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ELECTRONIC VOTING IN ADOPTING RESOLUTIONS OF LIMITED COMPANIES: THE EXAMPLE OF ESTONIAN LAW

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Abstract. In the wake of the COVID-19 crisis that began in 2020, countries all over the world had to develop new solutions in legislation to replace various traditionally physical operations with digital solutions. Estonia, with rules in the field of company law and in holding shareholders' meetings, was no exception. In May 2020, new regulation was introduced into Estonian law, allowing shareholders to participate in meetings using digital means. Although electronic voting itself was already allowed under Estonian law before 2020, the new situation raised a number of legal issues. This article addresses these issues and possible solutions with regard to the legal perspective of electronic voting. As the law does not contain precise requirements for holding an electronic vote, there are many aspects that must be considered in order to comply with the general principles of company law, e.g., how to identify the person giving their vote, and how to ensure the security and reliability of electronic voting. Based on the analysis in this article, the procedure must ensure the identification of shareholders as well as the reliability of casting votes, but must also be proportionate for achieving these aims.

Keywords: shareholder rights, company law, electronic voting, exercising shareholder rights in digital form.

Introduction

In the legal literature, it has already been noted previously that the development of the rights of shareholders has been strongly affected by two important modern trends – digitalisation and globalisation (Zetsche, 2005, p. 112). Electronic meetings and electronic voting have several advantages compared to meetings held physically. In particular, they enable shareholders to participate in a meeting and vote regardless of their current location, thus making participation in adopting resolutions more accessible for a larger number of these people. This also means smaller expenses which shareholders would have to incur in connection with travel. For quite some time, the development of modern technology has enabled the use of different solutions for shareholders to communicate with the management board at a meeting, and to raise objections and questions (on participation in a virtual general meeting, see, e.g., Zetsche, 2005, p. 112).

In the legal literature, it has also been found that replacing an ordinary vote with an electronic one enables making voting more transparent since the voting results are disclosed to the participants immediately and can be monitored and verified (Cohen, 2021). In terms of the latter aspect, electronic voting is particularly useful for public limited companies with a large number of shareholders since determining the results of voting in physical meetings may take time, in particular if voting takes place in writing.

The issue of flexible use of electronic means of communication in the exercise of shareholder rights arose especially strongly in connection with the restrictions imposed in Estonia as well as other countries in spring 2020 due to the spread of COVID-19, which posed significant impediments to customary modes of travel and direct communication. In connection with this, on 24 May 2020, legislative amendments entered into force in Estonia which now clearly stipulate that, regardless of whether a company's articles of association provide for this kind of voting, each company may hold their general meeting virtually and offer shareholders an opportunity to exercise all their rights by electronic means of communication (see in more detail: Vutt, 2020, pp. 34–46). The

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explanatory memorandum to the Draft Act notes in this regard that the need to prepare the draft arose in particular during the emergency situation declared by the Estonian Government on 12 March 2020, but the solutions set out in the draft are also intended for use after the end of the emergency situation.

The aim of this article is to find answers to the questions of which legal requirements extend to the exercise of voting rights by electronic means of communication and whether, as a result of legislative amendments of a permanent character introduced in Estonian law, regulation of this issue has become more flexible than before. It will also explore the opportunities that could be used for voting by electronic communication at a virtual general meeting (shareholders meeting) and those that could be used for voting without convening a general meeting in the context of the current legal framework.[2]

The main methods the author applies in this article are the method of teleological interpretation of legal provisions and the comparative method. Germany has been chosen as the main reference country as Estonian private law, including company law and general rules of civil law, has been largely developed on the basis of the principles of German law. The comparable company types in Germany are *Gesellschaft mit beschränkter Haftung* (GmbH), which is similar to an Estonian private limited liability company, and *Aktiengesellschaft*, which is similar to an Estonian public limited liability company. The fact that Estonian law has followed the concept of different types of limited companies is also the reason why German law has been chosen to be compared to Estonian law.

1. The legal framework of electronic voting – temporary or permanent?

The development of electronic communication has already for some time affected the general meetings of shareholders in two ways: first, by enabling distance voting for shareholders; and second, by enabling general meetings to be held so that shareholders do not have to attend physically (Boros, 2004, margin reference 2). As a third option, the above article also mentions allowing the possibility of electronic voting by an appointed proxy holder, but due to its limited scope the present article will not analyse the institution of proxy voting and related legal problems. A distinction is drawn in the legal literature between whether a meeting takes place physically but shareholders who so wish are enabled to attend through electronic means of communication, or whether all the participants are at different locations during the meeting and no physical meeting is held at all (Fairfax, 2010, p. 1367).

