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CONVENING THE GENERAL MEETING OF SHAREHOLDERS OF A LIMITED COMPANY: ESTONIAN LAW IN A DIGITAL PERSPECTIVE

Maris Vutt[1]

University of Tartu, School of Law, Estonia
E-mail: marisvutt@gmail.com

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Abstract. In today's modern and digital society, electronic means of communication are used in all areas of life, including communication between shareholders of companies. The objective of this article is to determine whether – and if so which – modern-day electronic communication channels could be used by Estonian private and public limited companies for sending a notice of a general meeting, and also whether Estonian legislation is in accordance with the above-mentioned principles of the EU on this matter. To that end, the article begins with an analysis of the legal nature of a notice on convening a meeting and its communication. The article also analyses the requirements established in the Estonian legislation on convening a general meeting, comparing it with corresponding German and, to a lesser extent, British law. The hypothesis is that the applicable law in Estonia may currently impose unreasonable obstacles to the use of digital and flexible solutions for convening a meeting. Based on the analysis of the article, the main conclusion is that Estonian company law has not exercised all the possibilities for ensuring the use of flexible digital solutions regarding communication between a company and its shareholders, and therefore needs modernisation.

Keywords: shareholder rights, company law, convening meetings, exercising rights in digital form

Introduction

Digitalisation is a general trend in many areas including company law. In 2019, a new company law directive was adopted in order to promote the use of digital tools in several fields of company law.[2] In legal literature, Estonian company law has been described as a model of digitalization (Teichmann, 2017, p. 578). This is true in many aspects as Estonia was one of the first European countries to introduce the fully electronic commercial register, and the level of online registration of companies in Estonia is quite high. According to one survey, by 2011 85% of all companies in Estonia were already registered electronically (Kalvet et al., 2013, p. 93). However, one can ask whether Estonia can be considered successful in introducing digital solutions to other areas of company law.

It is important to determine the rules for sending notices of meetings for exercising the voting rights of shareholders, and to ensure their right to have a say in a company's decisions. Since the use of electronic means of communication (e-mail, Skype, messaging applications, etc.) is commonplace nowadays, the question arises of whether a company could utilise these communication methods in contact with its shareholders, including notifying them of a meeting.

An expert group established by the European Commission has emphasised, in its report on digitalisation of company law, that the use of electronic means of communication benefits companies and also their shareholders,

[1]PhD candidate, University of Tartu, School of Law; attorney, Law Firm TGS Baltic.
[2]Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law (Text with EEA relevance).

partly through enabling companies to make information available sooner and at less expense. The expert group noted that the Member States should afford all their companies (large and small alike, whether or not their shares are listed on a stock exchange) the opportunity to use electronic means of communication, ensuring, *inter alia*, the completeness of such communication (ICLEG, 2016, para 12.1–12.2, p. 23).

The expert group noted also that companies should, whilst also fulfilling other obligations, send notices on meetings to shareholders via electronic means (ICLEG, 2016, para 13.1, p. 25). This expert group made a recommendation to the Commission to consider adoption of measures designed to ensure that the company law of Member States would not inhibit the implementation of such communication (ICLEG, 2016, p. 25).

The objective of this article is to determine whether – and if so which – modern-day electronic communication channels could be used by Estonian public and private limited companies for sending a notice of a general meeting, and whether Estonian legislation is in accordance with the above-mentioned principles of the EU on this matter. To that end, the article begins with an analysis of the legal nature of a notice on convening a meeting and its communication. The article also analyses the requirements established in the Estonian legislation on convening a general meeting, comparing it with corresponding German and, to a lesser extent, British law. German law has been chosen for the comparative analysis due to the fact that German law, including company law, has always been a model for Estonian legislators. The United Kingdom, on the other hand, represents a different legal system, and thus often offers more flexible legal solutions. Among other things, the author considers whether the statutory provisions on convening a general meeting are mandatory in nature, and to what extent shareholders may deviate from the law in their selection of means of communicating notice and in delineating the respective rules in the articles of association of the company. The hypothesis is that the applicable law in Estonia may currently impose unreasonable obstacles to the use of digital and flexible solutions for convening a meeting. The main methods applied in this article are the comparative method and the method of teleological interpretation of legal provisions.

