrictions relating to physical gatherings aimed at protecting the public health were in place.

The LSC requires a company to hold an annual general meeting of shareholders within 4 months after the end of the corporate financial year (Part 1 of Art. 24 of the LSC). The annual general meeting has to approve the annual financial statements of the company and decide on the distribution of corporate profits. The approved financial statements of the company have to be submitted to the Register of Legal Entities within 30 days following the annual general meeting (Parts 2 and 3 of Art. 58 and Part 1 of Art. 59 of the LSC).

On a comparative basis, during the COVID-19 pandemic, when restrictions on physical gatherings were applied and the traditional form of general meeting could not take place, temporary

special measures in the field of company law were enacted in some jurisdictions, and new legal rules were adopted or existing legal rules were relaxed or suspended (Enriques in press, pp. 261–262). For example, given the restrictions on physical gathering, shareholders had to exercise their rights at general meetings remotely or through proxy, to vote by correspondence in advance of the meeting, or to adopt decisions without meeting. Additionally, the deadline to convene an annual general meeting was extended by simultaneously postponing the delivery of annual financial statements of companies to the business register (Borselli and Farrando 2020, pp. 274–294; BETTER FINANCE-DSW 2020, pp. 6-12).

Unlike in some other jurisdictions that specifically addressed the emergency situation in the field of company law, in Lithuania there were no special legal rules dealing with annual general meetings of shareholders, and the explicit annual general meeting requirement was retained – i.e., neither was the deadline to convene an annual general meeting extended nor were corporate directors released from the duty to convene the annual general meeting. As under normal circumstances, during the COVID-19 pandemic the annual general meeting had to be held within the prescribed term. Shareholders' rights were also not specifically addressed by law during the pandemic.

In Lithuania, due to the quarantine restrictions imposed – where all events and gatherings organized in both open and closed spaces were prohibited, as introduced in the period of 16 March to 18 May 2020 in the territory of the Republic of Lithuania by Resolution No. 207 of the Government of the Republic of Lithuania of 14 March 2020 – companies could not convene annual general meetings with shareholders' physical attendance. For the remainder of May to 1 June 2020, physical gatherings were significantly restricted.

Having regard to the closed nature of the general meeting, in one of the cases, shareholder argued that the quarantine restrictions should be understood within the boundaries of the specific concept of meetings to express views and opinions freely in public gatherings to ensure the expression of the civic activity of the person in society. This position was not sustained by the jurisprudence (the ruling of Vilnius district court of 20 August 2020 in the case of administrative offenses No. AN2-273-898/2020). Given that the quarantine restrictions were aimed at managing the pandemic, the court ruled that the notion of gatherings equally applies to companies holding annual general meeting with the physical participation of their shareholders.

Case law on changing the format of the general meeting

Given the quarantine restrictions on holding a physical form of general meeting, coupled with the restrictions on travel, in order to fulfil their duty to hold an annual general meeting during the pandemic companies had to choose other formats in which to conduct the meeting. Case law evidences that, in 2020, the legal framework would also have permitted the exclusively online format of the general meeting of shareholders, as companies facing the challenge of holding a purely virtual meeting invited all shareholders to vote by correspondence (written ballot) before the date of the meeting took place. In such cases, some minority shareholders felt that their rights were not respected.

This can be illustrated by the following two examples of case law concerning challenging the decisions of the general meeting in private companies that, in principle, share similar arguments of

the parties and reasoning of the court at the appeal instance (the civil cases of Vilnius district court: the ruling of 20 April 2021 in case No. e2A-829-232/2021 and the ruling of 30 March 2021 in case No. e2A-777-565/2021). In civil case No. e2A-829-232/2021, the litigation was initiated by the minority shareholder holding 11.30 percent of the votes and disputing the corporate decisions approved by the majority of votes, holding 78.62 percent. In another case, No. e2A-777-565/2021, the litigation was initiated by minority shareholders holding 8.78 percent of the votes and disputing the corporate decisions approved by the majority of votes, holding 83.16 percent. The ground for raising a lawsuit by the minority shareholders against the decisions of the annual general meeting was an essential violation of their governance rights caused by a change of the format of the general meeting.