Under § 33^1(1) of the General Part of the Civil Code Act (hereinafter – GPCCA) in force as of 24 May 2020 (General Part of the Civil Code Act, 2002), a member of a body of legal persons may participate in a meeting of the body, and exercise their relevant rights, via electronic means, without being physically present at the meeting, having recourse to two-way real-time communication or to other similar electronic means that allow the member, while at a remote location, to follow, and speak at, the meeting and to vote in any matters that have been tabled for resolution, unless otherwise provided for by law or by the articles of association. Subsection two of the same section lays down that a meeting held via electronic means is subject to the provisions applicable to taking decisions at a meeting of the body in question.[3]

Along with amending the GPCCA, certain provisions of the Commercial Code (1995) were also amended. Previously, § 298^1(1) of the Commercial Code laid down for public limited companies and § 170^1(1) of the Commercial Code for private limited companies a possibility to prescribe in their articles of association that shareholders may vote on draft resolutions prepared in respect of the items on the agenda of a general meeting by using electronic means prior to the general meeting or during the general meeting if this is possible in a technically secure manner. Section 290^1(1) of the Commercial Code (in respect of listed public limited companies), § 298^1(1) (in respect of ordinary public limited companies) and § 170^1(1) (in respect of private limited companies), in force

[2] The issues concerning exercise of other shareholder rights during a shareholders' meeting have been covered in the previous published paper of the author that has been referred to in this article.
[3] The explanatory memorandum to the Draft Act does not indicate that Estonia used a direct example of the law of any other country, but rather the underlying approach proceeds from general proposals made during a review of company law.

as of 24 May 2020, only refer to § 33[1] of the GPCCA and stipulate that any participation and exercise of rights (including voting) at a general meeting of shareholders may take place electronically.

Thus, as of 24 May 2020 it is no longer necessary to lay down the possibility of electronic voting or the relevant rules in a company's articles of association. On the one hand, this should mean more flexibility and options as to how to arrange electronic voting. At the same time, however, this makes the manner of voting and the environment to be used less predictable for shareholders. Although § 298[1](3) of the Commercial Code is no longer in force, in the opinion of the present author electronic voting should still take into account that the procedure laid down for electronic voting must ensure identification of the shareholders and security and reliability of voting and be proportionate for achieving these objectives.

It should also be noted that on 27 March 2020 Germany passed a law for alleviating the consequences of the COVID-19 pandemic (Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht [Act to Mitigate the Consequences of the COVID-19 Pandemic under Civil, Insolvency and Criminal Procedure Law, COVInsAG], 2020). This law also lays down rules on virtual general meetings and electronic voting in the case of public limited companies. Article 2 § 1(1) of COVInsAG entitles the management board to organise voting either in writing or by means of electronic communication, regardless of whether the articles of association provide for this option or not. Specifically, § 118(2) of the AktG (Stock Corporation Act) lays down that articles of association may allow shareholders to vote without attending the meeting either in writing or by means of electronic communication. Articles of association may also stipulate that the management board can decide whether to organise a written or electronic vote. According to the implementing provisions, the above rules in Germany apply to shareholder meetings held and resolutions adopted in 2020. Article 6(2) of the Act lays down that the temporary rules cease to have effect at the end of 2021.

However, changes arising from the restrictions in relation to the pandemic have been planned as temporary in Germany. The more regular (so to speak) provisions are more general in nature – § 118(2) of the AktG stipulates that articles of association may allow, or may grant authority to the management board to allow, shareholders to cast their votes without attending the general meeting, in writing or by means of electronic communication. The legal literature uses the general term "postal vote" (*Briefwahl*) for this type of voting, and according to the legal literature this type of voting also includes voting in cases where the general meeting is virtual (Herb & Merkelbach, 2020, pp. 811–812). Legal scholars have posed the question of what technical possibilities could also be considered as admissible from the legal point of view. It is also debated whether holding a virtual meeting is precluded by the fact that under § 121(3) of the AktG the general meeting is supposed to take place at one specific location[4] and, in order to exercise their right to vote, a shareholder should go to that location (Goette et al., 2018 § 134, margin reference 90). Since transposition of the Shareholder Rights Directive (Directive (2007/36/EC) of the European Parliament and of the Council, 2007) into German law (see Act for the implementation of the Shareholder Rights Directive, 2009), however, the importance given to the "single location of the meeting" has diminished since articles of association may authorise, inter alia, casting one's vote either by letter, e-mail or onscreen form (*Bildschirmformular*), or in another similar manner. Before these changes, the main option for distance voting was to appoint a proxy holder (*Stimmrechtsvertreter*, *proxy voting*) who had to attend the meeting instead of the shareholder and vote on their behalf (Goette et al., 2018 § 134, margin reference 90).

2. Electronic vote – a mere digital signature?

Under § 33(1) of the GPCCA, a shareholder's vote constitutes a declaration of intention and the provisions of law concerning transactions apply to voting. Under § 68(1) of the GPCCA, a declaration of intention may be expressed in any manner unless otherwise prescribed by law. If a company organises an electronic vote, the question may arise as to whether this means that casting a vote must always take place in electronic form within the meaning of § 80 of the GPCCA. Specifically, § 80(2) of the GPCCA stipulates that, in order to comply with the requirements for electronic form, a transaction must be entered into in a form enabling repeated reproduction, must contain the names of the persons entering into the transaction, and must be electronically signed by the persons entering into

[4] More specifically, this provision stipulates that, inter alia, the place of holding the meeting must be notified to the shareholders.

the transaction. Under subsection three of the same section, an electronic signature must be given in a manner which allows the signature to be associated with the content of the transaction, the person entering into the transaction, and the time of entry into the transaction, and a digital signature is also deemed to be an electronic signature.