1. The Legal Nature of a Notice on Convening a Meeting

For examination of the possibilities of convening a meeting and the legal framework of the formation of the will of shareholders with regard to this matter, one must first delve into the legal nature of convening a meeting and the legal definition of the respective notice.
German legal literature states that the management board creates a basis for the meeting to take place by convening the meeting. The act of calling the meeting cannot itself be deemed a transaction (i.e. a declaration of intention intended to have a certain legal effect), since this declaration of intention (made by the management) does not on its own determine whether there will actually be a quorum at the meeting (Fleischer et al., 2016, Article 49 Rn. 8). Convening a meeting has been called a special 'act under company law' (Heidinger et al., 2017, Article 49 Rn. 15). At the same time, though, some German legal scholars are of the opinion that since, in the final stage, convening of a meeting is still aimed at ensuring that the meeting may validly take place if all the prescribed legal conditions are met, it could also be seen as a transactional declaration of intention (Article 49 Rn. 15–16). However, the opinion currently prevailing in Germany is that the regular rules on declaration of intention are not entirely suitable for application to convening a meeting (Fleischer et al., 2016, Article 51 Rn. 5).

Estonian legal literature has not addressed the legal nature of convening a meeting in detail, but it has noted (Saare et al., 2015, Ref. 893) that notice of a meeting is a declaration of intention that needs to be received within the meaning of the first sentence of Article 69 (1) of the General Part of the Civil Code Act (GPCCA).[3] Article 69 (1) stipulates that a declaration of intention directed at a certain person shall be expressed by the party making the declaration, and it enters into force upon receipt. In relation to convening a shareholders' meeting, the Supreme Court of Estonia has expressed a position in Case 3-2-1-10-17 that the provisions for sending a notice of a shareholders' meeting are special rules relative to the general norms in the GPCCA on communicating a

[3]General Part of the Civil Code Act, passed on 27 March 2002, entry into force on 1 July 2002.

declaration of intention (GPCCA Article 69), but it has not been specified whether a notice of a meeting is a declaration of intention. At the same time, the Supreme Court has found in Decision 3-2-1-123-07, analysing the matters pertaining to convening a meeting of a supervisory board of a public limited company, that sending such a notice could be regulated by the provisions on declaration of intention and transactions in the GPCCA. Since Article 68 (1) states that a declaration of intention may be expressed in any manner, unless the law prescribes otherwise and the Commercial Code (CC)[4] does not prescribe a specific formal requirement for the notice, any format could be used, including an e-mail message, to notify supervisory board members of a meeting.

It can be concluded from the above that Estonian case law proceeds from an understanding that, in general, a notice for convening a meeting of a body of a legal person governed by private law is a declaration of intention within the sense of the GPCCA. However, not all general provisions of the GPCCA are applicable to communicating notices on meetings, so it should be noted that a notice on convening a meeting is addressed by special regulation in the CC. This means, for example, that when determining the timeliness of sending a notice of a shareholders' meeting, one must not assess whether and when the receiving shareholder has had a reasonable opportunity to review the declaration received. In Decisions 3-2-1-6-03 and 3-2-1-10-17, the Supreme Court found that, instead, what is of relevance is when the notice could be deemed received at the postal or e-mail address of the shareholder in the case of use of the typical communication methods – that is, when the company can deem a message sent in a certain way received at the address of the shareholder.

Irrespective of whether a notice on convening a general meeting ought to be deemed a declaration of intention, it needs to be said that the sending of a notice is largely similar to a declaration of intention that must be received by a person not present. In both cases, it is important to ensure that the notice was sent to the correct address and that there is the possibility of the recipient actually receiving it. According to the second sentence of Article 69 (2) of the GPCCA, a declaration of intention directed to a party not present is deemed received once it has arrived at the residence or seat of the intended recipient and the recipient has had a reasonable opportunity to review it; however, the notice for a meeting also needs to be sent (to an address stated in the share register or the list of shareholders) in such a way that it would reach the recipient under normal conditions of delivery (per the third sentence of Article 172 (1) of the CC).

It can be concluded from the foregoing discussion that, although the Estonian legal literature does not clearly define the legal nature of a notice on calling of a meeting, the rules on declaration of intention apply to the extent to which the CC does not provide otherwise.

2. Ways of Notifying Shareholders of a General Meeting

Sending a notice of a general meeting of a private limited company is regulated by the second sentence of Article 172 (1) of the CC, which has been applicable in its current version since 1 January 2011. According to said provision, the notice shall be sent to the postal or e-mail address entered in the list of shareholders. Before 2011, the law provided for sending the notice simply to the address entered in the list of shareholders, and did not make clear reference to the possibility of sending the notice to an e-mail address. It is remarkable that the explanatory memorandum on the draft amendment act does not explain the reasons for the change or provide background on it. It merely states that the act shall be amended to allow sending a notice on a general meeting also to the e-mail address of a shareholder who has provided the corresponding address (EMCC, 2010). Thus, the law allows sending the notice to either a shareholders' postal address or their e-mail address.

[4]Commercial Code, passed on 15 February 1995, entry into force on 1 September 1995.