The company conducted the general meeting by replacing its traditional form of the gathering with voting by correspondence (written ballot) in advance of the meeting. Essentially, the shareholders, who expressed their will to convene a virtual general meeting being supplemented with voting by written ballots and who finally decided not to vote by correspondence, which was the only option offered by the company to participate in the meeting, argued that the shareholders and not the management are entitled to decide on a change of the format of the general meeting, and that such a decision should be made by shareholders unanimously. The plaintiffs also stressed that due to the change of the format of the general meeting they were deprived of the right to attend the meeting and the right to vote at the meeting, and other governance rights associated with the general meeting were also restricted (i.e., the right to take part in debates, the right to ask questions, the right to propose new agenda items, and the right to table alternative draft resolutions on agenda items). The shareholders-plaintiffs argued that if the general meeting could not have taken place in a lawful manner, then the company had to reconvene the meeting.

In both cases, the court emphasized that due to the quarantine restrictions imposed in relation to the quarantine regime, the company could not organize a physical annual general meeting of shareholders. The court sustained the arguments of the company that the change of the format of the general meeting by choosing voting by correspondence in advance of the meeting was justified since, at that time and under the particular circumstances of the case, the company was not able to deliver a virtual meeting at short notice, nor did it have the necessary funds to hold it. Remote participation would have been available only to a part of the shareholders because some did not have the opportunity to sign documents with an electronic signature, nor did they have the necessary electronic means of communication such as computer equipment, a phone, or internet access.

In case No. e2A-777-565/2021, it was stressed that neither the company nor its 38 shareholders had had enough time to prepare for holding the annual general meeting by electronic means. The court upheld the company's position that the only objective way to fulfil the requirement on the convocation of the annual general meeting within the established deadline (30 April 2020) was the invitation of shareholders to vote by correspondence before the meeting took place.

In both cases, the court not only considered the specific conditions of the quarantine, but also analyzed the engagement of the plaintiffs-shareholders. The shareholders argued that had they voted by correspondence in advance of the meeting, they would have agreed with the proposed unlawful form of the meeting. The court, however, qualified the shareholders' behavior in not using their

associate rights as passive (e.g., the shareholders failed to ask for information related to the agenda of the general meeting, to submit questions in advance, to propose alternative draft resolutions on the agenda items, or to table new agenda items). Given the specific circumstances of the quarantine and the passive engagement of the plaintiffs vis-a-vis the company, the court ruled that due to the change of the format of the general meeting the procedural violations on the convocation of the meeting did not amount to an essential violation of the shareholders' governance rights.

In the legal proceedings initiated by the shareholder of a private company holding 25 percent of the votes, the court (the ruling of Klaipeda district court of 4 April 2022 in civil case No.e2A-195-1092/2022) had to rule, among other things, on the validity of the decisions of the annual general meeting of shareholders as of 30 April 2020 (*inter alia*, the decision to approve the financial statements for 2019) and the decisions of another general meeting as of 18 June 2020, both held by voting by correspondence even though the shareholder had made a request to arrange a virtual or physical meeting. Unlike in the abovementioned cases, the shareholder-plaintiff had voted by correspondence before the date of the meetings.

When assessing the shareholder's arguments about the breach of their governance rights associated with the change of the form of the general meeting, the court partly upheld the company's position that it had difficulties in arranging shareholders' remote participation in the annual general meeting on 30 April 2020 due to objective reasons, since the company had to find safe ways to communicate remotely and to ensure the proper identification of participants-shareholders, as required by Part 5 of Art. 21 of the LSC. Although the legal framework does not guarantee debates at the corporate meeting and direct interaction among its participants (the court expressed the view that other fellow shareholders and corporate management may not attend the general meeting), the plaintiff's position concerning the forthcoming general meeting was disclosed and known to the fellow shareholders, as the shareholder had submitted arguments and concerns in written form both to the company and the other shareholders before the meeting. The court agreed that the shareholder's participation in either a remote or physical face-to-face gathering was constrained by the change of the form of the corporate meeting. However, given the above, it ruled that this hurdle by its nature and scale could not be an independent and sufficient ground for the court to declare the decisions of the general meeting invalid on that particular ground.

