

MARIS VUTT

Legal Opportunities for Using Digital
Solutions in Decision-Making for
a Limited Liability Company



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Solutions in Decision-Making for
a Limited Liability Company



UNIVERSITY OF TARTU

Press

School of Law, University of Tartu, Estonia

The dissertation has been accepted for the commencement of the degree of Doctor of Philosophy (Ph.D.) in law on 7 October 2024, by the resolution of the Council of the School of Law.

Supervisors: Professor, dr. iur. Janno Lahe (University of Tartu, School of Law)
Associate Professor, dr. iur. Kalev Saare (University of Tartu, School of Law)

Opponent: Professor, JUDr. Mária Patakyová (Comenius University in Bratislava, Faculty of Law, Department of Commercial Law and Economic Law)

Commencement will take place on 28 November 2024 at 11.00 a.m in the School of Law, Tartu, Näituse 20, room 203, and via video bridge.

The publication of this dissertation is supported by the School of Law of the University of Tartu.

ISSN 1406-6394 (print)
ISBN 978-9916-27-695-2 (print)
ISSN 2806-2353 (pdf)
ISBN 978-9916-27-696-9 (pdf)

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University of Tartu Press
www.tyk.ee

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LIST OF ORIGINAL PUBLICATIONS

This dissertation is based on the following publications:

1. M. Vutt 'Convening the General Meeting of Shareholders of a Limited Company: Estonian Law in a Digital Perspective'. – *International Comparative Jurisprudence* 2020/6 (1), pp. 95–107.
2. M. Vutt 'Digital Opportunities for – and Legal Impediments to – Participation in a General Meeting of Shareholders'. – *Juridica International* 2020/29, pp. 34–46.
3. M. Vutt 'Electronic Voting in Adopting Resolutions of Limited Companies: The Example of Estonian Law'. – *International Comparative Jurisprudence* 2022/8 (1), pp. 91–103.

ANALYTICAL COMPENDIUM TO A CUMULATIVE DISSERTATION

1. INTRODUCTION

1.1. The Research Topic and Previous Research

The topic of the dissertation combines two important aspects of modern company law – shareholder rights and the global digitalisation trend. Company law stipulates several rights for the shareholders of both public and private limited liability companies. According to the legal literature, those rights can be divided into two main groups: proprietary (also referred to as creditor rights) and managing rights.¹ These rights may differ by nature but arise from the same source – ownership of the company’s shares. Under Estonian law, shareholders’ rights are mainly stipulated in the Commercial Code (CC)² and An Act on the General Part of the Civil Code (GPCCA)³. The core of shareholders’ proprietary rights is the right to receive dividends based on an approved annual report.⁴ This implies that if a company has distributable profit and the shareholders have passed a resolution to distribute it, each shareholder will acquire a claim against the company. However, to exercise property rights, it is first necessary to reach the adoption of a relevant resolution. Therefore, the effective enforcement of the proprietary rights is contingent upon the company’s decision-making process, specifically the enforcement of the managing rights, which encompass, among other, the right to participate in shareholders’ meetings, the right to receive information, the right to vote, and the right to challenge resolutions that violate the law.⁵

The digitalisation of different areas of company law has been a focus of attention at the EU level. For example, The Digitalisation Directive⁶ from 2019 aimed to harmonise the legislation of Member States regarding the online registration of companies, enabling the formation of companies, registration of branches and filing of documents and information fully online. The development

¹ K. Saare, U. Volens, A. Vutt, M. Vutt. Ühinguõigus [‘Company Law’]. Tallinn: Juura 2015, p. 242 (in Estonian).

² Äriseadustik. – 15.02.1995. – RT I 1995, 26, 355; RT I, 06.07.2023, 131.

³ Tsiviilseadustiku üldosa seadus. – 27.03.2002. – RT I 2002, 35, 216; RT I, 06.07.2023, 98.

⁴ According to § 157 (2) and § 276 (1) of the CC, the shareholders have the right to receive dividends paid on the basis of an approved annual report. Other proprietary rights include the right to the liquidation dividend (§ 216 (1) and § 379 (1) of CC); as well as the right to subscribe to new shares (§ 193 (1) and § 345 (1) of CC).

⁵ W. Goette, M. Habersack, S. Kalss. Münchener Kommentar zum AktG, Verlag C.H. Beck, München 2024. – Heider, AktG § 11, Rn 13.

⁶ 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). – OJ L 186, 11.7.2019, p. 80–104.

of shareholder rights has also been strongly affected by digitalisation and globalisation. Both the initial Shareholder Rights Directive⁷ and its revised version,⁸ although mainly aiming to harmonise the regulation of shareholder rights in listed companies, emphasised that it is important to promote the exercise of shareholder rights at general meetings and to encourage long-term shareholder engagement. To reach these aims, the Member States were required to abolish any restrictions as regards participating in meetings through electronic means.

On 29 March 2023, the European Commission published a proposal for a new directive to further expand and upgrade the use of digital tools and processes in company law.⁹ Therefore, the digital exercise of shareholder rights continues to be on the agenda in the European Union.

In limited liability companies, adopting a shareholder resolution requires the implementation of three major activities: convening a shareholders' meeting, conducting the meeting and finally, exercising the voting rights. Those three steps necessary for making an informed decision and adopting a resolution are taken as a basis for addressing the subject matter.

One must note that although it is possible to pass resolutions in writing,¹⁰ the shareholders' meeting is still considered a part of the traditional decision-making process. Shareholders' meetings allow shareholders to come together, discuss important matters, stay informed about the company's performance and strategies and, therefore, make informed decisions about their investments. Discussions carried out during the meetings can also improve corporate governance. When choosing among the decision-making alternatives, it may be deemed more appropriate to convene a meeting if the company has multiple shareholders or in the event of a conflict between them.

As regards convening a meeting, the central issue is the communication between the company and its shareholders. Already in 2016, an expert group established by the European Commission noted that companies should, while also fulfilling other obligations, send notices of meetings to shareholders via

⁷ Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies. – OJ L 184, 14.7.2007, p. 17–24.

⁸ Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement (Text with EEA relevance). – OJ L 132, 20.5.2017, p. 1–25.

⁹ Proposal for a Directive of the European Parliament and of the Council amending Directives 2009/102/EC and (EU) 2017/1132 as regards further expanding and upgrading the use of digital tools and processes in company law COM/2023/177 final. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023PC0177>. Last accessed: 21.09.2024. One must note that the proposal for a directive is mainly aimed at regulating the technical aspects of digitalisation as it focuses primarily on promoting online procedures and electronic copies and extracts of company documents and information.

¹⁰ The law stipulates three different options for the shareholders to adopt decisions: the most traditional possibility is to convene a shareholders' meeting; however, it is also possible to adopt decisions without calling a meeting or by a written unanimous decision (§ 173, § 299¹ and § 305 (2) of the CC).

electronic means, and the Commission should consider the adoption of measures designed to ensure that the company law of Member States does not inhibit the implementation of such communication.¹¹

Estonian private law distinguishes between mandatory and dispositive provisions. Namely, § 5 of the Estonian Law of Obligations Act (LOA)¹² stipulates that upon agreement between the contracting parties, it is allowed to derogate from the provisions of the law unless the law expressly provides or the nature of the provision indicates that derogation is not permitted, or unless derogation is contrary to public order or good morals or violates the fundamental rights of a person. Contrary to the law of obligations, the Estonian CC does not contain such a rule and in many cases, the scope of general contractual freedom in company law remains unclear.¹³ However, the internal relations of a company are, at least in part, similar to those arising from a contract. Therefore, one of the main questions is whether and to what extent the company and its managing bodies have the right to choose communication modalities to ensure compliance with mandatory and unavoidable rules.

After a general meeting is convened, the next step in the decision-making process is to hold the meeting. In 2004, German legal scholar M. Kort expressed the view that a virtual shareholders' meeting is probably just a future dream ("*Zukunftsmusik*"), and it is questionable whether, beyond the previous approaches and plans in European countries, including Germany, the purely virtual general meeting (without any physical attendance) should be endorsed. Nevertheless, he emphasised that technological advancements and reduced expenses associated with virtual meetings tend to favour a virtual general meeting.¹⁴ By 2023, a fully virtual general meeting has become a reality.

Under § 170 (3) and § 297 (4) of the CC, a shareholder may participate in a meeting personally or through a representative. Considering the evolving business culture and overall digitalisation, the expression 'personal participation' has acquired a novel significance. This implies that in addition to physical participation, Estonian law envisages the possibility for shareholders to utilise electronic means to personally participate instead of appointing a representative. The company law review carried out by the Estonian Ministry of Justice (finalised in 2018), found that participation in a general meeting through virtual channels

¹¹ The Informal Company Law Expert Group (ICLEG). Report on Digitalisation in Company Law (March 2016) para 25. Available at: <https://orbilu.uni.lu/bitstream/10993/31152/1/2016-03-24%20icleg-report-on-digitalisation-24-march-2016.pdf>. Last accessed: 21.09.2024.

¹² Võlaõigusseadus. – 26.09.2001. RT I 2001, 81, 487. RT I, 04.07.2024, 17.

¹³ For example, it has been found in Estonian legal literature that the general dispositive principle cannot be applied to the whole field of company law, but each provision must be interpreted substantively to ascertain its nature. P. Varul *et alia*. Võlaõigusseadus I. Kommenteeritud väljaanne [‘Law of Obligations Act I. Annotated Edition’]. Tallinn: Juura 2016, chapter 5, comment 3 (in Estonian).

¹⁴ M. Kort. Infotechnologie im Aktienrecht: Zum Stand der „elektronischen Hauptversammlung“ – NZG 2007, S 653.

should be allowed if an adequate and secure real-time connection for participants is ensured.¹⁵

The general topic of exercising shareholder rights via electronic means has been discussed across Europe already for some time. The experts of the European Commission have noted that the general meeting of shareholders as the highest body of a public limited company was created to ensure effective communication between the company and its shareholders. However, thanks to the almost costless nature of digital communication, the rules for participation in a general meeting and the role of the general meeting should be reviewed.¹⁶ As previously mentioned, the European legislator consistently addresses the issue of the digital exercise of shareholder rights.

One of the major factors that changed the use of electronic means in company law was, without a doubt, the COVID-19 pandemic along with all the restrictions that were implemented to minimise physical contact between people. It has been stated in the legal literature that the virus outbreak can be viewed as an exogenous shock that increased dramatically the number of virtual shareholders' meetings.¹⁷ Before the COVID-19-related crisis and changes in Estonian legislation, electronic participation was explicitly only allowed for listed public companies. Due to the declaration of a state of emergency by the Estonian government on 12 March 2020, the Ministry of Justice of Estonia prepared a draft law including the expanding possibilities for digital meetings.¹⁸ The draft law entered into force on 24 May 2020 and since then, a uniform regulation of electronic participation for all legal persons, including public and private limited companies, is applicable. The regulation, however, is very scarce and limited to only one section. Namely, § 33¹ (1) of the GPCCA stipulates that unless otherwise provided for by law or by the articles of association, a member of a legal person's statutory body may participate in a meeting of such a body, and exercise their 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 on the issues put on the agenda. § 33¹(2) of the GPCCA adds that a

¹⁵ Ministry of Justice. Ühinguõiguse revisjoni analüüs-kontseptsioon ['The Analysis-Concept of Company Law Review'], Tallinn 2018, p. 538 (in Estonian).

¹⁶ The Informal Company Law Expert Group (ICLEG) (see Note 11), para 22.1.

¹⁷ M. Schwartz-Ziv. How Shifting from In-Person to Virtual-Only Shareholder Meetings Affects Shareholders' Voice. European Corporate Governance Institute, Finance Working Paper No 748/2021, p. 2. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3674998. Last accessed: 21.09.2024.

¹⁸ Tsiviilseadustiku üldosa seaduse ja teiste seaduste muutmise seaduse eelnõu SE 180. ['Draft Act Amending the General Part of the Civil Code Act and Other Acts SE 180']. Available at: <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/5a580d80-9735-437f-ab2e-00123eba9343/tsiviilseadustiku-uldosa-seaduse-ja-teiste-seaduste-muutmise-seaduse-elektrooniliste-voimaluste-laiendamise-koosolekute-korraldamisel-ja-otsuste-vastuvotmisel/>, 12.08.2024 (in Estonian). Last accessed: 21.09.2024.

meeting held by electronic means is subject to the same provisions applicable to the adoption of resolutions at a regular meeting of the respective statutory body.

A general regulation consistently opens the door for diverse interpretations and potential loopholes that need to be filled with case law. Every shareholder resolution is considered valid until the court states otherwise in a judgment that has entered into force. The development of case law requires time and the existence of dissenting shareholders who address the problems and apply to court. Therefore, it is impossible to answer the question of successful regulation without first analysing the meaning of the rules.

Several legal questions arise when implementing the possibility of participation in meetings via electronic means. The main issues are related to the verification of participants, technical problems, and the impact of such problems on the validity of resolutions. In the author's opinion, it is also unclear what is the concept of "the place of the meeting" in case the meeting will be carried out electronically, and how the minutes must be drafted and kept for such a meeting. In foreign legal literature, it has, for example, been discussed whether mandatory recording of such meetings should be introduced into the official policies of companies.¹⁹ The question of equal treatment of shareholders also arises in case the meeting is not fully virtual, *i.e.* when some shareholders attend the meeting in person while others have joined it via electronic means.