As regards Estonian private limited companies, the Supreme Court has indicated in its Case 2-16-17508 that Article 172 (1) of the CC provides the person calling a meeting with the choice of whether to send the notice to a postal address provided in the list of shareholders or instead to an e-mail address. When at least one of these options is exercised, the person convening the meeting is in compliance with the corresponding procedure specified by law. The Supreme Court has also expressed the view that sending a notice of a general meeting via registered mail is reasonable in, for example, a situation wherein the shareholder who is the intended recipient has several times failed to acknowledge receipt of e-mail from the company.

According to Supreme Court Decision 3-2-1-6-03, a general rule applies in Estonian law that in the case of sending the notice by regular post, it has to be sent (again, to the address indicated in the list of shareholders) in such a way that in the normal conditions of postal work, it would arrive at the address of the shareholder at least a week before the meeting is to be held. The Supreme Court has also indicated that an equivalent principle usually applies to sending the notice via e-mail: notice shall be deemed timely when the e-mail is sent both to the usual e-mail address used in communication between the shareholder and the company and in such a way that it would reach the recipient under normal circumstances in sufficient time to allow the shareholder at least one week to prepare for the meeting. Normally, sending an e-mail message implies its delivery to the recipient and it has to be assumed that the e-mail arrives on the day it was sent.

With regard to public limited companies, Article 294 (1) of the CC specifies that the notice shall be sent to the address entered in the share register by registered mail. If the public limited company has more than 50 shareholders, notices need not be sent to them individually; however, notice of the general meeting shall be published in at least one daily national newspaper. For listed companies, Article 294^1 of the CC since 2009 offers the possibility of publishing a notice about convening a general meeting on the company's website. This change was directly related to the obligation to transpose the Shareholder Rights Directive to Estonian law, based on Article 1 (1) of which certain requirements were established in relation to the exercise of certain shareholder rights arising from voting shares in relation to general meetings of companies that have a registered office in the Member State, and whose shares are being traded in a regulated market located or operating in the Member State. The explanatory memorandum on the draft act only states that the provision is necessary to transpose Article 5 (4) of the directive which, in essence, stipulates the same rule as Article 294^1 of the CC as then in force. Regrettably, the explanatory memorandum neither specifies the necessity of this provision or the purpose for it, nor contains analysis of whether such more lenient regulation of convening a meeting for listed public limited companies would lead to making at least the regulation on convening a shareholders' meeting more flexible, respectively.

With the CC amendments that took effect on 1 January 2006,[5] Article 294 $(1)^1$ was added, stipulating the possibility of also sending a notice on a general meeting electronically, on the condition that notification be included of the obligation to confirm the receipt of the document immediately. In this case, the notice is deemed delivered when the recipient returns confirmation of receipt of said document to the management in writing, by fax, or electronically. Neither the original text of the draft act nor its explanatory memorandum (EMCC, 2005) addresses such changes, so the purpose of this amendment cannot be identified therefrom. Article 294 $(1)^1$ has been added for the final version of the draft act of law. In the amendments to the CC on 28 December 2007, this provision was further specified, but the purpose for the provision was not. Statement of the meaning indicated above was added to the act with the act of law amending the acts pertaining to the notary information system and the registers of law.

Therefore, although Estonian law allows for sending a notice on calling a general meeting of a public limited company via e-mail, doing so has been made cumbersome in practice, and in a situation in which a shareholder

[5]Act amending the Commercial Code, passed on 12 October 2005, entry into force on 1 January 2006.

does not provide the management with confirmation of receipt, it is impossible to prove that the general meeting was properly convened.

In its Decision 2-16-17508, the Supreme Court has emphasised that the CC sets formal requirements on the sending of a notice on a meeting and that the purpose of such rules is to ensure that the shareholder receives the notices sent, along with enabling the person calling the meeting to be assured of, by sending the notice to a certain address, having complied with the requirements connected with sending the notice and of the decisions adopted at the meeting not being rendered null and void through violation of the procedure. Thus, according to the opinion of the Supreme Court, the procedural requirements of sending a notice are to protect the interests of both the receiving shareholder and the person convening the meeting.