In regard to another general meeting convened on 18 June 2020, the court took a different view, stating that the company had sufficient time to adapt to the changes and to organize the general meeting by electronic means. Having said that, the court found no sufficient basis to invalidate the decisions of the shareholders' general meeting on that particular grounds by considering the direct communication of the defendant vis-a-vis other fellow shareholders before the meeting.

The above jurisprudence demonstrates that the courts – by interpreting and applying the legal provisions governing the duty to convene an annual general meeting to approve annual financial statements within the firmly prescribed term, on the one hand, and the respective shareholders' participation rights, on the other – have evaluated the specific circumstances. *Firstly*, the courts have acknowledged that companies facing the COVID-19 pandemic, which was of an exceptional nature and scale, had to adapt to changes and transform their corporate practices towards remote participation with insufficient time to prepare for it. *Secondly*, the courts have considered the *status quo* of the LSC which had to be applied in the absence of temporary special legal measures to address the

situation of the quarantine in the field of company law. And the courts have supported a wider discretion of companies in using voting by correspondence instead.

Judicial challenges for more inclusive shareholder engagement at general meetings

Under normal circumstances, when the use of technology has already progressed significantly, corporate practices that do not enable shareholders' gathering in either form – physical and/or remote – and offer voting by correspondence as the only option to participate in the general meeting should pose concerns about the threshold required to meet the minimum standards of the fundamental rights of shareholders. While aimed at encouraging shareholder engagement, the law obliges the company, following the request of the shareholder, to arrange voting by correspondence on agenda items before the date of the meeting. Therefore, converting a forum for shareholders into their exclusively written participation at the company's own discretion under normal circumstances should not be permissible.

Following the jurisprudence of the Supreme Court of Lithuania, when the governance rights alone of shareholders are violated (and a violation of the financial rights of shareholders or collective interest or public interest is not simultaneously claimed), a breach of the procedural rules governing the organization of general meetings can be a sufficient ground to challenge the decisions of the meeting if the shareholder-plaintiff demonstrates that the decision being disputed causes prejudice which is not of a minor nature (Review of the case-law of the Supreme Court of Lithuania of 22 May 2019 on the implementation of shareholder rights and their remedies). A breach of the most fundamental rules governing the functioning of the corporate body and corporate decision-making at the general meeting, such as quorum requirements or majority rule, is treated as essential, and it forms a sufficient basis for the court to set the decision aside. In other cases, if the same results are anticipated if the meeting is re-convened anew with the attendance of the plaintiff-shareholder, as a rule, no essential infringement of the shareholder's governance rights associated with the procedural violation in holding the meeting will be found (for more about shareholders' remedy to challenge the decisions of general meetings in Lithuania, see: Banytė and Bitė (2013a, 2013b); Mikalonienė (2012a, 2012b); as to the side effects in case of the extensive right to challenge the decisions of the general meeting, see Hopt (2022, p. 8)).

Procedural rules governing general meetings are primarily designed for the benefit of shareholders, enabling them to control the company by using their powers and governance rights through the medium of the forum in collective decision-making (Toiviainen 1998, pp. 14, 26, 31). Governmental rights associated with the general meeting that are of a procedural nature empower shareholders to use their voting rights properly (Mikaloniene 2015, pp. 57, 60). These rules create prerequisites for shareholders to make decisions based on essential and correct information (rather than on the basis of incomplete and defective information) – which, *inter alia*, is obtained in the "*introduction of the agenda item – discussion – decision making*" phases of the meeting – as well as affect the decision-making at a general meeting and make their voice heard (Toiviainen 1998, pp. 40, 83, 95, 128; Perakis 2004, pp. 67–68, 74–75). There are two independent outcomes of the deliberations

at the meeting: *firstly*, the shareholder can make informative decisions; *secondly*, although adhering to the majority rule, the legal framework enables each shareholder to have an influence on the decision-making. For example, during the meeting shareholders can intervene and effectively contribute to the discussion, ask questions (*inter alia*, follow-up questions), express and exchange opinions, clarify positions and participate in debates, as well as, if the shareholder holds 5 percent of the votes, propose alternative draft resolutions on the agenda items and thus influence the substance of the decision to be made by other participants-shareholders.