The introduction of § 33¹ of the GPCCA to Estonian law has also raised a fundamental question concerning the nature of such regulation. At first glance, the wording of the aforementioned regulation seems to refer to the shareholder's right to exercise his or her rights via electronic means. Therefore, one may ask if a shareholder has the right to demand that the management board ensures him or her this opportunity. Even if the shareholder is entitled to request the management board to convene a meeting according to § 171 (1) clause 3 and § 292 (1) clause 2 of the CC, it remains uncertain whether they possess an additional distinct entitlement to request electronic participation. Although the grammatical interpretation method may suggest that the legislator intended to give shareholders the right to demand the enabling of virtual participation, this is necessarily not the case.

The final step in adopting a shareholders' resolution is to conduct a voting along with recording the voting results. Since the new regulation on electronic participation entered into force, it is no longer necessary to lay down the possibility of electronic voting or the relevant rules in a company's articles of association. The abolishment of the previous regulation in the Estonian CC has led to a situation where the law does not provide specific requirements that must be followed when conducting electronic voting upon the adoption of a shareholders' resolution. Given the previous regulation, it is not clear whether electronic voting within the meaning of the new regulation is only the type of voting where shareholders cast their vote by a digitally signed declaration of intention, or whether "electronic voting" as a term should cover all possible voting manners which enable that the entitled person can vote, using electronic means of communication.

¹⁹ M. Schwartz-Ziv (see Note 17), p. 7.

As regards Estonian company law, there is no previous in-depth analysis on these topics that has been published before this dissertation. There is one article, based on a publication of a conference presentation that concerns the topic of exercise of shareholder rights using electronic means within the scope of the decision-making rights of shareholders.²⁰ Several articles have been published concerning other aspects of the rights and obligations of shareholders;²¹ however, there is no comprehensive analysis on the topic of digital aspects of the decision-making process of a limited liability company. The theoretical sources of the dissertation are mainly composed of commentaries on the legal acts as well as foreign articles published in peer-reviewed legal journals and other authoritative sources, the focus of comparison being on German law. Namely, contrary to Estonian law, the German legislator has recently adopted extensive regulations on virtual meetings, which has triggered comprehensive discussions among legal scholars. For example, the author has analysed and used the articles and annotations of German scholars A. Walch, S. Häuslmeier, D. Leuering, D. Rubner, H. Wicke, D. Timmermann, J. Pfeuffer, A. Hoppe, J. Koch *et alia*, but also including examples from Luxembourg (D. A. Zetzsche, L. Anker-Sørensen, R. Consiglio, M. Yeboah-Smith) and the Netherlands (R. Kleipool, M. van Olfen).

1.2. The Objective of the Research and Research Questions

Legal literature has defined a virtual shareholders' meeting as a meeting where no shareholder is present at the usual meeting location and all shareholders participate by digital means of communication. Therefore, the general meeting of shareholders can be completely virtual, but it is also possible to use different electronic means of communication in the various stages of the meeting. It has been pointed out that as regards some aspects, virtual meetings should be distinguished from hybrid meetings where some of the shareholders participate in

²⁰ A. Vutt, M. Vutt. Adoption of Shareholder Resolutions in Post-COVID Era. Example of Estonian Law. *New Legal Reality: Challenges and Perspectives. II: 8th International Scientific Conference of the Faculty of Law of the University of Latvia. 21–22 October 2021, Riga*. Riga: 2022, University of Latvia Press, p. 445–458.

²¹ For example: M. Vutt. Shareholder's Voting Obligation as the Precondition for Replacing a Vote with a Court Decision. – *Juridica* 2017, 6, p. 391–400; K. Saare, M. Vutt. Opportunities of Holders of Minority Shareholdings to Reach a Corresponding Decision Regarding the Interests of a Capital Company. Example of the Compensation of Damage. – *Juridica* 2017, 9, p. 619–634; A. Vutt, M. Vutt. Shareholder Exit in Estonian Private Limited Companies: Proposals of the Company Law Revision Working Group. – *Juridica International* 2021, 30, p. 140–151; A. Vutt, M. Vutt. Shareholders' Draft Resolutions in Estonian Company Law: An Example of Unreasonable Transposition of the Shareholder Rights Directive. – *Juridica International* 2018, 27, p. 68–78; A. Vutt, M. Vutt. Shareholders' Individual Information Right: Prerequisites and Boundaries. – *Juridica International* 2015, 23, p. 60–69, *etc.*

person, while others exercise their rights via digital means.²² To exercise voting rights, it is also possible to use online voting platforms (shareholders being present at the meeting but at the same time being enabled to vote electronically using digital tools) and voting-by-mail where the votes are sent to the company (either before or during the meeting, among others by those not attending the physical meeting).²³ Douglas K. Chia and Ann S. Lee add in-person meetings with live Internet-stream to the list of various digital possibilities, explaining that this is the traditional in-person annual meeting with the addition of live Internet streaming (audio-only, or audio with video) for non-attendees to watch and/or listen the meeting remotely.²⁴

In the dissertation, the terms “virtual (as well as electronic or online) meeting” and “participation” are used in the sense of § 33¹ of the GPCCA, which means that the shareholders are not physically present but have access to the meeting through two-way real-time communication or other similar electronic means allowing them to follow, speak and vote. The term “electronic participation” is understood as an opportunity (but not an obligation) for shareholders to participate electronically in a general meeting. A “hybrid meeting” is a meeting with both electronic and physical participation. In case all shareholders participate remotely, the meeting is referred to as a (fully) virtual meeting. Similarly, the ICLEG has defined a “fully virtual meeting” as a general meeting in which shareholders cannot participate in person and must instead use online methods of participation.

The dissertation investigates two hypotheses. The first one concerns communication between the company and its shareholders when sending a notice of a general meeting, and the second one concerns electronic participation and voting.

The first hypothesis is that the legal rules governing the sending of meeting notices are currently too rigid for both private and public limited companies, and do not allow shareholders to fully take advantage of modern technological possibilities. Hence, it is advisable to amend the law to enable the shareholders of a private limited company to regulate the options for sending the notice of a shareholder meeting in the articles of association. Furthermore, the relevant regulations for public limited companies should be made more flexible.

The second hypothesis is that according to Estonian company law, every shareholder’s right to adopt resolutions can be exercised either physically or

²² It has been argued that some investors believe that a hybrid meeting may be the optimal format for a shareholder meeting. See: D. K. Chia, A. S. Lee. Report on Practices for Virtual Shareholder Meetings. – Harvard Law School Forum on Corporate Governance, January 11, 2021, p. 3, Available at: <https://corpgov.law.harvard.edu/2021/01/11/report-on-practices-for-virtual-shareholder-meetings/>. Last accessed: 21.09.2024.

²³ D. A. Zetzsche, L. Anker-Sørensen, R. Consiglio, M. Yeboah-Smith. The COVID-19-Crisis and Company Law – Towards Virtual Shareholder Meetings. – University of Luxembourg Faculty of Law, Economics & Finance WPS 2020-007, June 2020, p. 12–13. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3576707. Last accessed: 21.09.2024.

²⁴ D. K. Chia, A. S. Lee (see Note 22, p. 2).

electronically, and the same rights must be guaranteed to all shareholders regardless of their manner of participation. It may seem elementary to guarantee identical rights to all shareholders, irrespective of their participation mode. However, it has been argued in German legal literature that under the temporary law that was in effect during the COVID pandemic, it may have been legal to deprive the virtually participating shareholders of certain rights.²⁵ The essential question is whether the rights of virtual participants may differ from the rights of those who participate physically and if so, whether the differences are justified based on the different nature of participation.

The setting of the topic is related to the fact that several EU countries with a similar legal system to Estonia (primarily Germany,²⁶ but also the Netherlands²⁷) have begun to more thoroughly regulate shareholder rights in the context of fully virtual meetings of public limited companies.

The objective of the dissertation is to examine which requirements must be met when convening and conducting a shareholders' meeting electronically, and whether these requirements allow to ensure that shareholders have the same rights of participation and voting as in an ordinary meeting. To achieve this objective, the following research questions have been formulated:

- 1) Which modern electronic means of communication can be used to deliver notices of shareholders' meetings?
- 2) What is the legal nature of the statutory provisions regulating the convocation of a shareholders' meeting and do shareholders have the right to derogate from the statutory requirements on the form of the convocation in the articles of association?
- 3) What are the legal features of a virtual shareholders' meeting and which body of the company should decide whether to hold a virtual, hybrid, or physical meeting?
- 4) Which rights must be guaranteed to the shareholders participating in a general meeting electronically and does electronic participation allow shareholders to exercise their rights to the same extent as in a physically held meeting?
- 5) Which legal requirements apply to the exercise of voting rights by electronic means of communication?

²⁵ B. Gsell *et alia*. Beck-online. Grosskommentare. GesamtHrsg: Henssler Hrsg: Spindler/Stilz. Stand: 01.01.2023 – Paschos, AktG 118a, Rn 6.

²⁶ A. Walch, S. Häuslmeier. Die „neue“ virtuelle Hauptversammlung. – DNotZ 2023, S 106–128.

²⁷ R. Kleipool, M. van Olfen, T. Klein Bronsvooort, C. Nagtegaal, S. Dumoulin. Bill Permanently Allowing Virtual General Meetings Submitted to Dutch Lower House. 25.01.2024. Available at: <https://www.debrauw.com/articles/bill-permanently-allowing-virtual-general-meetings-submitted-to-dutch-lower-house>. Last accessed: 21.09.2024.

As a result of the research, the author will conclude whether Estonian company law needs amending and if so, the author will propose relevant amendments.

Additionally, the compendium sets out further development of the research subject concerning the legal remedies available to shareholders. A central issue in private law is the legal remedies available to persons if their rights are violated. Since the exercise of shareholder rights using electronic means of communication is subject to certain specificities, it is important to analyse them from the point of view of the main legal remedy available to shareholders under Estonian law – challenging the resolutions. The central question is whether or not the specific errors arising from the electronic exercise of shareholder rights can be considered grounds for challenging the resolutions of a shareholders' meeting.

1.3. The Structure of the Dissertation

The dissertation is based on three earlier articles by the author, published in 2020 (two articles) and 2022 (one article). It consists of two parts: an analytical compendium and the published articles. The analytical compilation summarises the primary issues raised in the published articles, while also presenting the author's perspectives, analysing the developments in the intermediate period, and advancing the subject matter within the scope of the research questions. The first article was published in 2020; however, the main principles introduced into Estonian law (the CC and the General Part of the Civil Code Act) have not been amended in the relevant field after May 2020 when the amendments concerning using electronic means to participate in the meetings were introduced more widely into Estonian law. These amendments have been covered by the author at the time of writing the articles.

Contrary to Estonia, the German and Dutch legislators have taken a different approach as regards electronic participation and voting and decided to develop a detailed and comprehensive set of rules for public limited companies for conducting and holding virtual meetings. Consequently, the author analyses whether the Estonian minimalistic approach has been sufficient or does Estonian law need a more detailed regulation of this matter to avoid legal disputes and ambiguity.

The compendium is divided into five substantial parts according to the research questions and additional analysis. The first part (Chapter 2) examines the advancements in the field of research since the publication of the articles, analysing the current state of legal research and regulatory efforts in countries with similar legal systems.

The second part (Chapter 3) concerns the legal regulation of the means of electronic communication when convening a general meeting and the legal nature of such regulations. It addresses and gives answers to the first two research questions.

The third part (Chapter 4) summarises the analyses and the conclusions as regards the third and fourth research questions. Among other questions, it discusses the legal features of a fully virtual shareholders' meeting, the distribution

of powers between the management board and the shareholders and the shareholders' right to demand the possibility of virtual participation. Since significant legislative developments have occurred in the countries used for comparison after the articles were published, the characteristics of a virtual meeting have been discussed more thoroughly in this part of the dissertation. This approach has been adopted to enhance the objective of the dissertation and conclude the research.

The fourth part (Chapter 5) outlines the results of the analysis of and the answers to the fifth research question, analysing the features of electronic voting and evaluating Estonian new regulation. It should be noted that voting rules comparable to those in the CC exist in German law only for public limited companies. The provisions governing the adoption of resolutions in German private limited company (*GmbH*) are rather minimalistic, and despite their apparent flexibility, they have also been criticised.²⁸ The law assumes that the shareholders are entitled to regulate this matter in the articles of association in the best suitable manner. Electronic voting in a private limited company is not regulated under German law; however, § 47 (1) of the *Gesetz betreffend die Gesellschaften mit beschränkter Haftung* (GmbHG)²⁹ provides for the possibility of holding a meeting by video communication. As the law governing Estonian private limited companies bears a greater resemblance to that governing public limited companies, both forms of Estonian limited companies are compared to the German public companies in this section of the dissertation.

Finally, in the fifth part (Chapter 6) a further development of the research subject is set out concerning the legal remedies of shareholders. It is through redress that justice comes to life. As with all areas of private law, the central question in company law is what remedies are available to shareholders if their rights have been violated. The emphasis here is on the most commonly used remedy in Estonia and Germany, namely challenging decisions.

1.4. Methods and Choice of Comparison Materials

The dissertation is based on dogmatic and comparative research methods. The dogmatic method is used to systematically analyse Estonian company law and general provisions of civil law as regards the three legal aspects of the decision-making process of a limited liability company – using electronic communication (i) when convening shareholder meetings, (ii) when participating in a meeting and (iii) when voting. As a result of the analysis, answers to the research questions will be found and the conclusions regarding the validity of the hypotheses will be provided, which, in turn, will make it possible to conclude as to whether Estonian law needs to be amended.