As to the ways of convening a meeting under German law, Article 51 (1) of the Limited Liability Companies Act (GmbHG)[6] stipulates that a shareholders meeting of a private limited company must be convened by sending a registered letter. For this reason, calling a meeting in any other way, via e-mail etc., is not allowed. However, this is a default rule, which means that it applies only in case the articles of association do not contain specific rules on calling a meeting. According to the prevailing opinion in the legal literature, the way of convening a meeting can be regulated more precisely in the articles of association. For instance, it can be stated that a meeting may be called by post but also via e-mail or in a certain internet forum (*Netzgruppe*; Drygala et al., 2012, Ref. 129, p. 236). Such an opinion prevails in German literature, despite the fact that the legislation does not contain a provision conferring the right to dictate the rules on sending meeting notices in the articles of association. German legal scholars have also stated that, as to the formal requirements of convening a meeting, the law is non-mandatory (Baumbach et al., 2017, Article 51 Rn. 39). Shortening the period of notice via the articles of association, however, is not allowed. This can be explained by the nature of the German private limited company (GmbH), in which the relationships between shareholders are largely regulated under the principle of general freedom of contract, and that therefore is afforded quite extensive freedom in its articles of association (Drygala et al., 2015, Ref. 28, p. 15). It has been noted in the legal literature that, in principle, shareholders could even agree on calling meetings completely without any specific format (Seeling & Zwickel, 2009, p. 1098).

The way general meetings of German public limited companies are convened is regulated by Article 121 (4) of the Stock Corporation Act[7] (AktG), which diverges from the provisions of private limited companies mainly in that a general meeting of a public company is convened primarily by publishing a notice in a publication identified in the law or in the articles of association (*Gesellschaftsblätter*). These could involve electronically published official notices (*Bundesanzeiger*) or other publications or places of publishing set out in the articles of association (Drygala et al., 2015, Ref. 226, p. 482). For holders of registered shares, notice of the meeting could, alternatively, be sent via registered mail, if the articles of association do not rule out that possibility (but this is not compulsory; i.e. the holders of registered shares may be summoned to a meeting by publishing of a general notice; Hüffer & Koch, 2018, Article 121, Rn. 11f). Since public limited companies in Germany are generally large entities with their shares listed on the stock market, the emphasis is on publishing the notice in a specific way and it is up to shareholders to make sure they are informed of the meeting taking place. Pursuant to this reading of the law, the presumed permissibility of sending registered mail should enable those public limited companies with a specified circle of shareholders to notify of their general meetings in a more flexible way (AktG; Spindler et al., 2015, Article 121, Rn. 61).

German legal literature has stated that a registered letter sent via an official postal service provider (Deutschen Post AG) is deemed equivalent to notices delivered by persons governed by private law that provide a delivery

[6] Limited Liability Companies Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung, GmbHG*), last amended on 17 July 2017.
[7] Stock Corporation Act (*Aktiengesetz*), last amended on 17 July 2017.

service, given that the delivery standards applied are the same as those for the official postal service. However, it has been pointed out that this position does not yet have the official approval of the German Supreme Court, so it has so far been called legally uncertain (Hüffer & Koch, 2018, Article 121, Rn. 11f). Also of relevance is that articles of association may provide for notifying via fax, e-mail, or SMS – or even, in smaller public limited companies, a Facebook post, yet scholars discussing modern-day electronic means of communication have emphasised that the mere fact of sending is not sufficient; reasonable receipt of the notice must be ensured (Article 121, Rn. 11f). It is deemed unacceptable to notify in a way that part of the notice is sent/published in one way and another part by another means (e.g. part of a notice being published in an official newspaper of record while the other is sent by e-mail; Grigoleit, 2013, Article 121, Rn. 22). The legal literature notes that notifying via telephone is not forbidden *per se*, although, in light of practical considerations (i.e. it is difficult to prove), it is not recommended (AktG; Hölters, 2017, Article 121, Rn. 32).

The landscape presented above affords extensive freedom of agreement to German private limited companies as to the format of sending a notice on calling a meeting. Furthermore, irrespective of the fact that the articles of association of a public limited company are generally assigned a higher level of imperativeness, Germany's public limited companies are also usually allowed to prescribe different ways of sending a notice about a meeting, additional to the ones set out in the law. This is convenient for smaller public limited companies that are interested in notifying their shareholders as flexibly as possible.

In the United Kingdom, sending notices to shareholders on calling a meeting is regulated by Article 308 of the Companies Act 2006, establishing that notice of a general meeting of a company must be given in hard-copy form, in electronic form, by means of a Web site, or partly by one of these means and partly by another. Part 3 of Schedule 5, annexed to the Companies Act, establishes that a company may send or supply a document or information in electronic form only to a person who has agreed (generally or specifically) that the document or information may be sent or supplied in that form, and to an address specified for this purpose by the intended recipient. The same principle of agreement applies to publishing a notice on a website.