On the basis of the legal fiction, it is deemed that a shareholder using a written ballot to vote by correspondence before the meeting takes place has participated in the meeting and their votes are counted for quorum and voting purposes (Part 5 of Art. 27 of the LSC). When the right to attend the general meeting, which includes the right to speak and the right to ask questions during the meeting, is eliminated against the shareholders' will, and shareholders are only invited to use their associated governance rights in written form, the elimination of shareholders' face-to-face attendance at the meeting in any form (physical or virtual) is obviously a breach of shareholders' governance rights.

Another aspect is whether such a breach must be a sufficient ground to challenge the decision of the general meeting. It has been long debated whether the restriction of the participation in the meeting is to be qualified under the most fundamental breaches of shareholders' rights, forming the basis to invalidate the decisions of the general meeting as unlawful. The prevailing case law which is aimed at balancing the interests of all persons concerned – those of the company, the plaintiff-shareholder and fellow shareholders who voted in favor of the decisions – considers that the decisions of a general meeting of shareholders should be declared invalid in limited cases, and treats this shareholder remedy to challenge the decisions of the general meeting on the procedural grounds as *ultima ratio* by simultaneously limiting the amount of litigation. Emphasis is placed by the jurisprudence on the legitimacy of the formation of corporate will and protection of the collective interest. As mentioned above, the case law essentially approaches the legitimacy of the general meeting in relation to the violation of the procedural grounds based on whether similar results should be expected if the meeting was to be reconvened anew with the attendance of the plaintiff-shareholder.

The use of public enforcement linked with the court proceedings on administrative offences against corporate directors who have committed offences in prejudicing shareholders' governance rights when holding the general meeting as being initiated by the shareholder can be seen as a partial response to the situation. According to the case law which involves private companies (the ruling of the Supreme Court of Lithuania of 8 February 2022 in renewed case of administrative offenses No. 2AT-3-387/2022; for similar litigation in administrative offenses, see: Vilnius district court, ruling of 12 November 2020, the case of administrative offenses No. AN2-407-908/2020; Šiauliai district court, ruling of 29 March 2022, the case of administrative offenses No. eAN2-28-744/2022), shareholders argued that failure to convene an annual general meeting within 4 months following the end of financial year and postponing holding the meeting until a later date after the quarantine violated their participation rights as shareholders.

Part 1 of Art. 119 of the Code of Administrative Offenses, in embedding sanctions for various violations of members' rights of certain type of companies, *inter alia* provides that failure to convene

a general meeting of a private company within the prescribed term as well as non-compliance with the procedure for holding these meetings leads to imposing fines on corporate directors. According to the case law, when the board of directors is not formed, the managing director has a duty on their own initiative to convene the annual general meeting, and this duty is not subject to any conditions. The director's duty to convene the annual general meeting by 30 April 2020 was violated, although the quarantine restriction on physical gatherings was imposed during the COVID-19 pandemic and therefore the company could not hold the physical general meeting in its traditional way. However, the director of the company should have organized the meeting within the prescribed term by employing other alternative means, i.e., enabling the participation of shareholders by electronic means or voting by correspondence (written ballots) in advance.