On this basis, it may be asked whether electronic voting within the meaning of the Commercial Code must only be the type of voting where shareholders have cast their vote by a digitally signed declaration of intention. The author of this article is of the opinion that probably this is not quite so since such a requirement would render electronic voting in a specially designated digital environment impossible. Thus, electronic voting at a general meeting and a meeting of shareholders, as well as prior to the meeting, should be understood as casting a vote in any manner which enables a guarantee in a technically secure manner that only the right persons can vote, that the votes can be correctly counted in the environment used, and that taking account of restrictions on voting is also ensured.

3. The possibilities to apply legal remedies in the event of technical problems

One of the legal issues arising in relation to electronic voting is what legal remedies could be available to a shareholder who cannot vote due to a technical reason.

If a shareholder of a private limited company cannot vote because they were not given information necessary for accessing the voting environment then, under Estonian law, this probably constitutes a serious breach of procedure for passing resolutions within the meaning of § 177^1(1) of the Commercial Code, and leads to nullity of the resolution. The situation is somewhat more problematic in the case of a public limited company since, for nullity of a resolution of a general meeting of shareholders, the procedure for convening the general meeting must have been seriously breached (§ 301^1(1) clause 4 of the Commercial Code). In the opinion of the present author, however, in the latter situation, it should be concluded, similarly to a private limited company, that this constitutes a breach leading to nullity of the resolution since such a breach impedes a shareholder in participating in passing the resolution and exercising their right to vote (Saare et al., 2015, p. 205, margin reference 995).

If voting fails due to a circumstance within the control of a shareholder, in the opinion of the author it may be deduced from the general principle of distribution of risks under private law that in such a situation a shareholder cannot rely on a technical error or invoke a remedy arising from a technical error because prior to the vote the shareholder should check their readiness to participate in voting. However, the matter is different if a company has maliciously chosen an unreasonable and uncommon voting environment (which for some reason is difficult to access or unstable). In part, the risks are probably mitigated by the fact that, similarly to voting in writing or by e-mail, a shareholder should be provided a reasonable time-frame for casting a vote in an electronic environment (Supreme Court Civil Chamber judgment of 23 May 2016 No 2-16-9415/41, para. 22).[5]

It may also be asked whether a shareholder who was given the necessary data for access to the voting environment but who, for technical reasons beyond their control, could nevertheless not vote, could contest the resolution by relying on a technical error or whether they could have a claim to oblige the company to enable them a new (electronic) vote. In view of the material preconditions for contestation, the possibility of contesting a resolution in the above case could arise only if the company has breached the requirements of the law or the articles of association.[6] However, similarly to the principle of distribution of risks which underlies liability under the law of

[5] According to Supreme Court opinion, the basis for determining a reasonable time should be § 7 of the Law of Obligations Act under which, with regard to an obligation, reasonableness is to be judged by what persons acting in good faith would ordinarily consider to be reasonable in the same situation. Additionally, to be taken into account in assessing what is reasonable are the nature of the obligation, the purpose of the transaction, the usages and practices in the fields of activity or professions involved and other circumstances. The Supreme Court reached the opinion that, depending on the circumstances and the substance of the resolution put to the vote, a reasonable time may also be merely two days.

[6] Under § 178(1) and § 302(1) of the Commercial Code, an entitled person may request annulment of a resolution which is contrary to the law or the articles of association.

obligations, impediments to voting which are beyond the control of the company cannot be considered a breach.[7] Thus, if the technical problems due to which a shareholder could not vote in the voting environment were such that the company could not affect them and, arising from the principle of reasonableness, it could not be expected to take this circumstance into consideration or avoid it or overcome the impeding circumstance or its consequence, then the company cannot be expected to organise a new vote. For the same reason, in that situation a shareholder also has no right to request that a new vote be organised.

4. The use of electronic communication in voting taking place at a meeting and in voting prior to a meeting

4.1. Electronic voting and different modes of voting at a general meeting

Under Estonian law, in the context of voting we mostly speak of two types of relevance in terms of electronic means of communication. In turn, this relates to how resolutions are passed. Shareholders in both private and public limited companies may pass resolutions either at a meeting or without convening a meeting (Commercial Code § 173(1) and § 299[1]) (Saare et al., 2015, p. 415, margin reference 885, 948, 1992). The third option for passing a resolution is a unanimous written decision, but from the point of view of this article that situation has only limited relevance in terms of electronic voting because this type of vote presumes a written form. Under § 80(1) of the GPCCA, this may be replaced by an electronic form which, under § 80(3) of GPCCA, means digitally signing a resolution.