²⁸ See part 2.2.2 of the dissertation.

²⁹ Gesetz betreffend die Gesellschaften mit beschränkter Haftung vom 20 April 1892, das zuletzt durch Artikel 9 des Gesetzes vom 22. Februar 2023 (BGBl. 2023 I Nr. 51) geändert worden ist. Available at <https://www.gesetze-im-internet.de/gmbhg/GmbHG.pdf>.

The author also uses a comparative approach to analyse and interpret Estonian law. Germany has been historically utilised as a primary comparative country in Estonian legal literature and has been deemed a pertinent reference country.³⁰ Estonian Supreme Court has also several times expressed the view that the legislation and case law of other countries with similar legal systems may be used as reference material when interpreting regulations of Estonian private law.³¹ Therefore, the main country used for comparison in the dissertation is Germany. Namely, Estonian private law has largely developed on the principles of German law and when designing the legal regulations in company law, among others, the German law was taken as an example. Germany can be considered as the best reference country when comparing the regulations of company law also because the system of German limited liability companies is similar to the same system under Estonian law. Respectively, German *Aktiengesetz* (AG)³² and GmbHG have been used for comparison in the dissertation. Recently, Germany has passed several laws regulating virtual general meetings and electronic voting, and the relevant legal issues have been extensively discussed in German legal literature. Since the starting point for company law regulations has been similar to Estonian law, the analysis of German law can help to interpret the respective Estonian regulations and find solutions to possible legal problems. Given the above, when carrying out the analysis, parallels are drawn in the dissertation with relevant German legal rules, case law, and opinions of legal scholars.

Additionally, when examining the first hypothesis, the laws of the Netherlands and the United Kingdom have also been used mainly as examples regarding some issues. First, the general provisions of law regulating legal persons in the GPCCA are primarily based on the Dutch Civil Code (*Burgerlijk Wetboek*),³³ and second, the Netherlands has proven to be a leading European country for innovative regulations in many subfields of company law.³⁴ The law of the United Kingdom has been utilised in examining the matter of convening the shareholders' meeting as the resolutions about the internal relations of limited companies in a common law system frequently exhibit flexibility and practicality.

³⁰ K. Saare *et alia* (see Note 1), p. 38 (in Estonian).

³¹ The Supreme Court decision in civil case No 3-2-1-145-04 of 21 December 2004, p. 39; the Supreme Court decision in civil case No 3-2-1-89-14 of 29 October 2014, p. 27.

³² *Aktiengesetz* vom 6. September 1965 (BGBl. I S. 1089), zuletzt geändert durch Gesetz vom 11.12.2023 (BGBl. I S. 354). Available at: <https://www.gesetze-im-internet.de/aktg/AktG.pdf>.

³³ P. Varul *et alia*. *Tsiviilseadustiku üldosa seadus. Kommenteeritud väljaanne* [‘General Part of the Civil Code Act. Annotated Edition’]. Tartu: Juura 2023. – K. Saare, chapter 2, comment 4 (in Estonian).

³⁴ For example, the Netherlands was one of the first countries to abolish the minimum share capital requirement, a similar regulation which entered into force in Estonia only on 1 February 2023. Dutch company law has been an example for designing the general provisions of the GPCCA on legal persons (see P. Varul *et alia* (see Note 33), chapter 2, comments 24–47 (in Estonian)) and it was also widely analysed and used during the company law revision (See: Ministry of Justice (see Note 15) (in Estonian)).

2. CURRENT STATUS OF LEGAL RESEARCH AND REGULATION

2.1. Suggestions of ICLEG³⁵ on possible regulation of electronic participation and virtual meetings on the EU level

In August 2022, ICLEG published a report on virtual shareholder meetings.³⁶ In this report, the expert group outlined several proposals regarding electronic participation and virtual meetings. The expert group stressed that any analysis for action taken at the EU level should begin with the question of purpose. The main purpose could be improving cross-border participation in general meetings. To achieve this objective, consideration should be given to supplementing the Shareholder Rights Directive so that offering electronic participation at general meetings would be made mandatory for all or at least large, listed companies. Consideration could be given to allowing all listed companies the option of holding purely virtual meetings. According to the expert group, the European legislator should also decide whether to address issues such as shareholder identification, especially when it comes to technical details. The objective is to harmonise the legal environment between Member States, especially for cross-border investors.³⁷

The second possibility offered by the expert group is that the legislator could take a broader approach and try to make electronic participation and virtual meetings available to all types of limited liability companies, including non-listed and private companies as more and more small and medium-sized companies tend to have cross-border memberships. The expert group expressed the opinion that an optional approach, requiring Member States to enable all private companies to provide for electronic participation and virtual meetings in their articles of association, would probably be sufficient.³⁸

According to the expert group, the legislator could also introduce mandatory rules on virtual meetings for times of crisis; however, in this case, the European legislator would have to argue that Member States were not able to suitably and conclusively address the issue when acting during the recent pandemic.

³⁵ The current ICLEG was established by the European Commission (EC) in 2020 to assist it with expert advice on issues of company law and corporate governance. It held its first meeting on 2 July 2020.

³⁶ The Informal Company Law Expert Group (ICLEG). Report on Virtual Shareholder Meetings and Efficient Shareholder Communication. August 2022. Available at: https://commission.europa.eu/system/files/2022-10/report_on_virtual_shareholder_meetings_and_efficient_shareholder_communication.pdf. Last accessed: 21.09.2024.

³⁷ The Informal Company Law Expert Group (ICLEG) (see Note 36), p. 56.

³⁸ The Informal Company Law Expert Group (ICLEG) (see Note 36), p. 57.

Comparing the above proposals of ICLEG with Estonian law one might ask to what extent is Estonian law in line with the proposals made by the experts. The author finds that Estonian law supports the idea that electronic participation, like virtual meetings, should be available to all forms of companies, not only public limited companies. Simultaneously, Estonian law does not support the view that European legislators ought to mandate the provision of electronic participation at general meetings for all, or at least large, listed companies.

As far as the laws of Estonia and the comparator countries examined in the dissertation are concerned, the third regulatory approach proposed by the ICLEG, i.e. the introduction of European rules for crisis situations, would be clearly excessive. Estonia, Germany, and the Netherlands have all been able to swiftly adopt the necessary legislation during the pandemic.

2.2. Regulatory efforts in countries with similar legal systems

2.2.1. Public limited companies in Germany and Netherlands

After publishing the articles, German company law has significantly changed as regards virtual shareholder meetings of public limited companies as the legislator has introduced separate regulations to AktG. The provisions governing electronic participation in ordinary meetings (§ 118 (1) of AktG) and voting by means of electronic communication (§ 118 (2) of AktG) have remained largely the same.

German legislators reached the permanent regulation of a fully virtual general meeting of a public company in 2022. The corresponding law (Law on the introduction of virtual general meetings of public companies and changing the regulations of cooperative, bankruptcy and restructuring laws³⁹) was adopted on 26 July 2022. The regulations on public limited companies came into force the day after its adoption, on 27 July 2022. Among other regulations, the new law amended AktG and § 118a of AktG is the central provision of the new law. It supplements the systematics of the regulations of the physical general meeting (§ 118 of AktG), defines the concept of the virtual meeting and specifies the requirements for holding it. The minimum requirement for a virtual general meeting is the audio and video transmission of the meeting. In addition, the new provisions contain further specifications as to the electronic means by which individual rights of shareholders are to be exercised. The main principle is that all rights that can be exercised in a face-to-face meeting according to the first sentence of § 118 (1) of AktG have an electronic equivalent in a virtual meeting.⁴⁰ As it has been stated in the legal literature, any form of electronic participation

³⁹ Gesetz zur Einführung virtueller Hauptversammlungen von Aktiengesellschaften und Änderung Genossenschafts- sowie insolvenz- und restrukturierungsrechtlicher Vorschriften. Vom 20. Juli 2022. – BGBl 2022. Teil I Nr 27.

⁴⁰ B. Gsell *et alia* (see Note 25) – Paschos, AktG § 118a, Rn 19.

should represent an additional opportunity that expands rather than narrows shareholders' rights.⁴¹

According to the explanatory memorandum to the law introducing virtual general meetings, the new regulation will permanently allow public companies to use the form of a fully virtual general meeting as an additional form of meetings in the future. Holding a virtual general meeting is subject to several requirements (e.g. the complete video and audio transmission). Furthermore, the explanatory memorandum states that special attention is paid to guaranteeing shareholder rights in such meetings.⁴²

The legal literature has also expressed the view that the minimum requirements to be met are now more comprehensive, especially since the law has picked up on various "best practices" established during the pandemic. Furthermore, individual rights to which shareholders are entitled are regulated in detail in separate regulations.⁴³ The explanatory memorandum to the law states that the regulation aims to legalise the fully virtual general meeting, excluding the physical presence of all shareholders.⁴⁴

Similar developments are taking place in Dutch company law. On 7 December 2022, the Dutch government published a draft law⁴⁵ permanently enabling Dutch companies and associations to hold their general meetings only virtually. Dutch lawyers have pointed out that the proposed draft would offer a permanent basis for fully virtual general meetings, replacing the temporary solution provided to mitigate the effects of the pandemic. Under the new law, Dutch companies would be able to choose between three types of meetings: a meeting held fully in person, a fully virtual meeting, or a hybrid meeting. The draft law does not automatically allow virtual general meetings and permits this option only if the articles of association provide for it. According to the draft law, the notice of the meeting must set out the procedure for electronic attendance and voting. Furthermore, two-way audio-visual means of communication must be provided, allowing shareholders to directly participate in the meeting, electronic voting must be available during the meeting, and it must be possible to identify shareholders that

⁴¹ D. Timmermann, J. Pfeuffer. Aktuelle Entwicklungen zu Online- und Hybrid-Versammlungen im Vereinsrecht. – NZG 2023, S 61.

⁴² Referentenentwurf des Bundesministeriums der Justiz Entwurf eines Gesetzes zur Einführung virtueller Hauptversammlungen von Aktiengesellschaften. 09.02.2022. Available at: https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/DE/2022_Einfuehrung_virtueller_Hauptversammlungen_Aktiengesellschaften.html. Last accessed: 21.09.2024.

⁴³ A. Walch, S. Häuslmeier (see Note 26), S 108.

⁴⁴ Referentenentwurf des Bundesministeriums der Justiz Entwurf eines Gesetzes zur Einführung virtueller Hauptversammlungen von Aktiengesellschaften (see Note 42), S 14.

⁴⁵ *Wet digitale algemene vergadering privaatrechtelijke rechtspersonen*. Available at: <https://www.internetconsultatie.nl/digiava/b1>.

participate electronically.⁴⁶ As of January 2024, the bill in question has been submitted to the parliament.⁴⁷

In this respect, the legal regulation in Estonia differs from that of the comparative countries since Estonian legislators have currently chosen a minimal level of regulation regarding electronic participation, and a fully virtual meeting is not separately regulated.

2.2.2. Private limited companies in Germany

In previously published articles, the author has not comparatively analysed issues concerning electronic participation in the shareholders' meeting of a German *GmbH* (private limited company) as there were no specific rules concerning this at the time. Although temporary rules on electronic attendance were introduced for public limited liability companies in the wake of the coronavirus pandemic, the German legislator decided not to introduce such rules for the *GmbH*. As of August 2023, the GmbHG was, however, amended and the author outlines the changes introduced below for the sake of a comprehensive approach.

The decision-making process of a private limited company, in contrast to that of a public limited company, may initially appear less formalised. This is especially noticeable regarding the *GmbH* in Germany.⁴⁸ The German approach can be explained by the fact that the private company is a small, closed entity with fewer shareholders and, therefore, the shareholders should have more rights to shape their legal relations in a way that suits them best. Historically, the legislator has, therefore, intervened less in the regulation of relations between shareholders of a private limited company and the GmbHG has been significantly less amended than AktG. It is worth noting that, even during the COVID pandemic, it was not considered necessary to regulate the decision-making of private limited companies further.

It is stipulated in § 48 (1) of the GmbHG that shareholder resolutions are adopted at shareholder meetings. § 48 (2) further states that a meeting is not necessary if all shareholders declare their consent to the disposition in question on text form or by submitting their votes in writing.

According to German legal literature, § 48 (1) of the GmbHG remained the same for 130 years, stipulating that resolutions of shareholders are adopted “in meetings”, whereas traditionally, a meeting has exclusively been interpreted as a physical meeting. Considering that the legal norm originates from the end of the

⁴⁶ R. Kleipool *et alia* (see Note 27).

⁴⁷ R. Kleipool *et alia* (see Note 27).

⁴⁸ As previously mentioned, the Estonian private limited company has been primarily regulated in a manner similar to that of a public company. The Estonian private limited company is distinguished from a public company by its somewhat more flexible management structure and milder capital requirements. In other respects, the private company as a legal form has developed quite similar to a public company, and despite attempts to simplify the rules regulating private companies more generally, it has never succeeded.