In addition, it is worth noting that even though the reasoning of the courts concerning the use of shareholders' rights associated with general meetings applies to the emergency situation in the above case law, it raises uncertainty as to the qualification of the plaintiff-shareholder's behavior under normal circumstances as well. It is not self-explanatory under which circumstances not using the governance rights associated with the general meeting by the shareholder-plaintiff who disagrees with the unlawful corporate procedural rules is to be treated as passive behavior which is not justifiable according to the diligence standard of the *bonus pater familias* shareholder and produces negative consequences for the shareholder-plaintiff. Alternatively, this may be an acceptable standard of behavior of the shareholder-plaintiff assuming that, as a rule, a shareholder has governance rights and not duties and by not using the rights the shareholder demonstrates non-acceptance of the violation of the shareholders' rights and thereby does not waive the protection of their rights.

To conclude, the judicial approach emphasizing shareholders' remedy to challenge the decisions of the general meeting based on the violation of the procedural grounds in holding a general meeting as *ultima ratio* endorses the protection of collective interest over the interest of the particular shareholder, and may suggest that the legal rules on remote shareholder participation have to be revisited to make them more inclusive.

Improving company law on remote shareholder participation for more inclusive shareholder engagement

The COVID-19 pandemic changed the understanding of how general meetings of shareholders should be conducted and during it companies gained experience on preparing for the transition to remote shareholder participation. While the above case law evidences that, in certain cases, transitional cost-based analysis by companies on enabling shareholders of a private company to participate by electronic means in general meetings, coupled with the majority view of shareholders, acted as an impediment to more inclusive shareholder participation.

Having said that, it should be noted that digitalized measures for shareholder engagement can at the same time contribute to certain inequalities among shareholders in fully realizing their voice in corporate governance by electronic means. This is particularly true in cases when corporate meetings are purely virtual and a hybrid format is not maintained. Those who are vulnerable or

disadvantaged in exclusively exercising shareholders' governance rights remotely or those who have not consented to such an exclusively remote format may potentially be concerned that their fundamental rights are respected.

For example, a confrontation among shareholders in a private company could potentially occur when the majority shareholders – seeking to promote efficiency in corporate management and to simplify communication between the company and its shareholders by using the experience gained during the COVID-19 pandemic – refuse to compromise with a hybrid format of general meetings and are in favor of holding purely virtual general meetings. This may occur while the minority shareholder who is not part of corporate management (despite holding 49 percent of the votes) prefers continuing the traditional use of the rights at these meetings by being physically present and having live, face-to-face debates at the general meetings, and contends that the deliberation phase with personal interaction brings real value into corporate decision-making as well as increases the accountability of management. The change of the meeting format which was used in the past as a long-term practice may be seen by the minority shareholder as a material change in the circumstances that fundamentally alters the investment environment, and hence they may consider that purely virtual general meetings should be inadmissible.

Given that social norms may play a role in contributing to inclusive shareholder participation, but the law is of decisive importance (Perakis 2004, p. 15), in the post pandemic context, company law rules have to be revisited to have better prerequisites to facilitate remote shareholder participation, on the one hand, and to ensure that minority shareholders are sufficiently protected, on the other. The protection of minority shareholders' rights are at the core of the procedural rules on holding general meetings (Toiviainen 1998, p. 128), first of all, company law rules should thus clearly approach whether the shareholder is entitled to use shareholders' rights by electronic means in relation to the general meeting, with the corresponding corporate duty to enable the shareholder to use the right in such format, as well as which corporate body decides on the purely virtual form of the general meeting.

New company law rules in 2022

The amendments of the Law on Stock Companies of 17 November 2022 – that *inter alia* aimed at improving the legal regulations of shareholder attendance and voting at general meetings by electronic means by changing Art. 21 of the LSC intended for normal circumstances – have tackled the above-mentioned issues. As the law currently stands (Part 4 of Art. 21 of the LSC), the duty to ensure the remote participation of shareholders at the general meeting is tied up with the interests of minority shareholders: upon the demand of shareholders possessing 1/10th of the voting rights (if the articles of association of the company do not provide for a lower threshold), the law imposes upon a company a duty to enable shareholders' participation and voting at a general meeting by electronic means. From comparative perspective, it should be noted (Borselli and Farrando 2020, p. 284) that this amendment is comparable with the legal rule in Latvia adopted during the COVID-19 pandemic, which permits a minority shareholder holding 20 percent of the share capital (unless

a lower threshold is stated in the articles of association of the company) to request participation in the meeting by electronic means.