First, a question may be raised as to the choice of modes of voting available to a company and the compatibility of different modes of voting with an electronic meeting. In the context of Estonian law, if the adoption of a resolution takes place at a meeting, a distinction should be drawn, first, between a situation where shareholders are given an opportunity to vote prior to a meeting by means of electronic communication or in an electronic environment specifically designated for this, and, second, a situation where voting takes place at a meeting carried out virtually so that the participants are connected to each other by two-way, real-time communication and all participants can directly perceive the development of voting results. The meeting and voting may also be combined so that participation takes place by two-way, real-time communication, but the vote should be cast in an electronic environment specifically designated for this.

In a situation where the meeting takes place virtually and the participants, in order to vote, must each show themselves and express verbally whether they are for or against the resolution, the voting may be considered electronic only within its narrower meaning. In that case, only an electronic channel of communication is created between the meeting participants. In that situation, the meeting environment must also enable the chair of the meeting to ascertain who is voting and how.

The Commercial Code does not regulate how voting must take place. Thus, if the management board decides to carry out a physical meeting for passing resolutions, then arising from the general principle of private autonomy the company is free to decide how to organise the vote. A company's articles of association may, of course, lay down a more specific procedure for voting, yet it is more common that the voting procedure is set by the board or the chair of the meeting. It should be noted that, for instance, in German practice, it is customary that the articles of association of at least large listed public limited companies authorise the chair of a meeting to set the voting procedure, since this enables a more flexible choice of mode of voting depending on needs (von der Linden, 2012, p. 931).

Section 130(2) of the German AktG (Aktiengesetz [Stock Corporation Act], 2017) stipulates with regard to the minutes of the general meeting that, in addition to the results of the vote, the minutes must also state the manner of voting. German legal literature notes with regard to different modes of voting that the customary manner of voting includes ballots, raising a hand, standing up, or saying one's name when asked who is for the draft resolution. By now, electronic voting is also one of the possible modes of voting at a meeting in German practice

[7] A statutory obligation exists between a shareholder and both a public or private limited company which gives rise to an overall duty to observe the principle of good faith in their mutual relationship and to take into account each other's legitimate interests. The principles of strict liability extend to this relationship of obligation.

(Hüffer & Koch, 2020, § 130 margin reference 17). Legal scholars have found that the choice of mode of voting must take into account that ascertaining the results of a vote should be as simple and certain as possible and that voting takes as little time as possible. Thus, in the case of a meeting with a small number of participants, raising a hand or expressing one's position verbally is more suitable, while at a general meeting with a large number of participants (in particular in the case of listed public limited companies) it is more reasonable to use ballots or electronic means of voting (e.g. postal vote prior to the meeting or in a separate voting environment) (Hüffer & Koch, 2020, § 130 margin reference 35).

Under § 304(1) clause 5 of the Commercial Code, the minutes of a general meeting must record, inter alia, the resolutions adopted at the meeting together with the voting results, including the number of shares that gave the votes, the proportion of the share capital of the shares represented by votes, the total number of votes, the number of votes given in favour of and against each resolution, and the number of abstentions.[8] Thus, Estonian law does not directly prescribe that the minutes of a general meeting or of a meeting of shareholders of a private limited company should necessarily record the mode of voting. Nevertheless, in the opinion of the present author, the fact that voting at a general meeting or a meeting of shareholders of a private limited company takes place electronically should be considered "another material circumstance at the general meeting" within the meaning of § 304(1) clause 7 of the Commercial Code which should be recorded in the minutes since this may have significance in ascertaining the voting results and their subsequent verification.

One possible legal issue in relation to voting at a meeting (or prior to a meeting) is also whether the vote must be public or whether it may also be secret. This issue is not regulated by either German or Estonian law, and thus, at first sight, it might be concluded that private autonomy of companies applies here as well. Nevertheless, a question may arise as to whether, in the case of a secret vote, it is verifiable who voted and how, and how in such a situation compliance with restrictions on voting is ensured.

Probably this is largely the reason why, according to German legal literature, it is debatable whether a secret vote may be held at a general meeting of a public limited company. For example, it has been found that even though the law does not preclude this, in that case it should definitely be ensured that restrictions on voting are already checked when distributing the ballots. As for preventing manipulation of votes, this must be verifiable by the chair of the meeting. At the same time, a view has also been expressed that a secret vote is impractical, especially in the case of public limited companies with a large number of shareholders and, if necessary, ballots with a concealed name may be used instead (Goette et al., 2018 § 134, margin reference 93). In conclusion, it is found that even though the chair of a meeting may decide to hold a secret vote, a shareholder has no individual right to request this (Hüffer & Koch, 2020, § 134 margin reference 35).