19th century, it is obvious that the historical legislature only had physical, face-to-face meetings in mind. However, this does not mean that historically accepted principles of interpretation should retain the original understanding until they are *expressis verbis* revised by the legislature. At the same time, the legislature should not hastily cement this historical idea just when it begins to experience a fundamental change due to actual circumstances. C. Bohmann argues that the regulation of virtual meetings of public limited companies is at least based on more than two years of experience with the provisional solution foreseen for the time of the pandemic; however, regarding private limited companies, there is a lack of comprehensive legal understanding, and both the sceptical and the optimistic view of virtual decision-making are ultimately based primarily on speculation.⁴⁹

As noted above, during the pandemic, the legislator did not create any special regulations for virtual meetings for private limited companies – unlike for public companies, associations and cooperatives – but only eased the requirements for adopting resolutions without a meeting under § 48 (2) of the GmbHG.⁵⁰ It has also been pointed out that since the pandemic has intensified the use of digital solutions, the German parliament *Bundestag* passed the final version of the draft Act to Supplement the Regulations for the Implementation of the Digitisation Directive⁵¹ on 23 June 2022, which then came into force in two stages. As a result, on 1 August 2023, an amendment to the GmbHG⁵² entered into force, adding the second sentence to § 48 (1), according to which shareholders’ meetings of private companies can also be held by telephone or video communication if all shareholders agree to this in text form.⁵³ While previously, purely virtual shareholder meetings were only possible if there was a respective provision in the articles of association, the new law allows private limited companies to hold virtual shareholders’ meetings without a corresponding provision in the articles of association, if all shareholders agree.

⁴⁹ C. Bochmann. § 48 I 2 GmbHG-E des DiREG-Referentenentwurfs als Digitalisierungsbremse im Recht der GmbH-Gesellschafterversammlung. – NZG 2022, S 531.

⁵⁰ C. Bochmann (see Note 49), S 531.

⁵¹ Directive (EU) 2019/1151 (see Note 6), p. 80–104.

⁵² Gesetz zur Ergänzung der Regelungen zur Umsetzung der Digitalisierungsrichtlinie vom 15 July 2022. – BGBl 2022, I, 26.

⁵³ The regulation of text form is stipulated in § 126b of the German Civil Code (BGB) See: Bürgerliches Gesetzbuch vom 02.01.2002, (BGBl. I S. 42), zuletzt geändert durch Gesetz vom 16.07.2024 (BGBl. I S. 240). Available at: <https://www.gesetze-im-internet.de/bgb/>, which mandates that a readable declaration, containing the name of the individual making the declaration, must be recorded on a medium that enables the recipient to maintain a record of or store the declaration and permits its unchanged reproduction. Under Estonian law, the identical form is referred to as a “form reproducible in writing” and encompasses handwritten but reproduced signatures, as well as electronic mail, fax, and other similar forms.

The explanatory memorandum to the draft law⁵⁴ points out that the reality has changed significantly, and meetings are increasingly being conducted using electronic means of communication. The exchange in conference calls, whether by telephone or video communication, when holding meetings is becoming a reality. Accordingly, there is often the expectation that resolutions will also be passed the same way as in face-to-face meetings. The memorandum explains that the amendment made to § 48 (1) of the GmbHG supplements the (dispositive) provisions on the internal organisational structure of the company and expands the possibility of decision-making to virtual meetings.⁵⁵

C. Bochmann has expressed the opinion that in reality, the new regulation seems to be rather restrictive and contrary to the justifications expressed in the explanatory memorandum, the possibilities of virtual decision-making are not expanded, but narrowed. According to C. Bochmann, this applies both to the concept of a shareholders' meeting in general and to the possibilities of drafting the articles of association regarding the permission of virtual resolution formats.⁵⁶

It can be concluded that the historical minimalism of the legal regulation of a German limited liability company is evident from the above. *GmbH* is much closer to a contractual relationship than large capital companies in terms of the structure and regulation of relations between shareholders. The question can be raised as to why there has been no special need to expressly regulate the virtual meeting of the shareholders of a private limited company. The reason is probably that the shareholders of such companies are used to shape the decision-making process in their articles of association. The previous version of § 48 (1) of the GmbHG did neither limit nor exclude the possibility to use electronic means of communication. The only issue that is additionally regulated since 1 August 2023, is that holding a virtual meeting is no longer a matter to be decided by a majority vote but requires the consent of all shareholders.

However, the proportionality of the new regulation has been considered debatable. According to the general principle, shareholders of a limited company should have the right to decide most questions by the majority vote, and the law requires unanimity only in very few cases.⁵⁷ There is currently a discussion in German legal literature as to whether the legislature should have been active at all, especially in the light of the decision of the German Supreme Court from 5 October 2021,⁵⁸ in which the court ruled that a merger resolution of a cooperative that according

⁵⁴ Referentenentwurf des Bundesministeriums der Justiz. Gesetz zur Ergänzung der Regelungen zur Umsetzung der Digitalisierungsrichtlinie. 22.03.2022. Available at: https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/DE/2022_Digitalisierungsrichtlinie_Erganzung.html Last accessed: 21.09.2024.

⁵⁵ Referentenentwurf des Bundesministeriums der Justiz (see Note 54), S 22.

⁵⁶ C. Bochmann (see Note 49), S 531.

⁵⁷ For example, the merger report does not have to be prepared if all shareholders of the merging company agree to it (§ 393 (2) of CC and § 8 (3) of UmwG). See: Umwandlungsgesetz vom 28.10.1994, BGBl. I S. 3210.

⁵⁸ BGH (II. Zivilsenat), Beschluss vom 05.10.2021 – II ZB 7/21. – BeckRS 2021, 31922.

to law has to be adopted in a general meeting, is in accordance with law when adopted in a virtual meeting.⁵⁹

C. Bochmann points out that in case all shareholders were present, it was possible to adopt resolutions, among other ways, virtually even before the amendment of § 48 (1) of the GmbHG. He refers to § 51 (3) of the GmbHG which states that if the shareholders' meeting has not been properly convened, resolutions can still be passed if all shareholders are present and agree to hold a meeting.⁶⁰ The CC includes similar regulations in § 172¹ and § 296 which stipulate that if the requirements of the law or articles of association have been significantly violated when convening a meeting, the meeting is not entitled to adopt resolutions unless all shareholders participate or are represented at the meeting. Resolutions passed at such a meeting are null and void if the shareholders against whom the convening procedure was violated do not approve the resolution.⁶¹

C. Bochmann also argues that a narrow interpretation of the referred § 51 (3) of the GmbHG might lead to the conclusion that the participation of all shareholders only corrects the errors of convening the meeting (deadlines, forms *etc.*). He adds that it cannot be harmful if a resolution is passed simultaneously to the virtual exchange of opinions, at least with the participation of all shareholders. This exchange is unlikely to be a legal meeting, but it does not have to be. C. Bochmann also explains that as the second sentence of 48 (1) of the GmbHG mandates the participation requirement for all shareholders in virtual meetings, the virtual meeting is inferior to the conventional face-to-face meeting, in which not all shareholders are required to participate to pass valid resolutions. The only requirement for physical meetings is that every shareholder is properly given an opportunity to participate, which is ensured through invitation formalities and deadlines. In addition, the duty of loyalty under company law ensures that the shareholder's right to participate is not infringed, for example by being summoned to a meeting at a foreseeably unsuitable time or in a foreseeably unsuitable place. The same should apply to virtual meetings.⁶²

Similarly, Estonian law provides that shareholders of a private limited company may adopt resolutions informally if all shareholders agree to the resolution and sign it (§ 173 (6) and (7) of the CC). Section 173 of the CC allows the adoption of resolutions by a majority vote in text form (in this case, the vote given by

⁵⁹ H. Fleischer, W. Goette. Münchener Kommentar zum GmbHG. Verlag C.H. Beck München, 4. Auflage 2023. – Liebscher. § 48, Rn 1a-1b; C. Bochmann (see Note 49), S 531.

⁶⁰ C. Bochmann (see Note 49), S 533.

⁶¹ Estonian Supreme Court has explained that the regulation in question provides two ways to consider a violation of the procedure for convening a meeting resolved: first, a violation of the procedure for convening a meeting is eliminated if all shareholders are present at the meeting despite the violation and agree to hold the meeting. Second, the nullity of the resolution will also be eliminated if the shareholders in respect of whom the convening procedure was violated approve the resolutions. See: The Supreme Court decision in civil case No 2-16-8010 of 29 November 2017, p. 12; The Supreme Court decision in civil case No 3-2-1-44-17 of 24 May 2017, p. 15.

⁶² C. Bochmann (see Note 49), S 533–534.

a shareholder must be either physically or electronically signed) or in a form that can be reproduced in writing (in this case, the transmission of the vote by e-mail or other means of communication is also sufficient, given it includes the name of the specific person and allows the vote to be reproduced later). The CC also provides for strict rules regarding convening a meeting, specifying the obligations of the board to guarantee shareholders the possibility to attend the meeting and the right to cast an informed vote (§§ 171–172 of the CC).

C. Bochmann criticises the new German law and points out that the best way to avoid legal uncertainty regarding the virtual decision-making process of a private limited company is to refer to the possibility of drafting the articles of association. He adds that even if the second sentence of § 48 (1) of the GmbHG can be interpreted as non-mandatory, it is still problematic because if the company is required to utilise virtual solutions expeditiously, particularly in exceptional circumstances, it may not be feasible to modify the articles of association on time to enable virtual adoption of resolutions. C. Bochmann argues that the foreseeable legal risks concerning introducing the new regulation are even more problematic than the practical hurdles of introducing statutory requirements for virtual decision-making. C. Bochmann also raises the question of whether the possibility of holding a virtual meeting can even be provided for in the articles of association and concludes that if this is the case, it is unclear with what majority of votes such provision can be introduced. Altering the articles of association requires 3/4 of the votes; however, the second sentence of § 48 (1) of the GmbHG requires unanimity.⁶³

It is noteworthy that Germany has opted for a different approach to regulating virtual participation for different types of legal persons. According to the legislator, this is a fundamental decision justified by the fact that if there is a need for discussion and/or potential for conflict, a face-to-face meeting as a means of communication should be preferred.⁶⁴

The new regulation as regards German private limited companies can, however, be considered questionable, among other reasons because Germany has also adopted the Law on the Modernisation of Partnership Law⁶⁵ that has made several changes to the German Commercial Code – Handelsgesetzbuch (HGB).⁶⁶ The new version of § 109 of the HGB entered into force on 1 January 2024. It regulates, among other things, the adoption of resolutions within partnerships. The

⁶³ C. Bochmann (see Note 49), S 534.

⁶⁴ Referentenentwurf des Bundesministeriums der Justiz. Gesetz zur Ergänzung der Regelungen zur Umsetzung der Digitalisierungsrichtlinie (see Note 54), S 18.

⁶⁵ Gesetz zur Modernisierung des Personengesellschaftsrechts. Vom 10. August 2021. – BGBl 2021, I, 53. MoPeG.

⁶⁶ Handelsgesetzbuch in der im Bundesgesetzblatt Teil III, Gliederungsnummer 4100-1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 13 Absatz 4 des Gesetzes vom 10. März 2023. – BGBl. 2023 I Nr. 64.

explanatory memorandum to the law⁶⁷ states that the new regulation provides that the partners adopt resolutions in meetings since the meeting guarantees an optimal decision-making process, and provides information and the opportunity to discuss, speak and object. However, the memorandum emphasises that the law allows resolutions to be passed in both face-to-face and virtual meetings (e.g. held via telephone or video conference).

In German legal literature, there are also critical views towards the virtual form of meetings in general, which can to some extent explain the legislator's choices. For example, H. Altmeppen has criticised the concept of a virtual meeting and expressed the view that virtual meetings are more likely than face-to-face meetings to raise the risk of doubts about the voting results. He argues that this is especially evident in a telephone conference, but even when the shareholders participate in a video conference, it is sometimes difficult to reconstruct the result of the decision if it is not clearly expressed. The author of the dissertation disagrees, at least as regards the meetings that take place via video. At the same time, H. Altmeppen reasonably points out that even in a face-to-face meeting there remains the possibility that voting results and, therefore, also the resolution will not be clear when the results have not been clearly established and disclosed.⁶⁸ However, that does not mean that a meeting held via electronic means of communication could be considered less safe *per se*. The management board is responsible for ensuring that the same standards apply as to a physical meeting. Since the determination of voting results can be informal or implicit in practice, the procedure for determining voting results and adopting resolutions must be reliable and verifiable.⁶⁹

C. Bochmann points out that video conferences have both advantages and disadvantages as regards the decision-making process of shareholders: their benefits are undisputed in terms of flexibility, quick availability, environmentally friendly, time-saving and reduction in travel expenses. At the same time, its weaknesses are reduced liveliness and spontaneity of the exchange, confidentiality risks and "zoom fatigue" (boredom or tiredness associated with the overuse of online communication platforms). He also points out that different shareholders may have different expectations regarding the possibilities to participate; however, despite many various interests and somewhat ambiguous legal interpretations, no increase in disputes about virtual decision-making formats can be determined according to published court decisions. In any case, the author agrees with the caution that the second sentence of 48 (1) of the GmbHG poses a risk of abruptly terminating the discussion regarding virtual shareholder meetings within the

⁶⁷ Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz Entwurf eines Gesetzes zur Modernisierung des Personengesellschaftsrechts. 19.11.2020. Available at: https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/DE/2020_Personengesellschaftsrecht.html. Last accessed: 21.09.2024.

⁶⁸ H. Altmeppen. Dogmatische Grundfragen des Beschlusstatbestands in GmbH und Personengesellschaft und ihre Bedeutung für Online-Beschlussfassungen. – NZG 2022, S 1567.

⁶⁹ H. Altmeppen (see Note 68), S 1567.