It follows that a company will have to maintain a hybrid format of the meeting, i.e., physical presence will be supplemented with remote participation. Shareholders will benefit from expanded ways to use their rights at the general meeting in a more suitable form of participation – whether an online or offline format.

In addition to the physical general meeting or hybrid general meeting, the LSC clearly identifies a virtual general meeting. A conditional precedent for a company to hold a purely virtual (and not a hybrid) meeting is that the articles of association of the company have to provide for such a form of shareholders' gathering. These provisions of the articles of association have to be approved unanimously by shareholders holding voting shares. This amendment is similar to those in Austria, Germany, and Norway, for example, where a purely virtual general meeting in private companies is permissible with the consent of all shareholders (ICLEG 2022, p. 10).

A purely virtual form of meeting should not necessarily be all-inclusive, and the articles of association of the company can list certain decisions to be passed by using another form of shareholders' attendance and voting at the meeting (e.g., a hybrid meeting). According to the *travaux preparatoires* (Explanatory Note No. XIVP-1854 of 2022), if shareholders make a unanimous decision, a virtual meeting is a default rule and a physical meeting is an exception to that rule as stated in the articles of association of the company. A shareholder may consider that certain decisions of major importance deserve to be passed in a physical meeting by listing the decisions in the articles of association (e.g., to amend the articles of association, modify share capital, or change the company's legal status). It is suggested that a qualified majority is sufficient to revert to the physical general meeting as a default format.

Although the rule that the use of electronic means can be made subject to requirements necessary to ensure the identification of the shareholder and the security of electronic communication by the company, as long as the proportionality standard is retained, the board of directors (or the managing director if the board is not formed) has to approve internal regulations for attendance and voting at general meetings by electronic means by, *inter alia*, addressing shareholders' identification and data security issues. As stressed in the *travaux preparatoires*, it is not, however, permitted by the internal corporate rules to reduce shareholders' rights associated with attendance (e.g., the right to ask questions, to express opinions, to participate in discussions, as well as the right to challenge the decisions of the general meeting).

The new legal rules put an emphasis on the traditional form of in-person gathering as the prevailing format of the general meeting, and therefore treat it as a default rule. On the basis of the principle of contractual freedom, shareholders as holders of the governance membership rights that are exercised at their forum can opt out of a physical meeting through the articles of association and replace it with a purely virtual meeting instead. To facilitate more inclusive shareholder engagement, upon the demand of the minority shareholder, the company should allow the shareholder to participate by electronic means in addition to in-person attendance.

Therefore, the legal framework *firstly* implies physical attendance and voting by shareholders at a general meeting, as a default rule, and supplements it with the remote participation. *Secondly*, the new regulations highlight the importance of the private autonomy of shareholders over the discre-

tion of corporate directors in turning to a hybrid or virtual format of their participation at the meeting.

Potential for better law

There is certainly some space for a better law. For example, the notion on shareholder attendance and voting at the general meeting by electronic means in relation to the exercise of their rights in full at the meeting as a forum for shareholders should have been better clarified (for procedures used in remote participation, see Nili and Shaner (2022, pp. 169–172, 185–192, 195)). Shareholders' remote participation is another mode (way and form) in which shareholders can exercise their rights. Unless all shareholders agree otherwise, the right of the shareholder should not be modified because of the format – physical or remote – in which it is being used at the general meeting. Shareholder participation by electronic means, as an alternative to physical participation, should be comparable with the latter, and a different format of the use of the shareholder attendance and voting rights at the general meeting must have no effect on the substance of the rights of the shareholder. Despite procedural changes, companies have to provide shareholders with the same participation rights at a general meeting. Therefore, the content of the right should not change; options for actions under the right should not be restricted, minimized, or eliminated; and the powers of the shareholder should not be reduced. Shareholder participation by electronic means should be a replica of shareholders' in-person participation (e.g., there should be continuous, real-time, two-way transmission of communication that allows participants to see, hear, and speak with each other at the meeting) (for comparative examples, see: ICLEG 2022, pp. 11–12).