Under Estonian law, a secret vote at a general meeting of shareholders or a meeting of shareholders of a private limited company is not precluded since the law does not prescribe that voting results should record by name how someone voted. This applies to both public and private limited companies. However, it should be concluded that, in holding a secret vote, steps should be taken to ensure that only those whose voting rights are not restricted can cast a vote. If a company fails to comply with this requirement, then a shareholder may request annulment of a resolution of the meeting (Supreme Court Civil Chamber judgment of 11 June 2014, No 3-2-1-55-14, para. 23).[9] It should also be taken into account that each meeting participant should be ensured the right of objection.[10]

4.2. Voting prior to a meeting

In Estonia, casting a vote before a meeting is regulated under § 298^2 of the Commercial Code, whose first subsection lays down that a shareholder may vote on draft resolutions prepared in respect of the items on the

[8] Arising from § 171(5) of the Commercial Code, the cited provision also applies to the minutes of a meeting of shareholders of a private limited company.
[9] In line with Estonian case-law, a shareholder may request annulment of a resolution passed in breach of a restriction on voting rights.
[10] Under § 178(3) and § 302(3) of the Commercial Code, a shareholder who participated in a meeting may request annulment of a resolution only if they had their objection to the resolution recorded in the minutes.

agenda of a general meeting by submitting their vote to the public limited company prior to the general meeting at least in a format which can be reproduced in writing, unless otherwise prescribed in the articles of association, provided that identification of shareholders and security and reliability of voting is ensured in voting prior to the meeting. The right of shareholders of a private limited company to vote prior to a meeting is regulated in the same way (§ 170(5) Commercial Code). Both private and public limited companies are governed by § 298^2(3) of the Commercial Code, under which a blank form designated for this by the company must be used for voting prior to the meeting. This may give rise to the question of whether such a requirement of a blank leaves any possibility to carry out voting prior to a meeting in an electronic environment. Answering this question involves analysing which statutory requirements apply in this regard. According to § 298^2(1) of the Commercial Code, these requirements are as follows:

- casting a vote must be possible at least in a format reproducible in writing;
- identification of shareholders must be ensured;
- security and reliability of voting must be ensured.

First, in the case of electronic voting, a question may arise as to the meaning of "casting a vote must be possible at least in a format reproducible in writing". A question may also be raised as to whether in a situation where voting is organised in a specially designated electronic environment the requirement of a form reproducible in writing can be considered to be fulfilled.

In line with § 78 of the GPCCA, the requirement of a form reproducible in writing is fulfilled if the vote is cast in a manner enabling a permanent record reproducible in writing and contains the names of the persons entering into the transaction. Unlike the written form, this need not contain handwritten signatures. In that light, the online environment where voting takes place must enable a permanent record reproducible in writing. In the legal literature, it has been noted that a website fulfils the requirement of reproducibility in writing if the information on the relevant website can be downloaded and saved (Varul et al., 2010, § 79 comment 3.2). A voting environment enables reproduction in writing if printouts from it can be made (in the author's opinion, the type of environment should also be visible) and data can be saved on an external data carrier. On this basis, in the opinion of the author it may be concluded that a voting ballot used in the electronic environment can also be considered a form reproducible in writing on the precondition that the blank form can be saved on an external data carrier.

However, in order for the requirements imposed on electronic voting to be considered fulfilled, the electronic environment where voting takes place should also enable the identification of persons. In this regard, a question may be raised as to how strong the means of identification used in this situation should be. The strongest possible link between the voter's identity and the voting result is created by digital means of identification that apply, for example, when electing representatives to parliament (Riigikogu Election Act, 2002).[11] However, in the author's opinion, it would not be reasonable to impose such strict requirements on voting by shareholders because, after all, organising the vote, including electronic voting, takes place at the expense of the company, which in turn affects the company's management costs and ultimately also the profit earned by the shareholders.

A question may also be raised as to which requirements the precondition "the transaction contains the names of the persons entering into it" must comply with. In German law, as regards the form reproducible in writing, it has generally been found that it is sufficient if the declaration of intention can be attributed to the person in some way – the person making a declaration of intention in a form reproducible in writing must be reasonably recognisable by the addressee of the declaration of intention (i.e., the company and other shareholders) (Schubert, 2021, § 126b margin reference 7).

[11] For example, electronic internet voting is subject to the requirement that the e-voting system must comply with the ISKE baseline security standard, a risk analysis must be carried out to determine the required level, and the security class of the system must be set. The security class is assessed on a regular basis, the system must use an appropriate and up-to-date cryptographic algorithm while the precise specification of the algorithm is determined by the State Electoral Office before each election. An information systems auditor must be present at generation, use and destruction of secret keys used in electronic voting.

In the opinion of the present author, it follows from the foregoing that simply sending the shareholders a link to the voting environment without the possibility of verifying who can use this link is not sufficient in order to identify the persons who voted. For this reason, in the opinion of the author, for voting on draft resolutions of shareholders it is not possible to use an ordinary poll organised in an electronic environment – i.e., where each person receiving the link can enter their name and simply note whether they are for or against the resolution. It would probably also not be compatible with the spirit and purpose of the law if the voting environment did require that the persons entering it should identify themselves but did not reflect who voted and how, because the data about who voted in favour of the resolution constitutes an important part of the record of voting according to the law.