GmbH before the pros and cons have been adequately observed and deliberated upon. The assumption that functional equivalence should only be guaranteed if all shareholders participate is likely to overshoot the target.⁷⁰

As a conclusion, it can be inferred that the Estonian law would not necessitate a provision similar to the second sentence of 48 (1) of the *GmbHG*, as it would neither facilitate the adoption of shareholder resolutions nor enhance the effectiveness of shareholder meetings. Furthermore, it would be an unnecessary restriction that would distort the objectives of 33¹ (1) of the *GPCCA*, which is to keep the regulation of virtual participation as simple as possible.

⁷⁰ C. Bochmann (see Note 49), S 535.

3. ELECTRONIC COMMUNICATION IN THE PROCESS OF CONVENING A SHAREHOLDERS' MEETING

3.1. General remarks on the legal nature of the notice of a shareholders' meeting

As regards electronic participation, various electronic forms became essential during the pandemic, and the situation required the legislator's attention. The rules governing the sending of notices of meetings have largely remained the same and no significant changes have been made to Estonian or German law regarding the convening of meetings.

The analysis in the first article revealed that despite the absence of comprehensive research as regards the legal nature of the notice of the meeting in Estonian legal literature, it has been referred to as a declaration of intention that necessitates receipt within the meaning of the first sentence of 69 (1) of the GPCCA. Section 69 (1) of the GPCCA stipulates that a declaration of intention directed at a certain person must be expressed by the party making the declaration and it enters into force when it has reached the addressee and he or she has a reasonable opportunity to acquaint himself or herself with it. However, the provisions for sending a notice of a shareholders' meeting are special rules that prevail over the general norms in the GPCCA.⁷¹

It can be concluded that according to Estonian case law, a notice of a shareholders' meeting is a declaration of intention within the sense of the General Part of the Civil Code Act, although not all general provisions of the GPCCA apply to communicating notices as the procedure has special rules arising from the CC. As long as the CC foresees special regulations on specific issues, the GPCCA is not applicable. For example, to determine whether a notice of a meeting has been sent in time, it is not necessary to assess when the shareholder could reasonably have had access to it. Instead, the relevant time is the time when the notice of the meeting could be expected to reach the shareholder, given the characteristics of the means of communication used.

Hence, a notice of a meeting bears a striking resemblance to a declaration of intention addressed to an individual who is not present, as it is imperative to ensure that it was sent to the appropriate address and that the recipient can actually receive it. According to the second sentence of § 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 recipient and the recipient has had a reasonable opportunity to review it; however, the notice for a meeting 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 (third sentence of § 172 (1) of the CC).

⁷¹ See: the Supreme Court decision in civil case No 3-2-1-10-17 of 12 April 2017, p. 16.

In summary, one can, therefore, conclude that although the Estonian legal literature does not define the legal nature of a notice on calling a shareholders' meeting, the rules on declaration of intention foreseen in the GPCCA apply to the extent to which the law does not provide otherwise.

German legal theory (especially as regards private limited companies), on the other hand, suggests that the act of calling a meeting and sending a notice cannot be considered a transaction (i.e. a declaration of intention intended to have a certain legal effect) since this declaration of intention (generally made by the management) by itself does not generate legal effects and determine whether there will actually be a quorum at the meeting.⁷² Convening a shareholders' meeting has been referred to as a special 'act under company law'.⁷³ The notice of a meeting is still aimed at ensuring that the meeting may take place if all the prescribed legal conditions are met, according to some German legal scholars.⁷⁴ However, the current opinion prevailing in Germany is that the regular rules on declaration of intention are not entirely suitable for application to convening a meeting.⁷⁵

Although at first glance it seems that Estonian and German legal theory differ on the legal nature of the notice of the meeting, the approach is actually quite similar – to the extent that the law prescribes specific rules, the general provisions governing the making of declarations of intention are not applicable.

3.2. Options for sending notice of a shareholders' meeting

According to the second sentence of § 172 (1) of the CC, the notice of a meeting of a private limited company must be sent to the postal address entered in the list of shareholders or to an e-mail address. The possibility to send the notice of a meeting to shareholders via e-mail was added to the CC and entered into force on 1 November 2011.⁷⁶ In the explanatory memorandum of the draft law,⁷⁷ this amendment was not specifically justified and it was only stated that the law would be supplemented to allow the company to send the notice to a shareholder via e-mail if the shareholder had informed the company of his or her e-mail address. One can, therefore, conclude that the legislator aimed to expand the forms of notification of a meeting and give private limited companies the opportunity to

⁷² H. Fleischer, W. Goette (see Note 59) – Liebscher, § 49, Rn 8.

⁷³ A. Heidinger, S. Leible, J. Schmidt. Kommentar zum Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbH-Gesetz). Verlag C.H. Beck München, 2. Auflage 2017. – Römermann, § 49, Rn 15.

⁷⁴ A. Heidinger *et alia* (see Note 73) – Römermann, § 49, Rn 15–16.

⁷⁵ H. Fleischer, W. Goette (see Note 59) – Liebscher, § 49, Rn 5.

⁷⁶ Äriseadustiku muutmise seadus. – RT I 2010, 77, 589.

⁷⁷ Äriseadustiku muutmise seaduse eelnõu SE 552. [‘Commercial Code Amendment Act. Draft law SE 733’]. Available at: <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/3c7833d5-7972-3348-8cca-c210ab5e36ea/ariseadustiku-muutmise-seadus/>. 2.08.2024 (in Estonian). Last accessed: 21.09.2024.

communicate with its shareholders more flexibly. From the standpoint of the legislator, it probably did not seem necessary to justify this change, as the development of technology and attempts to save management costs have always been sufficient arguments in various aspects of digitisation.

Section 172 (1) of the CC does not include a requirement that a notice sent by e-mail can only be deemed to have been received if the shareholder confirms that he or she has received the e-mail. As regards private limited companies, the Supreme Court of Estonia has expressed the view that according to law, the body calling a meeting (usually the management board) has the discretion to choose 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 meeting is convened in compliance with the law.⁷⁸

Regarding public limited companies, § 294 (1) of the CC specifies that the notice must be sent to the address entered in the share register by registered mail. If the company has more than 50 shareholders, it may instead publish a notice of a meeting in at least one daily national newspaper. For listed companies, § 294¹ of the CC provides that the notice of a general meeting is to be published on the company's website. As regards electronic means of communication, § 294 (1)¹ of the CC stipulates the possibility to send a meeting notice also via e-mail or fax. However, the fax or e-mail message must refer to the obligation to confirm the receipt of the document immediately and the notice is deemed delivered only if the recipient confirms that he or she has received it (either in writing, by fax, or electronically). It can, therefore, be concluded that although Estonian law allows for the sending of a general meeting notice via e-mail, this method is not particularly advisable for a public company. If a shareholder fails to acknowledge receipt of the notice, the notice will not be considered to have been properly sent, and the shareholder may later claim that the company has materially breached the procedure for convening the meeting.

German law specifies that the convocation of a shareholders' meeting of a private limited company must take place by sending a registered letter (§ 51 (1) of the GmbHG). Therefore, the law does not provide any other means of notification for the meeting. Nonetheless, this is a default rule; therefore, it applies only in the absence of specific guidelines in the articles of association. The method of convening a meeting is at the shareholders' discretion, and they can provide that a meeting will be called by regular mail, e-mail, or even via an internet forum.⁷⁹ The formal requirements for convening a meeting are non-mandatory,⁸⁰ as the relations between the shareholders of a private limited company (*GmbH*) are

⁷⁸ The Supreme Court decision in civil case No 2-16-17508 of 30 May 2018, p. 10.

⁷⁹ T. Drygala, M. Staake, S. Szalai. Kapitalgesellschaftsrecht. Mit Grundzügen des Konzern- und Umwandlungsrechts. Heidelberg, Dordrecht, London, New York: Springer, 2012, Rn 129, S 236.

⁸⁰ A. Baumbach, A. Hueck. Gesetz betreffend Gesellschaft mit beschränkter Haftung. Beck'scher Kurzkommentare, 21. Auflage 2017. – Zöllner/Noack, § 51, Rn 39. Shortening the period of notice via the articles of association, however, is not allowed.

subject to the principle of general freedom of contract. Therefore, shareholders are afforded the freedom to shape the internal matters of the company in the articles of association.⁸¹ In principle, shareholders could agree to call meetings completely without any specific format, according to the legal literature.⁸²

The way general meetings of German public limited companies are convened is regulated by Article 121 (4) of AktG. This differs 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*).⁸³ 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.⁸⁴ Since public limited companies in Germany are generally large entities with their shares also often listed on the stock market, the emphasis is on publishing the notice in a specific way and it is up to shareholders to acquire the information about the meeting taking place. The presumed permissibility of sending registered mail should enable public limited companies with a specified circle of shareholders to notify of their general meetings more flexibly.⁸⁵

Similarly to a German private limited company, the rules for sending the notice are default and the articles of association may stipulate otherwise. According to the legislator's intention, the reservation in the articles of association is intended to make it easier for companies with a manageable number of shareholders to convene meetings by allowing the articles of association to stipulate less stringent requirements for the notification method, such as fax or e-mail. Nevertheless, the articles of association may also stipulate more stringent requirements, such as the requirement for a return receipt. Since the law does not limit the content of possible provisions in the articles of association, it has been pointed out that it is even conceivable to provide for a verbal or telephone convocation, although this is not generally recommended considering the informational standards of the notice foreseen in the law. According to the purpose of the standard, simplifications in the articles of association must also always provide for individual notification of the convening of the meeting. It is not possible to stipulate that the meeting will be convened solely by publication on the company's website. A provision in the articles of association making it mandatory to convene a meeting only by individual notices sent to all shareholders would be inadmissible since the company

⁸¹ T. Drygala, M. Staake, S. Szalai (see Note 79), Rn 28, S 15.

⁸² R. O. Seeling, M. Zwickel. Typische Fehlerquellen bei der Vorbereitung und Durchführung der Gesellschafterversammlung einer GmbH. – DtSR 2009, S 1098.

⁸³ These could involve electronically published official notices (Bundesanzeiger) or other publications or places of publishing set out in the articles of association. T. Drygala, M. Staake, S. Szalai (see Note 79), Rn 226, S 482.

⁸⁴ U. Hüffer, J. Koch. Beck'scher Kurz-Kommentare, Vol. 53. Aktiengesetz. Verlag C.H. Beck München, 13. Auflage 2018. – Koch, § 121, Rn 11f.

⁸⁵ G. Spindler, E. Stilz. Kommentar zum Aktiengesetz. Verlag C.H. Beck, München, 3. Auflage 2015.– Spindler, Stilz, Rieckers, AktG § 121, Rn 61.

must always have the legally secure option of convening the general meeting solely by publication in the Federal Gazette.⁸⁶ It is also deemed unacceptable to notify in a way that part of the notice is sent/published in one way and another part another way (e.g. part of a notice being published in the Federal Gazette while the other part is sent by e-mail).⁸⁷

The above-mentioned framework permits extensive contractual freedom for German private limited companies regarding the manner of delivering a notification and arranging the meeting. Public limited companies are also allowed to prescribe different ways of sending a notice, even though the general rules can overall be described as more mandatory.

In the United Kingdom, sending a convocation notice is regulated in Article 308 of the Companies Act 2006,⁸⁸ establishing that a notice of a general meeting of a company must be sent in a hard-copy form, in electronic form, using a website, 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.

It can be concluded that in the reference countries, the notification options are either left to the discretion of the shareholders or at least a reasonable choice is given to the shareholders between different modern methods of notification. In Estonia, the ways of sending the notice provided for by law are different for private and public limited companies, whereas for public limited companies the sending of the notice by e-mail is subject to quite strict requirements and if the company aims to avoid disputes, the use of this option is essentially excluded. To determine whether Estonian law permits more flexible solutions in the articles of association of a company, the author analysed whether it is feasible to deviate from the provisions of the law in the articles of association. If this is not an option, then Estonian law cannot be considered competitive regarding this issue.

3.3. Contractual freedom as regards the regulation of sending the notice of a shareholders' meeting

To assess the regulatory nature of the rules on sending meeting notices, one must first ask about the purpose of such rules. The Supreme Court of Estonia has emphasised that the formal requirements for sending the notice of a meeting are

⁸⁶ B. Gsell *et alia* (see Note 22) – Rieckers AktG § 121 Rn. 71.

⁸⁷ H.C. Grigoleit. *Aktiengesetz. Kommentar*. Verlag C.H. Beck München, 2. Auflage 2020 – AktG § 121, Rn 22.

⁸⁸ The Companies Act 2006. Available at: <https://www.legislation.gov.uk/ukpga/2006/46/contents>, 29.07.2024.

established to ensure that shareholders receive the notices and to enable the company to be assured that by sending the notice to a certain address, it has met the requirements prescribed in law. The Supreme Court's view is that the formal requirements for sending a notice are intended to protect the interests of both parties, the shareholder receiving the notification and the person initiating the meeting.⁸⁹

Similarly, it has been pointed out in German legal literature that the purpose of the standards established for convening the shareholders' meeting is to ensure the participation of shareholders in the decision-making process of the company (protection of disposition) and to enable the shareholders to prepare for the meeting (protection of preparation) to adequately exercise the membership rights. Additionally, the regulation aims to ensure legal certainty by providing specific prerequisites to the meeting that legitimise corporate actions, and to form the company's will in accordance with the announced agenda.⁹⁰

Estonian legislation stipulates a predetermined standard for sending the notice of a general meeting. Nevertheless, it does not specify whether shareholders may agree on alternative notification methods.