3. Provisions Regulating the way of Sending a Notice on Convening a Meeting – Default or Mandatory Rules?

Since Estonian legislation provides a certain standard for sending a notice about convening a general meeting but does not state whether shareholders may agree on some other form of notification, one needs to analyse whether the provisions regulating sending of said notice of a meeting are subject to party autonomy or instead mandatory (imperative). The internal organisation of a private limited company as a closed capital company is generally viewed as a matter of party autonomy in German law, and the shareholders can shape their relations via the articles of association to quite a considerable extent. The limits to them are deemed to consist of the overall limits of capital protection and private autonomy (Fleischer et al., 2016, Article 3, Rn. 1).

Although public limited company law is considered significantly more mandatory, German legal literature still witnesses some debate as to the extent to which public limited company law, primarily in its provisions regulating relationships between a company and its shareholders, may be deemed subject to party autonomy. It has been held that, since the first sentence of Article 23 (5) of the AktG states that articles of association may deviate from the law only in cases clearly foreseen in legislation, the provisions of articles of association may specify and supplement the legal provisions only when the law does not fully regulate the matter. Therefore, shareholders of a German public limited company may not replace legal provisions with alternative ones, though they may supplement the existing rules. Nevertheless, legal scholars have viewed such supplementation and clarification in a broadening sense – adding rules that build on the rules stipulated by law in a way that does not affect the overriding nature and objective of the legal provisions has also been seen as supplementation (not replacement) (Behrends, 2000, p. 579). This position can be agreed with, and the author finds that it could be transferred to

Estonian company law, although in regulating the format for sending a notice, it could prove complicated to define when a legal provision can be deemed exhaustive and, hence, closed and mandatory regulation.

Since Great Britain is part of the Anglo-American legal system, the approach to the imperativeness of provisions is somewhat different from what is familiar in German or Estonian law. Legislative provisions may be either permissive or mandatory, and the permissive (presumptive) rules apply without the parties needing to agree upon them separately. Although such rules apply automatically, shareholders of a company still maintain a considerable right to determine the extent to which the rules apply to them. In the case of mandatory rules, however, shareholders possess no such right of self-determination, and these rules apply the same way to everyone. An example of a mandatory provision would be a company's obligation to keep a register of its members (Cheffins, 1997, pp. 218–219).

In Estonian law, the principle of party autonomy is provided by Article 5 of the Law of Obligations Act[8] (LOA), stating that, upon agreement between the parties to an obligation or contract, the parties may derogate from the provisions of the LOA unless said act expressly dictates otherwise, the nature of a provision indicates that derogation from the act is not permitted, or derogation would be contrary to public order or good morals or in violation of a person's fundamental rights. In addition, Article 1 (1) of the LOA provides that the provisions of the general part of the LOA apply not only to all contracts and other multilateral transactions but also to obligations that do not arise from a contract.

The Estonian Supreme Court has stated that articles of association of companies are, by nature, a part of a memorandum of association, which is why their clauses can be interpreted in accordance with the contract interpretation principles set out in Article 29 of the LOA as is set out by the practice of Supreme Court in Case 3-2-1-166-09. As the articles of association of a limited company can be viewed as a multilateral transaction or at least a part thereof, it could be asked whether and to what extent Article 5 of the LOA, stating the principle of party autonomy, can be applicable to regulations in the articles of association of a limited company – that is, to what extent the shareholders are allowed to agree upon matters differently than is established in the law.

In Estonian legal literature, there are conflicting opinions on the imperativeness of the provisions of the CC. The author agrees with the statement that it cannot be said that the set of provisions of that code as a whole follows the principle of party autonomy; each provision needs to be viewed separately (Varul, 2016, Article 5, comm. 3). However, it has also been expressed in Estonian legal literature that, for reasons of Article 139 (2) and Article 244 (2) of the CC, the principle of party autonomy should not be applied to articles of association (Article 5, comm. 3). Both of these provisions indicate that, in addition to the mandatory content set out in the law (Article 139 [1] and Article 244 [1] of the CC), articles of association may include other conditions as long as they are not in contradiction with valid legislation. The provisions also state explicitly that when a clause of articles of association is in conflict with the law, the latter prevails. Such a wording may leave an impression that no deviation from the law is allowed in articles of association.

This opinion is probably strengthened by the fact that the CC contains clear references to the possibility of regulating certain matters differently than is prescribed by law, in several other places. For example, Article 156 (1) of the CC provides that a shareholder who fails to pay for his or her share or for the increase in nominal value of the share on time is required to pay a fine for the delay in the amount provided for by law to the private limited company unless the articles of association specify otherwise. Article 157 (2) clearly enables deviation from the principle set forth in the law that shareholders are paid part of the profit (i.e. paid dividends) in proportion to the nominal value of their shares. The law also provides for a possibility of establishing stricter requirements for what constitutes a quorum (Article 172 [2] and Article 297 [1] of the CC) or majority of votes (Article 174 [1] and 299 [1] of the CC) than the ones set by pertinent legislation.