Thus, to ascertain the results of voting, the necessary personalisation requirements are probably somewhat higher, and the requirement of a form reproducible in writing should be considered fulfilled when the environment not only displays how many votes were given in favour or against a certain resolution, but also shows who voted and how. This interpretation is also supported by § 299^1 and § 173 of the Commercial Code, which regulate the adoption of resolutions without convening a meeting, and whose rules are similar to voting prior to a meeting. Specifically, § 299^1(4) and § 173(3) of the Commercial Code lay down the requirements of form for a record of voting in the case of a vote without convening a meeting. Under these provisions, the voting record must indicate not only the resolutions adopted along with the voting results but also the names of the shareholders who voted in favour of each resolution (§ 299^1(4) clause 3 and § 173(3) clause 3 of the Commercial Code). The purpose of this requirement is to ensure the verifiability of votes cast outside the meeting (regardless of how the votes are cast) as well as of the voting results. In the author's opinion, whether a vote is cast prior to a meeting or without convening a meeting at all should involve no significant distinctions in terms of legal regulation.

If the underlying consideration is the purpose of the rules for voting and adopting a resolution and the accompanying shareholder rights (e.g., raising an objection to a resolution or subsequent contestation of a resolution) then, in the author's opinion, the application used for electronic voting should be constructed so that the voter understands at what moment their vote is submitted, i.e., the voter should see confirmation to this effect. Every shareholder who has voted should have the possibility to verify whether the application used for voting has duly submitted their vote to the voting environment in line with their intention. This is necessary, for example, for a shareholder to be aware of whether they were actually ensured the opportunity to vote as one of the most important membership rights. The voting environment must also ensure that the voting results only take into account the votes cast by the shareholders with the right to vote.

5. Electronic voting without convening a meeting

If a company decides to organise a so-called written vote, the question also arises as to what extent the current law enables shareholders to use electronic communication for voting. Section 33^1 of the GPCCA does not directly regulate the issue of how electronic voting takes place when a resolution is adopted without convening a meeting.

When opting for this type of decision-making, the management board must send the draft resolution in a form reproducible in writing to all shareholders and set a deadline during which a shareholder must submit their opinion. This opinion must also be at least in a form reproducible in writing. A shareholder who fails to notify whether they are for or against the resolution by the deadline is deemed to have voted against the resolution (§ 173(2), § 299^1(2) of the Commercial Code). The management board must prepare a record of voting concerning the voting results and, in the case of a private limited company, the record must be sent to all shareholders. The management board of a public limited company does not have to send the record of voting to shareholders but must make the record available for shareholders. The law also lays down the minimum content of a record of voting, which, among other important data, must also contain the resolutions adopted along with the voting results, including the names of shareholders voting in favour of the resolution (§ 173(3) clause 3, § 299^1(4) clause 3 of the Commercial Code) and, at the request of a shareholder expressing dissent in respect of the resolution, the substance of their dissent (§ 173(3) clause 5, § 299^1(4) clause 4 of the Commercial Code). Opinions submitted by shareholders about draft resolutions sent to them form an inseparable part of the record of voting (§ 173(4), § 299^1(5) of the Commercial Code).

In the author's opinion, the same requirements apply to the so-called postal vote. These will apply when shareholders are given the opportunity to vote prior to a meeting. All shareholders must be ensured access to draft resolutions put to the vote. Identification of those who voted, and, if a special environment is used for voting, the security and reliability of that environment, must also be ensured. It is also important that the environment should enable restrictions on voting to be taken into account as well as to ascertain who voted and how.

While in Estonian law adopting resolutions without convening a meeting is regulated similarly both for private and public limited companies, in German law the rules for a private limited company, i.e. GmbH, and for a public limited company, i.e. AktG, are different. This is because in German law a closed company is a much less regulated form of company due to historical traditions. In view of this, it may be asked whether Estonian law, which has created similar rules both for small closed companies and large open companies, is excessively restrictive for private limited companies.

The passing of resolutions by shareholders of a German closed limited liability company, i.e. GmbH, is regulated by § 48 of the GmbHG (Gesetz betreffend die Gesellschaften mit beschränkter Haftung, GmbHG [Limited Liability Companies Act], 2021), under subsection 1 of which shareholder resolutions are passed at a meeting of shareholders. Under the second subsection of the same section, a meeting need not be held if all shareholders declare their consent in a form reproducible in writing either to the resolution or to the fact that voting takes place in writing. In the legal literature, it has been noted that the provisions on form laid down by § 126b of the BGB (Bürgerliches Gesetzbuch [Civil Code], 2021) apply to shareholder consent provided in a form reproducible in writing and, to comply with this requirement, the shareholder's relevant declaration must be readable and attributable to the consenting shareholder. Besides, a shareholder may give relevant consent, for example, by fax or e-mail but also in the online environment of a private limited company or even in a social media group (Schultleis, 2020, p 170). Thus, the GmbHG distinguishes between voting in a form reproducible in writing – this presumes affirmative votes given in the relevant form by all shareholders – and written voting, which, in turn, presumes that all shareholders should agree at least in a form reproducible in writing to adopt the resolution by written vote. In the legal literature, "all shareholders" is understood as meaning both shareholders with the right to vote as well as those who for some reason are not entitled to vote in passing the resolution. This is justified by the fact that a written vote must also replace a shareholder's right to attend a meeting and not only the shareholder's right to vote. According to the legal literature, however, this position is debatable since such an interpretation is allegedly too restrictive in its scope of application (Fleischer & Goette, 2019, § 48 margin reference 156, 157). In the latter case, the formal requirement of "reproducible in writing" applies to consent, while the requirement of written form applies to the resolution itself within the meaning of § 126 of the BGB (Wicke, 2020, § 48 margin reference 5), which means primarily the requirement of a handwritten signature or an electronic signature replacing this.