Articles of association of a limited company can be considered a quasi-contractual agreement between shareholders. However, at the time when the CC was adopted (i.e. in 1995), Estonia had not yet introduced a modern law of obligations. The Law of Obligations Act as well as the new General Part of the Civil Code Act were adopted in 2002 and only then was the principle of contractual freedom clearly stipulated in Estonian private law. Section 5 of the LOA states that, upon agreement between the contracting parties, they may derogate from the LOA unless the law expressly dictates otherwise, the nature of a provision indicates that derogation from the law is not permitted, or derogation would be contrary to public order or good morals or in violation of a person's fundamental rights. Section 1 (1) of the LOA provides that the provisions of the general part of the Law of Obligations Act are also applicable to all multilateral transactions and, therefore, also to articles of association of a limited company.

Sections 139 and 244 of the CC respectively prescribe the minimum content of the articles of association of a private and public limited company. According to §§ 139 (2) and 244 (2) of the CC, the articles of association *may also provide for other conditions which are not contrary to the law*. If a provision of the articles of association conflicts with the law, the law shall apply instead of the provision of the articles of association. As can be seen, the general rule is the same for both types of limited liability companies, and, therefore, the provisions of the CC are deemed mandatory and can only be modified if the law explicitly permits it.

⁸⁹ The Supreme Court decision in civil case No 2-16-17508 of 30 May 2018, p. 12.

⁹⁰ H. Fleischer, W. Goette (see Note 59) – Liebscher, GmbHG § 51, Rn 3; H. Ziemons, C. Jaeger, M. Pöschke. Beck'scher Online Kommentar. GmbHG, 55. Verlag 2022. – Schindler, § 51, Rn 2.

Nevertheless, Estonian legal literature, namely the annotated version of the LOA, has expressed somewhat controversial opinions on the mandatory nature of the provisions of the CC.⁹¹ The author agrees with the statement that it cannot be said that all the provisions of the CC are of the same nature. Therefore, each provision needs to be viewed separately. However, the wording of §§ 139 (2) and 244 (2) suggests that no deviation from the law is allowed in articles of association unless the law explicitly allows it.

This view is supported by the fact that the CC contains several provisions which clearly allow shareholders to agree differently in the articles of association. For example, § 157 (2) enables deviation from the rule that shareholders are entitled to receive dividends proportionate to the nominal value of their shares. The law also provides for the possibility of establishing stricter rules as regards a quorum (§§ 172 (2) and 297 (1) of the CC) or the majority of votes (§§ 174 (1) and 299 (1) of the CC) than the ones foreseen in the CC. Sections 172 (1) and 294 (2) of the CC that regulate sending the notice of a shareholders meeting, on the contrary, do not include references to the possibility of agreeing differently in the articles of association.

On the other hand, it has also been argued in Estonian legal writings that, at the very least, the legal framework for the internal relations of a private limited company is largely governed by the principle of private autonomy and shareholders should be allowed to find the most suitable way to regulate both the relationships between them and those between them and the company. It has also been pointed out that the degree of flexibility of the regulations applicable to a private limited company's internal affairs cannot be determined solely by the provisions in respect of which the shareholders have been given an explicit right to agree on something different from what is stated in the law.⁹² The author agrees with this point of view because it is difficult to provide justification for the shareholders of at least private limited companies not being permitted to agree upon a different procedure of communicating among themselves than the one established by the law. However, the current rules do not provide sufficient legal clarity on this issue. The view expressed in the legal literature that the internal relations of a private limited company should be subject to broad contractual freedom has not been confirmed by case law.

According to German law, the internal organisation of a private limited company is subject to party autonomy. This implies that the shareholders have the right to regulate their relationships in the articles of association. The limitations of this principle arise mainly from the creditor and minority protection rules. As regards public limited companies, the law is generally considered mandatory (§ 23 (5) of AktG). However, German legal scholars point out that shareholders may specify the provisions of the articles of association and even add rules that develop the rules stipulated by the law in a way that does not affect the prevailing nature of

⁹¹ P. Varul *et alia* (see Note 13), chapter 5, comment 3 (in Estonian). The contradictory opinions are included within the same commentary of the annotated version.

⁹² K. Saare *et alia* (see Note 1), p. 90 (in Estonian).

the law. This position can be concurred with, and the author concludes that considering the purpose of the rules, Estonian law should be interpreted similarly. Furthermore, when regulating the format for sending a notice of a shareholders' meeting, it may be challenging to determine when a legal provision can be considered comprehensive and, therefore, a mandatory regulation.

3.4. Conclusive remarks

The fundamental difference between Estonian and German law is not that Estonian law explicitly allows the use of more flexible and modern methods for sending notices, but that under German law, shareholders' right of self-organisation at least in private limited companies comes first. According to German law, the shareholders of a private limited company have the right to decide which notification method suits them best.

As noted above, the extent of legal regulation and freedom of agreement largely depends on the purpose of the rules. The purpose of the requirements for sending a notice of a meeting is to ensure that a shareholder receives the notice and that the company has certainty that it has met the requirements prescribed by law by sending the notice in a certain manner. The broader objective is to provide all shareholders with the opportunity to effectively exercise their membership rights.

Given these regulatory objectives, the author finds it difficult to justify that the shareholders of Estonian private limited companies should be prohibited from agreeing in the articles of association on how notices of meetings are to be sent to shareholders. The only electronic means of communication currently provided for by law is the possibility to send the notice of a meeting by e-mail; however, the author considers that this should also be allowed in any other form that allows written reproduction. The author finds that Estonian law should rather support the position that the shareholders of a private limited company should have the right to agree in the articles of association that the procedure for sending the notice of a meeting is different from that stipulated in the law, provided that it does not violate the principle of good faith and no shareholder is treated less favourably compared to others. Of course, it can be argued that clear rules provided by law create general legal certainty, which can sometimes be a value in itself, considering how complex relationships between people can sometimes be. On the other hand, it is questionable why the shareholders' right to choose the inner structure and the principles of functioning of the private limited company should be limited.

Considering the CC does not provide for the possibility of deviating from the law in the articles of association regarding the notification of a shareholders' meeting of a private limited company, and since different views have been expressed in the legal literature on the mandatory/default nature of the law, the law should be amended to allow shareholders the option of providing in the articles of association for the most appropriate means of communication in addition to

those provided for by law. The author finds that § 172 (1) of the CC should be amended, allowing to foresee in the articles of association that the notice of a meeting is sent to the shareholders not only by e-mail but by using another communication method that allows written reproduction.

Unlike private limited companies, there is no presumption that the shareholders of public limited companies should be allowed to regulate all intra-corporate relations themselves. The rules on public limited companies are shaped based on the assumption that this type of company is an open entity with a large number of shareholders, rendering stricter rules justified. Although one can conclude that the same level of party autonomy cannot be recognised regarding the manner of calling a general meeting of a public limited company, more freedom in the articles of association should at least be allowed to non-listed companies.

The author is of the view that the provision that a notice of a meeting may be sent to shareholders by e-mail but can only be deemed to have been received if the shareholder acknowledges receipt (§ 294 (1¹) of the CC) is too rigid and it is recommended to eliminate the requirement for acknowledgement of receipt. The presumption must be that a shareholder will receive the notifications sent to the email address he or she has disclosed to the company. Alternatively, the law could allow for the possibility that, in smaller companies and with the shareholders' consent, notices may be delivered via electronic channels different from the ones currently provided for by legislation. Naturally, shareholders should have the option to withdraw their consent at any time.⁹³

It can be concluded that under Estonian law, the only digital solution that can be used when sending a notice of a shareholders' meeting is e-mail. Hence, it can be inferred that Estonian company law has not taken advantage of all the potential to guarantee the utilisation of adaptable digital solutions in communication with shareholders, despite being emphasised in both EU legislation and expert reports. Due to the relatively rigid regulation and the mandatory nature of the law, Estonian law cannot be considered competitive regarding sending meeting notices. In the author's view, legal clarity as a regulatory aim does not outweigh flexibility, especially concerning private limited companies. Just as the law governs the relationship between shareholders and the company, the articles of association must provide an equally clear and predictable framework for all parties involved.

⁹³ One of the options that could be considered is to set up an official platform for sending meeting notices that would serve as a good alternative to e-mail messages. Since using such platforms could probably not be made compulsory for shareholders, the author finds 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.

4. ELECTRONIC PARTICIPATION AND A VIRTUAL MEETING

4.1. General remarks on electronic participation and a virtual meeting

Participation in company matters is one of the most important aspects of internal relations of a limited liability company. The right to participate must be universally granted, and its extent must not depend on how the company is being managed. Nonetheless, given that shareholders possess a multitude of rights through their participation in the meeting, including but not limited to the right to information, the right to ask questions and receive answers, the right to vote, and the right to challenge resolutions, it is inevitable to inquire whether shareholders should be guaranteed the same rights in the case of electronic participation as they do in the case of physical attendance.

As already mentioned, the legal forms of limited companies in Estonia and Germany have historically developed somewhat differently. The regulation of a public limited company, as a large capital company with numerous shareholders, is regulated in greater detail under German law, whereas the regulation of a private limited company is considerably less stringent, and many matters are left to the shareholders' discretion. As a result, German company law has almost no rules as regards electronic participation and virtual meetings of private limited companies. In Estonia, both forms of limited companies are shaped relatively similarly, and in many aspects, a private company resembles a smaller and only a little less formally regulated public company. The same approach is also reflected in the regulation of electronic participation. Since one cannot compare the incomparable, in this part of the dissertation it is only possible to compare Estonian general principles and regulations to German regulations and legal concepts concerning German public limited companies.

One might ask why it is necessary to hold a shareholders' meeting if the law also provides for the possibility of adopting written resolutions and allowing voting via email.⁹⁴ As concluded in the first article,⁹⁵ the need for a meeting has been justified in the legal literature by the finding that holding the meeting allows shareholders to communicate with each other as well as with the management board. Section 290 (1) of the CC states that shareholders exercise their rights at the general meeting, unless otherwise provided by law. Another question that may be raised is why to choose electronic participation (or even a fully virtual

⁹⁴ The Commercial Code stipulates three different options for the shareholders to adopt decisions: the most traditional possibility is to convene a shareholders meeting, but resolutions can also be adopted without calling a meeting or by a written resolution (§ 173, § 299¹ and § 305 (2) of CC).

⁹⁵ See: M. Vutt. Convening the General Meeting of Shareholders of a Limited Company: Estonian Law in a Digital Perspective. – *International Comparative Jurisprudence* 2020, 6 (1).

meeting). Assuming the need for electronic participation does not arise from the requirements of social distancing but from the fact that some shareholders cannot, for whatever reason, be present at the place of the meeting, they could, instead use representatives or proxies. Such representatives can, in general, both vote and participate in the discussions on behalf of the shareholder. However, personal participation, whether physical or electronic, allows for a significantly more efficient and direct exercise of shareholder rights. Therefore, participation by a proxy cannot be considered equivalent to personal participation.

Regarding the regulation of a virtual meeting and electronic participation, one may also ask about its more general necessity. The author argues that the legitimacy of the meeting does not depend on the technology used to hold it, as long as the essence of the meeting – the possibility of discussion, exchange of information and voting – is preserved.

The German Supreme Court also confirms this view. Namely, in 2021, the German Supreme Court (*Bundesgerichtshof*) had to decide on the validity of a merger resolution that had been passed by a cooperative in a virtual meeting.⁹⁶ According to § 13 (1) of the Transformation Act (UmwG), the merger resolution can only be passed *in a general meeting of the company*. The referred provision of law applies to all types of legal entities. The legal dispute arose from the commercial registry procedure. Namely, on 2 December 2020, a company⁹⁷ applied to the registration court with a request to enter the merger of a cooperative in the commercial register. The registration court rejected the application because the merger resolution of the cooperative from 30 November 2020 was passed in a virtual meeting. The cooperative filed the complaint against the decision of the registration court, but it was rejected by the Higher District Court (*Oberlandesgericht*).

German Supreme Court took the position that the above-mentioned requirement of UmwG does not prohibit adopting a merger resolution in a virtual meeting. The court emphasised that according to the temporary law, resolutions of the members of a cooperative may also be adopted in writing or using electronic means, even if it is not expressly permitted in the articles of association or if the articles of association do not contain any provisions as regards written or electronic resolutions or virtual meetings. The court concluded that the electronic procedure for adopting resolutions includes the form of a virtual general meeting without the physical presence of the members.

⁹⁶ See the decision: BGH (II. Zivilsenat), Beschluss vom 05.10.2021 – II ZB 7/21. – BeckRS 2021, 31922.

⁹⁷ The type of the company was not specified in the court decision, but as regards the essence of the dispute this can be considered irrelevant as the UmwG allows for the merger of a wide variety of legal entities.