[8]Law of Obligations Act, passed on 26 September 2001, entry into force on 1 July 2002.

This leads us to question whether, in the absence of such clear indication, the provision should automatically be considered mandatory – that is, a provision that does not allow deviation. The author of the article finds that the above reasoning is still not consistent with private autonomy and the right to free self-realisation enshrined in Article 19 of the Constitution,[9] which form the foundations of the principle of party autonomy.

Contrary to the view that the provisions regulating the potential content of articles of association are presumably mandatory, it has been held also in Estonian legal literature that at least the legal regulation of the internal relationships of a private limited company is largely based on the principle of private autonomy. The purpose of regulating relationships within private limited companies should be to ensure flexibility and a possibility for the shareholders to find the most suitable way to regulate both the relationships between themselves and between them and the private limited company. Therefore, it has been found that shareholders of a private limited company, unlike shareholders of a public limited company, have an opportunity to shape the internal relationships of their company in a manner largely in parallel with the principles (Saare et al., 2015, Ref. 358) arising from the regulation of partnerships. It has been found in legal scholarship that, if one wishes to establish whether a certain provision regulating a private limited company is subject to party autonomy, the protective purpose of that provision needs to be ascertained (Ref. 359). There has also been an opinion expressed in the legal literature that the extent of the flexibility of the regulations applicable to a private limited company's internal relationships (unlike the equivalent relations of public limited companies) cannot be determined only by the provisions in respect of which the shareholders have been given an *expressis verbis* right to agree on something different from what is stated in the law (Ref. 358).

The author agrees with this opinion, because it is difficult to provide justification for shareholders, at least of private limited companies, not being permitted to agree upon a different procedure of communicating among themselves than the one established by the law.

This interpretation is supported by the fact that Article 20 (2) of the Non-Profit Associations Act[10] (NPAA), for instance, does not specify a certain way of calling a general meeting at all. It states that the management board shall call the general meeting pursuant to the procedure prescribed by law or the articles of association. The second sentence of Article 20 (6) of the NPAA provides that articles of association may prescribe a more specific procedure for dispatching notices on calling a general meeting. The same provisions are applied to apartment associations, according to Article 20 (1) of the Apartment Ownership and Apartment Associations Act.[11] Thus, the question arises: why should the freedom of decision under articles of association of members of Estonian non-profit organisations be greater than that in a closed capital company (that is, a private limited company)?

As to the right of the shareholders of public companies to agree on a different procedure of notification in their articles of association, one could ask why the law should provide for the possibility of sending a notice on a meeting via e-mail while deeming only notices that are met with confirmation of receipt by the recipient duly received. Such rules make verifying sending of a notice of a meeting to a shareholder too burdensome for a company. The rules on public limited companies are probably shaped on the basis of the assumption that the entity is an open type of limited company with a large number of shareholders, rendering stricter rules justified. At the same time, most of Estonian public limited companies are, in fact, more similar to closed companies, making overly strict requirements clearly unreasonable for many of them.

One could also compare with the provisions regulating notice of calling a meeting that are found in the Commercial Associations Act[12] (CCA). Namely, Article 41 (1) of the CCA establishes that the notice shall be sent to the address

[9]Constitution of the Republic of Estonia, passed on 28 June 1992, entry into force on 3 July 1992.
[10]Non-Profit Associations Act, passed on 6 June 1996, entry into force on 1 October 1996.
[11]Apartment Ownership and Apartment Associations Act, passed on 19 February 2014, entry into force on 1 January 2018.
[12]Commercial Associations Act, passed on 19 December 2001, entry into force on 1 February 2002.

entered in the list of members, and Article 41 (1^1) stipulates that notice of the general meeting shall be sent to the e-mail address entered in the list of members if the member has submitted a corresponding written request to the relevant association. Although a commercial association is a company to which the legislation on private limited companies applies in the event of the absence of special provisions, entities of this form often have a large number of members and are more similar to a large public limited company where calling a meeting is concerned. Up until 30 June 2009, the second sentence of Article 41 (1) of the CCA also provided for a different way of notifying of a meeting, in accordance with the articles of association.