In the opinion of the author, the above provision in the GmbHG cannot be considered a successful solution in terms of legal clarity. German legal literature also indicates that the provision is open to several interpretations. For example, it has been found to be debatable to what extent, in the case of consenting to the resolution itself (i.e., when voting in favour of a resolution), the statutory requirement that the shareholder must have consented to passing a written resolution can also be considered to be simultaneously fulfilled. One possible interpretation is the opinion that consenting to the resolution itself means simultaneous consent to a written vote, while votes against the draft resolution cannot be deemed as such consent. This interpretation is justified by the fact that only in this way is it possible to distinguish between the two alternative modes of voting laid down by § 48(2) of the GmbHG. In the event of this interpretation, a resolution cannot be deemed adopted in a situation where all shareholders have voted in writing but the resolution has not gained the votes of all shareholders entitled to vote. This means that such a resolution cannot be passed by a majority vote because votes against may be construed as a need to still hold a meeting to pass the resolution.

However, this approach is found to be difficult to reconcile with practice by arguing that for those shareholders who vote in favour of the resolution, thus having also consented to a written vote, it generally makes no difference whether the resolution is finally adopted by majority or by consensus. Casting a vote may also be interpreted as a shareholder's wish to participate in passing the resolution without convening a meeting and that way contribute to passing the resolution. Thus, allegedly it cannot be presumed that in a situation where no consensus is reached

the shareholders who voted in favour would necessarily see the need to convene a meeting to pass the resolution. At best, such a wish may be attributed to those shareholders who vote against the resolution and who must clearly express their consent to a written vote so as to be able to conclude that they subjected themselves to the will of the majority in choosing the mode of voting (Fleischer & Goette, 2019 § 48 margin reference 159). In conclusion, according to the predominant opinion, under the cited provision of the GmbHG, as a first option, it is thus possible to pass a unanimous resolution which must be made in a form at least reproducible in writing, and second, in the event of consent of all shareholders given in a form reproducible in writing, a vote complying with the requirement of written form is possible (Michalski et al., 2017, § 48 margin reference 203).

In the opinion of the present author, it may be concluded from the above that, even though at first sight Estonian rules for smaller companies are stricter in comparison to German law, the legal clarity of the Estonian rules is better and is not open to debate over whether shareholders have consented to a postal vote or not. In the author's opinion, problems with interpretation of German law inevitably spill over to situations where a GmbH wishes to organise an electronic vote, which in turn may impede reasonable use of digital technologies.

6. Practice relating to the use of electronic communication in holding general meetings of shareholders

As a continuation of the above legal theoretical debate, it may be asked how the restrictions in spring 2020 affected the practice of holding general meetings of public limited companies. As large open limited companies, public limited companies are precisely the types of companies for whom holding a general meeting is important since the meeting allows the most effective communication between the company's management board and the shareholders. The biggest need for holding a general meeting is for public limited companies with many shareholders with fragmented share participation and where shareholders themselves do not manage the company.[12] In both Estonia and Germany the latter group of companies includes primarily listed public limited companies. Concerning specific industries, it has been found in the legal literature that virtual shareholder meetings are more frequent among tech firms, and firms traditionally more engaged with shareholders whose intention is to increase shareholder participation (Brochet et al., 2021).

The practice of general meetings of Estonian listed public limited companies in 2020 shows that companies opted for different approaches. As one example, we could mention the public limited company AS Ekspress Grupp who, in 2020, offered a possibility of electronic voting prior to the meeting for passing the resolutions of the extraordinary general meeting. Although the meeting itself took place on 20 September 2020 physically at the company's registered office, the management board recommended that the shareholders vote electronically on draft resolutions concerning items on the agenda prior to the general meeting and not physically attend the general meeting. To vote electronically, a ballot had to be filled out which was attached to the notice of the meeting both on the Nasdaq Baltic stock exchange and the company's own homepage. A ballot that had been filled out and scanned had to be sent by e-mail to the designated address at the latest by the start of the meeting with either a digital or handwritten signature along with a copy of the personal data page of the identity document (AS Ekspress Grupp, n.d.). A more precise procedure of electronic voting was attached to the notice convening the meeting on the above websites.