German Supreme Court also stated that § 13 (1) of UmwG⁹⁸ does not require shareholders to be physically present at the meeting and the meeting can also be held virtually in case this is permitted by law or the articles of association of the respective legal entity and if the opportunities for the shareholders to exchange views with the management and with each other are comparable to those granted in a physical meeting. The above-mentioned legal provision only requires the resolution to be passed in a meeting, without specifying the form of this meeting in more detail. Therefore, although according to the conventional understanding, the term “meeting” should primarily mean the physical presence of the participants in the place of the meeting, one must consider that due to the development of communication technologies, the meaning of a meeting has changed over time and the most important aspect is not how a meeting is held but rather whether it is guaranteed that the subject of the resolution will be properly discussed. It has also been pointed out that § 13 (3) of UmwG only requires the physical presence of the notary at the same place as the chair.⁹⁹

The justifications of the German Supreme Court can be considered convincing, as the legal regulations must be interpreted primarily according to their purpose. The historical legislator may have meant that a general meeting means that people gather physically in the same room at the same time; however, with the development of technological opportunities, the possibilities of meeting and organising a joint discussion are more diverse. The Supreme Court of Estonia has similarly equalised a virtual place with a physical, holding that the requirement to send a notice of a general meeting to the members “to the address of the members” can be considered fulfilled if the company sends the notice to the e-mail address of a member.¹⁰⁰

The decision of the German Supreme Court discussed above has been considered remarkable not only as regards general meetings of cooperatives but more generally for all types of companies since the dispute concerned the broader question of whether, in a situation where the law requires the adoption of a certain resolution in a meeting, the requirements of the law are met if it is adopted in a virtual meeting.¹⁰¹

German legal literature has expressed the view that the obligation to hold a meeting is intended to enable the shareholders to discuss the merger – undoubtedly a major economic change – with one another and with the members of managing bodies before the resolution is passed. The law does not require the physical presence of shareholders or members. The only requirement is that the meeting must meet the requirements stipulated in the law and the articles of

⁹⁸ Section 13 (1) of UmwG stipulates that the merger agreement enters into force only if the shareholders of the legal entities involved consent to it by a merger resolution. The merger resolution may only be adopted at a shareholders’ meeting.

⁹⁹ D. Leuring, D. Rubner. *Virtueller Verschmelzungsbeschluss*. – NJW-Spezial 2021, S 751.

¹⁰⁰ M. Vutt (see Note 95), p. 103.

¹⁰¹ H. Wicke. *Zulässigkeit virtueller Versammlungen*. BGH-Beschl. v. 5.10.2021 – II ZB 7/21 und die große verbandsrechtliche Frage der Stunde. – DSrR 2022, S 498.

association and shareholders must have an opportunity to exchange views.¹⁰² It is noteworthy that the temporary German law regarding virtual meetings did not distinguish resolutions according to their scope or importance, and it was permissible to adopt all types of resolutions in a virtual meeting. Furthermore, the current legal framework also does not distinguish between distinct decisions in this regard.

In the light of the abovementioned judgement of the German Supreme Court, the question can be raised as to whether the outcome would have been the same had there been no temporary regulations allowing to hold meetings virtually regardless of the articles of association and, therefore, the will of the shareholders. In other words – would holding a virtual meeting have violated the law if the articles of association had not provided for the possibility of holding a virtual meeting?

First, one can argue, that the purpose of any general meeting should be defined the same way as it was defined by the German Supreme Court. Namely, a general meeting aims to allow shareholders to exchange views with the management and with each other and to exercise their rights. This approach allows the author to take the position that if the shareholders (or the members of any other form of company since the form of a legal person is somewhat irrelevant considering the objectives of adopting the merger decision) were guaranteed all the same rights as they would have had in a physical meeting, the case should have been resolved in the same way. This means that the merger resolution should have been considered in accordance with the law, even though neither the law nor the articles of association expressly provide for the possibility to hold the meeting via electronic means of communication.

On the other hand, if the law stipulates that the resolutions are to be adopted in a meeting and if various legal provisions governing the meeting refer to physical presence of the shareholders (e.g. a requirement that the general meeting should take place “in the location of the company”) it can be argued that the meeting requires that the shareholders attend the meeting in person. In this case the provisions of the law can be considered violated if the meeting is held virtually. This approach is supported by the understanding that the legal provisions governing a public limited company are rather mandatory in nature. No less important is the understanding that the question whether the meeting should be virtual or physical should primarily be decided by the shareholders, and not by the board. However, the latter approach seems rather artificial, and the author of the dissertation is of the opinion that a resolution adopted in a virtual meeting cannot be considered illegal simply because the meeting was virtual. It would be justified to consider the resolutions adopted in a virtual meeting as contrary to the law only in case some specific legal provisions have been violated (e.g. if shareholders were not granted the proper right to vote or to ask questions *etc*).

The latter point of view has certainly a broader meaning and is also applicable in the context of Estonian law. One can conclude that although the case law may

¹⁰² D. Leuring, D. Rubner (see Note 99), S 751.

equalize in-person and electronic meetings, one of the important objectives of legal regulation is legal certainty, and therefore it is necessary to provide for certain legal rules to guarantee the unanimous understanding in certain matters. If the permissibility of electronic participation is explicitly foreseen in law the companies can be sure that a meeting held in electronic form is equivalent to a physical meeting. However, how extensive and detailed the legal regulation should be is a separate question.

4.2. Development of the regulation of electronic participation

It has been pointed out that in most jurisdictions, shareholders have historically had the right to attend general meetings only in person. Before the COVID-19 pandemic, there were only some countries that already allowed virtual meetings (i.e. meetings held without the physical presence of shareholders), such as the U.S. (states of Delaware and Indiana), Canada, Hong Kong, Luxembourg (for companies with fewer than 60 shareholders), Liechtenstein, Norway, and the United Kingdom.¹⁰³

The legislation on virtual shareholder meetings quickly started to evolve during the pandemic. German legal scholars have noted that with the COVID-19 pandemic in the background, the shareholder general meetings during 2021 and 2022 have been characterised as at least partly virtual.¹⁰⁴ Legal scholars from Luxembourg Dirk A. Zetzsche, Roberta Consiglio, and Miko Yeboah-Smith as well as Linn Anker-Sørensen from Norway have referred to the fact that many legislators all over the world adopted the so-called crisis legislation.¹⁰⁵

The legal regulation of electronic participation and virtual shareholder meetings in Estonia is clearly divided into two distinct time periods: prior to 24 May 2020 and after that date. Until 23 May 2020, § 290¹ of the CC stipulated that a listed company may prescribe in its articles of association that shareholders can participate in the general meeting and exercise their rights by electronic means without physically attending the general meeting and without appointing a representative if this is possible in a technically secure manner. The above-mentioned regulations laid down general requirements for electronic participation for the companies whose shares are listed on a stock exchange. The main feature of those prerequisites was that virtual participation was allowed only if foreseen in the articles of association. As for non-listed public companies and private limited companies, the CC only regulated electronic voting (respectively § 298¹ and § 170¹ of the CC).

¹⁰³ D. A. Zetzsche *et alia* (see Note 23), p. 13–14.

¹⁰⁴ A. Walch, S. Häuslmeier (see Note 26), S 106.

¹⁰⁵ Among others, Germany, Austria, Switzerland, Italy, Spain Norway etc. See: D. A. Zetzsche *et alia* (see Note 23), p. 3–4.

On 24 May 2020, a new regulation entered into force which explicitly allows electronic participation for all other types of legal entities. The General Part of the Civil Code Act was supplemented with a provision (§ 33¹) according to which, every member of a body of a legal person may attend the meeting of the body and exercise their rights without being physically present by electronic means that allow the member to observe the meeting, to speak, and to vote, unless the articles of association provide otherwise. The new law aimed to grant an opportunity to hold virtual meetings regardless of the stipulations foreseen in the articles of association.

Although the previous law did not provide for electronic participation for non-listed public limited companies and private companies, the author finds that electronic participation was not prohibited before the new law if this option was foreseen in the articles of association of a company. The legal literature has not yet confirmed this view¹⁰⁶ and it has even been noted that the admissibility of such provisions in articles of association of other types of companies is rather debatable.¹⁰⁷ Nevertheless, Estonian case law has found that, in principle, other types of associations had the right to provide for electronic participation and voting in their articles of association before 24 May 2020. The court has argued that resolutions adopted in an electronic general meeting of a cooperative held in March 2020, i.e. before the entry into force of § 33¹ of the GPCCA, are void for breach of the procedure for convening the meeting, as the articles of association of the cooperative did not provide for the possibility of electronic participation.¹⁰⁸ It can be inferred from this that, in the court's perspective, the resolutions would have been legal had the articles of association permitted an electronic meeting.

In Germany, three periods can be distinguished as regards regulating electronic participation and virtual meetings: pre-pandemic (until March 2020), temporary (from March 2020 until July 2022) and permanent regulation (since July 2022).

Since 2009, after the introduction of the first Shareholder Rights Directive,¹⁰⁹ public listed companies have had the option to choose whether to allow electronic participation in the general meeting in their articles of association or to authorise the board of directors to arrange the electronic participation. However, even then, the shareholders always had the right to attend the meeting in person.

During the pandemic, the right of German public companies to allow electronic participation and hold virtual general meetings was regulated by a temporary law on company law measures, which aimed to fight the effects of the

¹⁰⁶ K. Saare *et alia* (see Note 1), p. 346–348 (in Estonian).

¹⁰⁷ U. Volens, A. Vutt. Õigusteadlased: digitaalse koosoleku võrdsustamisest füüsilise koosolekuga (Legal Scholars: Equalising a Digital Meeting with a Physical Meeting). Available at: <https://www.err.ee/1074990/oigusteadlased-digitaalse-koosoleku-vordsustamisest-fuusilise-koosolekuga> (in Estonian). Last accessed: 21.09.2024.

¹⁰⁸ Tartu County Court decision in civil case No 2-20-9896 of 7 April 2022, p. 9–11.

¹⁰⁹ Directive 2007/36/EC (see Note 7), p. 17.

pandemic.¹¹⁰ The temporary law came into force on 27 March 2020, and it was the first time the German legislature enforced the possibility for public limited companies to hold a fully virtual general meeting.¹¹¹

The approach of the legislator of the Netherlands was similar. In response to the coronavirus pandemic, the Dutch government introduced temporary legislation, which allowed Dutch companies to hold their general meetings in a virtual form, giving the management board the right to decide whether a virtual meeting is to be held. The law came into force on 24 April 2020, and it had a retroactive effect, applying to all general meetings held on or after 16 March 2020. According to R. Kleipool and others, all the participants of the meeting, including the members of the management board, had the right to attend the meeting only electronically from different locations. The possibility to follow the general meeting was given to the shareholders either by video or by audio communication. However, shareholders were not entitled to participate in two-way discussions in real-time – instead, they were granted the right to submit written or electronic questions before the meeting and follow-up questions during the meeting. Regarding voting, the temporary Dutch law stipulated that unless the company has facilitated electronic voting during the meeting, votes may only be submitted before the meeting.¹¹²

Temporary rules regulating virtual shareholder meetings in Germany were valid until July 2022. These regulations did not provide for continued legalisation of those virtual general meetings that had already been convened but that were meant to take place after this date. However, a certain legal continuity was guaranteed by § 26n (1) of the Implementation Act of the Public Limited Companies,¹¹³ which stipulates that for general meetings convened up to and including 31 August 2023, the management board has the right to decide, with the consent of the supervisory board, that the meeting will be held as a virtual general meeting in accordance with § 118a of AktG. A. Walch and S. Häuslmeier have pointed out that the transitional regulation did not provide for any other requirements, in particular the involvement or approval of shareholders, but the holding of a virtual general meeting was nevertheless already based on the new requirements of § 118a of AktG.¹¹⁴

¹¹⁰ Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht Vom 27. März 2020. Bundesgesetzblatt Jahrgang 2020 Teil I Nr. 14, ausgegeben zu Bonn am 27. März 2020. Available at: https://dejure.org/BGBI/2020/BGBI_I_S_569.

¹¹¹ A. Walch, S. Häuslmeier (see Note 26), S 106.

¹¹² R. Kleipool *et alia* (see Note 27).

¹¹³ Einführungsgesetz Zum Aktiengesetz Vom 6. September 1965 (BGBl. I S. 1185), das zuletzt durch Artikel 14 des Gesetzes vom 11. Dezember 2023 (BGBl. 2023 I Nr. 354) geändert worden ist. Available at: <https://www.gesetze-im-internet.de/aktgeg/BJNR011850965.html>. EGAktG.

¹¹⁴ A. Walch, S. Häuslmeier (see Note 26), S 125.

According to temporary law (Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht, art 2 § 1), the management board was given the authority to decide that the general meeting of a public limited company should be held virtually, provided that the entire meeting was broadcast. The shareholders were also given the opportunity to exercise their voting rights and ask questions. The management board was given the authority to decide whether the supervisory board members may participate in the general meeting via audio and video transmission.

Therefore, it can be inferred that the German and Dutch legislators were cautious in regulating electronic participation outside the articles of association, limiting it to temporary regulations. This may be attributed to the fact that, in accordance with the company law of previously mentioned European countries, virtual participation, including virtual meetings, is still regarded as secondary compared to physical participation. Hence, it is primarily up to the shareholders to determine whether or not to allow it.

4.3. Legal features of electronic participation

Estonian law is rather general when defining the characteristics of electronic participation in a shareholders' meeting. According to § 33¹ of the GPCCA, the main features of electronic participation are that the shareholders are not physically present, but they have access to the meeting through electronic means, which allows them to follow the course of the meeting and to speak and vote. The law does not distinguish between a fully virtual and a hybrid meeting.