When considering the amendments to provisions regulating calling of meetings in general, one can see that the law originally stated that a notice should be sent to the address of the partner, shareholder, or (in the case of a commercial association) member. The same was set out in Article 41 (1) of the CCA for commercial associations. In 2014, Article 41 of the CCA changed via Section 1^1, according to which a notice about a general meeting may also be sent to an e-mail address, subject to the intended recipient's permission.[13] The Supreme Court has settled a legal dispute under constitutional review proceedings in which it needed to determine whether the earlier law, which stated that the notice must be sent to the address of a member, allowed sending it by e-mail. The Supreme Court concluded that when the law states that a notice should be sent to a person's address, this may encompass an e-mail address. The Court stated that the meaning of the word 'address' has broadened such that the term no longer indicates only the postal address of the residence or location. *Inter alia*, the Supreme Court relied upon the *Dictionary of Standard Estonian*, explaining that there exist also the concepts of postal address, e-mail address, and Web site address. Thus, when one considers the modern-day meaning, 'address' could indeed also denote an e-mail address according to Supreme Court Case 3-4-1-51-14. In light of the foregoing discussion, amendment of the law to render explicit the option of sending the notice to an e-mail address could be deemed redundant.

In conclusion, it needs to be agreed that the provisions regulating internal relationships among the shareholders of a private limited company are expected to be subject to party autonomy. In contract law, the parties can agree upon concluding a contract on how declarations of intention are sent with regard to matters falling under the contract, and how they could be deemed received. Naturally, standard contract terms are an exception here. For instance, the Supreme Court has found in Case 3-2-1-151-11 that those standard terms that, to a consumer's detriment, are not in line with the distribution of risks obtained at the time of declaration of intention, are null and void.

In company law, firstly, the provisions made to protect the creditors could be seen as mandatory. These provisions consist mainly of provisions regulating the protection of a company's capital (Saare et al., 2015, Ref. 996), but the relevant set of mandatory provisions probably also encompasses the provisions for the protection of minority shareholder rights. Shareholders cannot deviate from the law in their regulation of these issues. The provisions addressing sending of a notice on a meeting, however, are aimed at regulating the internal organisation of the company and should, hence, be at least partially subject to party autonomy.

4. Possibilities for Sending Notice of a General Meeting Electronically Under Estonian Law: Has Digitalisation Sufficient Reach?

The purpose of sending a notice about a general meeting is to ensure that the shareholders become aware of the meeting taking place, are able to participate, and are involved in making decisions (Saare et al., 2015, Ref. 889). The format of calling a meeting established by the legislation should also ensure operation in accordance with that purpose. Therefore, one could well ask whether this objective has been violated in a case the shareholders have, via their articles of association, agreed on a different, electronic means of notification. If there is no violation of it, there is also no need for excessive regulation and limitation of the freedom of articles of association.

[13]Act amending the Commercial Code and other related acts, passed on 27 February 2014, entry into force on 31 March 2014.

The author finds that, in view of the nature of a private limited company as a closed company, the rules for convening the meeting foreseen in CC should be seen as subject to party autonomy, and the shareholders should be allowed to provide the specifying and supplementing methods of electronic delivery that allow one to reasonably assume that receiving the message is ensured. Likewise, it has been concluded in German legal literature that, from the perspective of electronic declarations of intention becoming valid, the significance lies in how these can be deemed to have arrived within the sphere of influence of the receiver (Säcker et al., 2018, Article 130, Rn. 18) and when one can consider the recipient to have become aware of the declaration of intention in this sphere of influence under regular circumstances (Article 130, Rn. 18).

If notice of a meeting is viewed as a declaration of intention made to a person not present, agreements made in articles of association should be allowed. For example, they might provide for the notices being sent to shareholders via Skype or an instant-messaging message. Using the electronic channels referred to would enable making declarations of intention both to the people present and to the ones who are absent. When communication takes place simultaneously via the respective means of communication and both parties are online, it is a declaration of intention between parties present. When the communication is not simultaneous, however, there is a declaration of intention expressed to a party not present. It is probably also possible to create a group in a social-network service used by all parties (e.g. Facebook) for communication between shareholders and the private limited company.

Since the provisions of the CC are based on the general logic that notifying of a meeting takes place by sending a notice to a person who is absent (located in some other place than the company that delivers the notice), a question may arise as to how the term for sending a notice could be deemed observed when the law provides that the notice shall be sent in such a manner that, under normal conditions of delivery, it would reach the addressee at least one week before the meeting takes place. According to the interpretation of the Supreme Court in Case 3-2-1-10-17, this means that there must be at least one week between the reasonably expected time of receipt and the date of the meeting.

While, with regard to e-mail, it has been concluded in case law (Cases 3-2-1-129-15 and 3-2-1-123-07) that a person performing economic or professional activities checks his or her e-mail at least once per working day, there is not yet any case law on the matter of how and under what circumstances a notice on a meeting could be deemed received by the intended recipient when sent via an instant messenger service, over Skype, or by SMS. Also, in sending a notice via a Facebook group, there is the possibility that it may be complicated to prove later when the message might be received by the relevant recipient under normal circumstances, because there is currently no common understanding of how often an average reasonable Facebook user checks the information provided on that platform, or of how legitimately he or she can claim later that the notice was not visible among all the other information.