According to Part 1 of Art. 14 of the LSC, the governance rights of the shareholder cannot be limited, save for in the cases provided by law. Therefore, as long as the law does not provide limitations in relation to the attendance and voting rights of shareholders at the general meeting being exercised remotely, the company is not entitled to limit shareholders' rights.

Although extra costs and additional administrative burdens for companies are foreseen in a hybrid format general meeting, if compared to a uniform format of meeting, the remote participation of shareholders at a larger scale can be envisaged on the basis of contractual freedom through the medium of articles of association as well as the private autonomy of the company. In this case, it is debatable whether each shareholder rather than only shareholders holding a minimum of 10 percent of the votes should be entitled by law to demand remote participation in the general meeting. Participation by electronic means aimed at more inclusive shareholder engagement should, in general, be part of corporate practices in holding general meetings by private companies.

In some jurisdictions, the impact of technical constrains on the process of remote participation and in challenging the decisions of general meetings has been addressed (EC 2022, p. 11). In Lithuania, the legal framework providing a generally rather casuistic approach in relation to providing for legal grounds to challenge the decisions of the general meeting by establishing that the decisions of legal entities can be declared invalid if the decisions violate the law, the articles of association of the legal entity, or the principles of reasonable behavior and good faith (Part 4 of Art. 2.82 of the Civil Code; Part 10 of Art. 19 of the LSC), should be preserved. Technical constraints that produce

impediments for shareholders to use their rights should be viewed in a way comparable to physical constrains, subject to the peculiarities of their online nature, and therefore defects in shareholders' rights should be treated alike.

Having said that, the amendments of the LSC achieve more legal certainty as regards the remote exercise of the rights of shareholders at general meetings, and contribute to more inclusive shareholder engagement by strengthening the advantages of digitalization and dealing with shareholders' attendance and voting at general meetings by electronic means in an overall more balanced way.

Conclusions

The new Lithuanian legal rules on remote shareholder participation in general meetings, as adopted in November 2022, that are intended for normal circumstances, sufficiently promptly considered the most problematic issues as far as they relate to inclusive shareholder participation in private companies, and have dealt with shareholder attendance and voting at general meetings by electronic means in an overall more balanced way.

Although there is some space for improvement, the amendments of the LSC achieve more legal certainty as regards the remote exercise of the rights of shareholders at general meetings, and contribute to more inclusive shareholder engagement by both strengthening the advantages of digitalization and placing an emphasis on the private autonomy of shareholders over the discretion of corporate directors in turning to a hybrid or virtual format of their participation at the meeting. The new rules are likely to reduce the confrontation that minority shareholders can face in light of a judicial approach endorsing the protection of collective interest over the interests of an individual shareholder when the decisions of a general meeting are challenged on procedural grounds.

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LAW AND SUSTAINABILITY

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Editors:
Alessio Bartolacelli
Dovilė Sagatienė

Wydawnictwo Księgarnia Akademicka
Kraków 2023

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Reviewers:
Prof. dr. Virginijus Bitė
Assoc. Prof. dr. Juozas Valčiukas

Copy-editor:
MB „Kopis“

Cover design:
Pawel Sepielak

Approved by Mykolas Romeris University Law School Council on February 2, 2023 by resolution No. 1T-2 (1.12 E-20401)



ISBN 978-83-8138-839-9 (print)
ISBN 978-83-8138-840-5 (online)
https://doi.org/10.12797/9788381388405

KSIĘGARNIA AKADEMICKA PUBLISHING
ul. św. Anny 6, 31-008 Kraków
tel.: 12 421-13-87; 12 431-27-43
e-mail: publishing@akademicka.pl
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