AS Tallinna Sadam (Port of Tallinn) held a written vote instead of a regular general meeting. The list of shareholders was closed on 19 June 2020 and the deadline for voting was 29 June. It was possible to choose between two options: first, a shareholder could submit a filled-out and digitally signed ballot or a ballot signed on paper and scanned to the e-mail address indicated in the notice; second, a shareholder could submit a filled-out paper ballot with a handwritten signature or send it by post to the company's address. The notice indicated that in the absence of technical tools a ballot paper may also be filled out and signed at the company's head office on weekdays from 9:00 to 16:00. In addition to shareholders being able to vote without being physically present at the meeting, at the beginning of the voting period the company also organised an online seminar on their YouTube channel, providing shareholders an opportunity to ask questions both before and during the meeting through the

[12] The needs of closed limited companies are mostly different – unlike shareholders in a public limited company, who mostly only play the role of investors, shareholders of private limited companies usually themselves participate in the company's daily activities and thus probably use more flexible options for decision-making than a meeting.

application of the relevant channel (AS Tallinna Sadam, n.d.). On the company's website, a more precise description of the voting procedure was also published along with the subsequent materials of the webinar.

As a third example, AS Merko Ehitus enabled its shareholders to vote electronically prior to the meeting. To do so, a ballot had to be filled out by clearly noting on it one's vote (for, against, or abstaining) in respect of each draft resolution. Then, the ballot had to be confirmed by electronically signing it with an e-signature.[13] A shareholder could also record their vote only in respect of some of the draft resolutions. A ballot that had been filled out and electronically signed had to be sent by e-mail to the company's e-mail address by the designated time (AS Merko Ehitus, 2020).

As concerns German practice in holding electronic meetings, this option is still viewed with scepticism. The first examples of public limited companies which organised their general meeting during the restrictions electronically under the current law were Bayer AS and Deutsche Lufthansa AG. According to the Lufthansa notice of general meeting of 25 June 2020, shareholders were also given the option of distance voting, in addition to appointing a proxy, for which they had to send a filled-out ballot to the company either by post or fax by midnight on 20 June at the latest. In addition, until the beginning of the meeting it was possible to cast one's vote either by e-mail or in the online environment offered by the company (Deutsche Lufthansa AG, 2020). However, in the German legal literature it has been noted that several public limited companies cancelled meetings that had been physically convened for spring or summer and postponed them instead of using electronic possibilities for holding the meetings and voting (Schäfer, 2020, p. 484).

Thus, the practice of Estonian listed public limited companies nevertheless shows that shareholders were enabled to use the simplest electronic means of communication for distance voting, and no separate electronic environment was used. The response of German public limited companies to the restriction on physical meetings arising from the emergency situation was similar or even more conservative. The restrictions in spring 2020 did not lead to the development and introduction of a special voting platform for companies. The reason for this is probably that no companies have so far seen the need to develop such a voting platform: until the other options (e.g., voting by e-mail) are no longer sufficient for companies, they are not ready to contribute to developing new applications. So far, the stock exchange market and the government have also not seen the immediate need to create a separate voting platform, yet such an application would probably help to avoid many disputes since it would create a stable and well-designed voting environment. However, it is worth mentioning that a simple and functional environment has been created for apartment associations in Estonia, which, for example, enables sending notices of a general meeting and voting on draft resolutions of the general meeting put to the vote.[14]

Conclusion

In connection with the legislative amendments entering into force in Estonia on 24 May 2020, it is no longer necessary to lay down the possibility of electronic voting in a company's articles of association. Even though this means greater flexibility and more options for companies, at the same time it also makes the mode of voting and the environment to be used less predictable for shareholders. Although the law contains no precise requirements, it should be taken into account that the procedure laid down for electronic voting must ensure the identification of shareholders as well as the security and reliability of electronic voting. The above must also be proportionate for achieving these aims.

In the opinion of the present author, in the case of electronic voting it is not justified to interpret the law so that, in order to cast an electronic vote, it must definitely be electronically signed by the person casting the vote. Otherwise, electronic voting would become excessively onerous in environments specially designated for this. On this basis, electronic voting at a general meeting and at a meeting of shareholders, as well as prior to the meeting, should be understood as casting a vote in any manner which enables a guarantee, in a technically secure

[13] In Estonia, such identification tools are either an ID-card, Mobile-ID or a newer Smart-ID complying with the qualified e-signature standard.
[14] This environment is at the website www.korto.ee.

manner, that only the right persons can vote, that the votes can be correctly counted in the environment used, and that taking account of restrictions on voting is also ensured.

Since in the case of electronic voting a company must ensure that only the right persons can vote, it cannot be considered sufficient that simply a link to the voting environment is sent to shareholders without the possibility of verifying who can use that link. The environment used should also enable ascertaining who voted and how. For these reasons, it should not be allowed to use an ordinary poll organised in an electronic environment to vote on draft resolutions – i.e., where each person receiving the link can enter their name and note whether they are for or against the resolution.

In practice, in connection with the emergency situation in force in spring 2020, many companies used the possibilities of electronic voting. At the same time, the practice of large listed public limited companies in Estonia shows that only simple tools were used for carrying out distance voting. According to information available to the author, the use of separate electronic environments is rare; indeed, this is still viewed with scepticism. However, such scepticism has no proper basis in a situation where a company has complied with all the statutory requirements when holding an electronic vote.

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