As to the legal requirements on sending a notice about a general meeting of a public limited company, even when these rules are considered mandatory, Estonian law should provide for a possibility that, with the permission of the shareholder, the notice could be delivered via other electronic channels than the ones currently listed in the CC, on the condition that the shareholder may withdraw his or her consent at any time. This would also be in compliance with the principle of private autonomy.

The author is of the opinion that it is worth considering whether it would be possible to develop the information system of the Estonian commercial register further by creating a separate platform that enables delivering notices on calling meetings and that could be used by companies. However, it is doubtful that such a form of delivery could be made compulsory. The situation can be compared with that of Article 311[1] (6) of the Code of Civil Procedure,[14] regulating serving of procedural documents to advocates, notaries, bailiffs, bankruptcy administrators, and state or local government agencies electronically through the public e-File or another designated information system. The e-File is an online information system which allows procedural parties and their representatives to electronically submit procedural documents to courts, and to observe the progress of the

[14]Code of Civil Procedure, passed on 20 April 2005, entry into force on 1 January 2006.

proceedings related to them. Court documents may be delivered to the above-mentioned persons in a different way only with good reason. The persons listed above are professionals who use or can be assumed to use the e-File every day. The author of the article finds that, although a shareholder should take care of receiving the notices, it is not reasonable to assume that these persons would constantly use the electronic environment chosen for sending notices. Therefore, the use of such a platform could be required of shareholders only when they have agreed to it (similarly with the rules established in British law).

Conclusions

Although no uniform opinion has been formed in Estonian law as to whether a notice on a meeting is a declaration of intention, sending of the notice is similar to a declaration of intention to a person not present. The similarity lies in the fact that it is important to send the notice to the correct address and to ensure that the intended recipient has a chance of actually receiving it. Therefore, current Estonian legislation can be interpreted in such a way that calling a general meeting of a private or public limited company is a declaration of intention in the meaning of GPCCA, but not all the provisions of the GPCCA apply to sending notice of convening a meeting. This means that when determining the timeliness of sending a notice of a shareholders' meeting, the company need not assess whether and when the receiving shareholder has had a reasonable opportunity to review the notice, and the notice can be considered timely if the company sends it on time and uses the communication channels prescribed by law.

The main question considered in this article is whether the provisions of the CC regulating the calling of a shareholders' meeting are mandatory, since that determines whether shareholders are free to find the most suitable way for them to deliver notices on meetings (incl. by using a wide range of digital solutions). One can conclude that, at least in the case of private limited companies, such provisions should be only default rules, since, on account of a private limited company being a small company, greater flexibility of the corresponding provisions and in the shareholders' options for agreeing differently than prescribed by law should be deemed justified. It is difficult to argue that shareholders of a private limited company should be forbidden to agree upon a communication process that differs from the one established by law. In company law, the mandatory provisions are usually the ones enforced for the protection of creditors, but the regulations on calling a meeting pertain more to the internal relationships of a company; hence, they should be (in the main) non-mandatory rules. However, since neither the CC nor the case law provides clear instructions on this matter, it would probably be necessary for the law to establish clearly that a private limited company may determine the method of sending a notice of a meeting in the articles of association and in a manner different from what is dictated by the law. One can also conclude that the same level of party autonomy cannot be recognized with regard to the manner of calling a general meeting of a public limited company, but more freedom for the articles of association should at least be allowed to non-listed public companies. The law should also allow for the possibility that, with the shareholder's consent, notices to the shareholder may be delivered via electronic channels different from the ones currently provided for by legislation. Naturally, the shareholder should have the option of withdrawing his or her consent at any time.

The currently accepted range of ways of calling a meeting offers no suitable (nor 'official') digital solution next to e-mail that would enable sending a notice about a meeting electronically. Therefore, one can conclude that the hypothesis of the article has been confirmed: Estonian company law has not exercised all the possibilities for ensuring the use of flexible digital solutions in communication with shareholders, even though this has been emphasised both in EU legislation and in experts' reports. One of the options might be to consider whether the current information system for the commercial register could be developed to include a platform for sending notices on meetings. If so, the next question to consider would be whether this channel could or should be mandatory for companies. Either way, it would serve as a good alternative to e-mail messages because the information system of the commercial register already contains the data of shareholders, and it would be possible to create a system that enables identifying the time when the recipient has accepted the notice (in a manner similar to the e-File system used in court proceedings in Estonia). Since using such a platform could probably not be made compulsory for shareholders, the author has to take the position that its introduction in a company would probably be possible only with the agreement of shareholders and only for those shareholders who have given their consent.

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