Electronic participation must allow shareholders to participate via two-way real-time communication. The law does not prescribe more precise requirements for this type of electronic communication. Estonian legal literature has expressed the view that online participation through a video call solution must meet at least three conditions to qualify as online participation in the sense of the GPCCA. First, it must enable the remote shareholders to monitor the meeting in real-time (through a video call environment), both in sound and image (e.g. Zoom, Skype, Teams, Google Meet, *etc*). Second, it must make it possible for shareholders to speak, including presenting proposals, dissenting opinions and objections, for example, via a text chat window or a microphone and camera. The chair of the meeting must also be able to monitor who is speaking. Third, shareholders must be able to vote (e.g. via a text chat window or a microphone and camera, or via e-mail during the meeting or in a separate environment). It has also been noted that participation in a meeting and voting by electronic means need not take place in electronic form within the meaning of § 80 of the GPCCA,¹¹⁵ meaning that there is no need for identification via electronic signature.

¹¹⁵ P. Varul *et alia* (see Note 33) – K. Saare, § 33¹, comment 3.2 (in Estonian). This means that the votes in question do not need the electronic signature in the meaning of § 80 of GPCCA.

In a study conducted in 2019 to analyse the use of electronic meetings, it was found that about 97% of the virtual meetings were audio-only meetings, usually supplemented by a slide presentation. It was explained that audio-only meetings are considered less likely to encounter technical difficulties and are less costly compared to a live video feed.¹¹⁶ The author finds that a meeting with an audio-only connection does not meet the requirements of Estonian law. Since video conferencing software has evolved considerably, the costs of meetings should not differ much, depending on whether or not the company uses a video connection. Using an audio-only solution could lower the risk of technical malfunctions during the meeting; however, at the same time, it could increase several safety risks as it is difficult to ensure that only authorised persons attend the meeting. Additionally, the legislators (among others, Estonian) have by now accepted the understanding that a real virtual meeting that can replace the physical one must ensure both video and audio communication between the participants.

Earlier German legal literature has also expressed a concern that as shareholders do not influence the technical aspects of the meeting, they cannot be sure whether the draft resolution displayed in the electronic environment is the same that will be put to voting.¹¹⁷ However, the author argues that it is not possible to consider a virtual or a hybrid meeting more unsafe *per se*. Rather, it can be assumed that using a virtual environment allows for an even better recreation of the course of the meeting than a regular meeting.

4.4. Legal features of a fully virtual meeting

Estonian company law does not provide any specific regulations or definitions for a fully virtual general meeting. Instead, as discussed above, it provides general rules for attending a meeting using electronic means. Section 33¹ of the CPCCA approaches the concept of a virtual meeting from the perspective of exercising shareholder rights. In addition, the referred section does not distinguish between legal persons and, therefore, also not between public and private limited companies. Consequently, Estonian law does not specify which exact requirements must be met to consider a general meeting a virtual one.

Contrary to Estonian law, § 118a of AktG includes the definition of a fully virtual general meeting. According to the first subsection of § 118 of AktG, the articles of association of a public limited company may provide for or authorise the management board to provide for the meeting to be held without the physical presence of the shareholders or their proxies at the location of the general meeting. One can, therefore, conclude that the law defines a virtual general

¹¹⁶ F. Brochet, R. Chychyla, F. Ferri. Virtual Shareholder Meetings. – European Corporate Governance Institute. Finance Working Paper No 777/2021, p. 8. Available at: <https://ssrn.com/abstract=3743064>. Last accessed: 21.09.2024.

¹¹⁷ L. Beck. Aktuelles zur elektronischen Hauptversammlung. Rheinische Notar-Zeitschrift 2014, S 164.

meeting as a form of meeting where the in-person presence of shareholders is excluded. Although Estonian law does not define a virtual meeting, the author finds that a meeting where shareholder participation in the meeting is only possible via means of electronic communication should similarly be considered a virtual meeting under Estonian law.

To ensure that all shareholders understand that the convened general meeting is only virtual, § 121 of AktG subsection 4b provides that in the case of a virtual general meeting, the notice of a meeting must, among other items, state how shareholders and their proxies can join the meeting electronically. In addition, the invitation must state that the physical presence of shareholders and their proxies at the location of the general meeting is excluded. The same conclusion can be drawn from § 172 (2) and § 294 (4) subsection 2 of the CC, according to which the place of the meeting must be indicated in the notice of the meeting.

Section 33¹ of the GPCCA provides the following requirements for holding a virtual meeting:

- 1) the electronic connection used for attendance must be two-way,
- 2) it must be real-time, and
- 3) it must allow the participants to exercise their rights and obligations.

German legal literature points out that the concept of a virtual general meeting in the temporary law, valid during the pandemic, was based on four main requirements: video and audio transmission of the meeting, enabling shareholders to exercise their voting rights via electronic communication, granting shareholders the right to ask questions and guaranteeing the possibility to object to the resolutions. It means that although shareholders were able to follow the live broadcast of a general meeting in image and sound and exercise their voting rights (among other things, by postal vote and by issuing a power of attorney), a live right to speak in the meeting was not granted.¹¹⁸ The temporary regulation in Germany and a permanent regulation in Estonia are, therefore, somewhat different as in Estonia, the law specifically provides that shareholders must be provided the right to speak at the meeting.

The new German regulation (§ 118a of AktG) specifies the obligatory requirements for a fully virtual meeting:

- 1) the entire meeting must be broadcast with images and sound,
- 2) shareholders must have the possibility to exercise their voting rights through electronic communication, namely via electronic participation or electronic postal voting, as well as by issuing a power of attorney,
- 3) shareholders who are electronically connected to the meeting must be granted the right to submit motions and nominations for elections at the meeting by way of video communication,

¹¹⁸ B. Gsell *et alia* (see Note 25) – Paschos, AktG § 118a, Rn 6.

- 4) shareholders must be granted the right to information via electronic communication (§ 131 of AktG),
- 5) shareholders must be granted the right to submit statements and to speak at the meeting by using video communication,
- 6) electronically connected shareholders must be granted the right to object to resolutions through electronic communication.

Section 118a of AktG provides that every general meeting can be held virtually, regardless of the nature of the resolutions to be adopted or the character of the general meeting (ordinary vs extraordinary meeting). Hence, the virtual meeting can also adopt resolutions in matters where the law does not allow written resolutions.¹¹⁹ It has also been pointed out in German legal literature that originally, the draft law provided that the articles of association may define items that could only be discussed and decided in a regular general meeting, but this suggestion was not supported.¹²⁰

According to German legal literature, the virtual general meeting is available to all types of public companies and the regulation does neither distinguish between listed and unlisted nor big and small companies. It has been explained that it can hardly be assumed that the shareholders of a listed company with a broad shareholder base generally prefer holding a virtual general meeting, or that a company with a small group of shareholders would be more likely to hold a regular meeting.¹²¹ This approach is somewhat similar to Estonian law, which treats all private legal persons in the same way from the point of view of electronic participation and, therefore, also virtual meetings.

4.5. The obligation to be physically present

One can conclude from the above that the main feature of a virtual meeting is that shareholders can only participate by electronic means. However, as the meeting is usually also attended by members of the board, the chairman of the meeting, and the recording secretary, who may not be shareholders, the question arises as to whether they may also participate in the meeting virtually. Section 33¹ (1) of the GPCCA stipulates that “a member of a legal person’s statutory body” is regarded as a participant in a meeting conducted through electronic means. This means that the law does not limit the electronic participation right only to shareholders, but also to members of management and supervisory board. The law does not specify if such a right can be executed only within the meeting of this exact body, for example, do the members of supervisory board only have a right to virtual participation in case a supervisory board meeting is being held? A

¹¹⁹ B. Gsell *et alia* (see Note 25) – Paschos, AktG § 118a, Rn 30.

¹²⁰ U. Hüffer, J. Koch (see Note 84) – J. Koch, AktG § 118a, Rn 6.

¹²¹ B. Gsell *et alia* (see Note 25) – Paschos, AktG § 118a, Rn 30.

reasonable interpretation, however, is a flexible one, since the purpose of the provision is to allow a meeting to take place without physically meeting. Therefore, the members of the management and supervisory boards should have the same right as the shareholders.

The provision also raises a question about the rights of other persons who must attend such meetings and whose participation is mandatory by law. For example, under § 304 (6) of the CC, shareholders representing at least 1/10 of the share capital have the right to demand that the minutes of the general meeting be notarised. This means that a notary must be present at the meeting. Another example is when an auditor is present at the meeting or convenes the meeting, which is allowed under Estonian law in case the management board fails to call the meeting (§ 171 (3) and § 292 (2) of the CC). To conclude, Estonian regulation does not specify if such persons should also be allowed to participate via electronic means or if their participation should take place solely in a manner prescribed by the management board if such meeting is convened by the management board. According to the author's perspective, it does not follow from Estonian law that individuals other than shareholders and board members cannot participate in the meeting electronically. This interpretation would be deemed unreasonable, as it is difficult to comprehend the rationale behind regulating the participation of individuals differently. Estonian Notarisation Act¹²² enables most notarial acts to be performed by remote authentication¹²³ and under § 12¹ (6¹) of the Notarial Regulations¹²⁴ and § 29 (3) of the Notarisation Act, remote authentication of the minutes of a general meeting is also possible.

The situation and legal provisions are different in Germany. Section 118a (2) of AktG foresees another central requirement for a virtual general meeting. Namely, members of the board must participate in a meeting at the location of the meeting. As stated in legal literature, this question was interpreted controversially under previous law, and it was not clear whether the board's obligation to participate included the possibility to participate virtually. Therefore, new rules explicitly foresee that the board members must attend the meeting at the location of the general meeting, which, according to J. Koch, means that their virtual participation is no longer sufficient.¹²⁵ J. Koch explains that shareholders should be able to see board members "on the podium". However, he adds that a breach of this obligation does not allow shareholders to contest the resolutions adopted in the meeting.¹²⁶

¹²² Tõestamisseadus. – 14.11.2001 – RT I 2001, 93, 564; RT I, 6.07.2023, 105, 3.

¹²³ Under § 13 (7) of the Notarisation Act, in the case of remote authentication, the necessary acts are carried out via a video bridge enabling a person and their intention to be identified, subject to the specifications deriving from the manner of authentication, and the act is deemed to have been performed in the presence of the notary.

¹²⁴ Notariaadimäärustik. – 19.06.2009. – RTL 2009, 51, 751; RT I, 08.03.2024, 3.

¹²⁵ U. Hüffer, J. Koch (see Note 84) – J. Koch. AktG § 118a, Rn 44.

¹²⁶ U. Hüffer, J. Koch (see Note 84) – J. Koch. AktG § 118a, Rn 44.

Therefore, it can be inferred that contrary to what the term “virtual general meeting” suggests at first glance, under German law, this type of meeting not only takes place in a virtual space but also at the physical meeting location. In general, the obligation to be present also applies to the members of the supervisory board; however, their participation is also permitted by video and audio transmission in accordance with the second sentence of § 118 (3) of AktG. The chair of the meeting and, in case the participation of an auditor is requested (§ 176 (2) of AktG), the auditor must be present at the location of the general meeting.

The question of whether a notary must be present in the transmission room is regulated in § 130 (1a) of AktG and according to it, the notary must make his or her observations about the course of the general meeting while being present at the location of the general meeting. J. Koch is, therefore, of the opinion that the notary must be physically present.¹²⁷ A. Wach and S. Häuslmeier support this view, adding that a direct perception that is not falsified by the intermediary of technical devices is essential as the notarial records have strong evidentiary effect. The above-mentioned authors also point out that the law regulating virtual meetings does not provide for the same transmission security requirements that are used for notarial online procedures and that are important when the security, resistance to manipulation and reliability of the video communication system as well as the highest data protection requirements must be ensured. However, considering the public reliability of the entries of a commercial register, the physical presence of a notary is of crucial importance, especially in the case of entries with constitutive effect. Therefore, it has been concluded that a notary can best fulfil his or her function as a neutral and legally qualified advisor and ensure an orderly and lawful course of proceedings when participating in person. Supervision of the course of a virtual meeting must be considered important as the shareholders are not present and accordingly, cannot directly observe the procedures carried out in the meeting.¹²⁸ Under German law, the minutes of the general meeting of shareholders must be in a notarised form (§ 130 (1) of AktG) and, therefore, the notary should state at the beginning of the minutes that it is a virtual general meeting and that the company has correctly implemented the requirements of § 118a. In particular, it should be explained in what form shareholders were given opportunities to participate. However, the notary does not have to check the functionality of technical processes but rather document evident violations. The minutes must be based on the notary’s perceptions, which in the case of a virtual meeting can be based on the screen views or printouts.¹²⁹

In conclusion, one must agree that the above reasoning is broadly understandable in a situation where at least the members of the board and technical support must be physically present at the meeting.

¹²⁷ U. Hüffer, J. Koch (see Note 84) – J. Koch. AktG § 118a, Rn 46.

¹²⁸ A. Walch, S. Häuslmeier (see Note 26), S 123.

¹²⁹ U. Hüffer, J. Koch (see Note 84) – J. Koch. AktG § 130, Rn 23e.

4.6. Technological aspects of a virtual meeting

Neither Estonian nor German law regulates the use of technology to arrange a virtual general meeting. In Estonia, § 33¹ (1) of the GPCCA states that the person attending such a meeting must have a recourse to two-way real-time communication. In Germany, the law states that shareholders must be able to participate and exercise their rights using electronic communication. The type of communication is, therefore, at the discretion of the management board. German legal literature cites that, in most cases, a video or telephone conference system should be chosen for this purpose, with a video conference system coming closest to a face-to-face meeting. However, it is also conceivable to use other applications (e.g. chat rooms or even e-mail – mostly in a supplementary way, especially for voting). The main principle is that electronic participation requires a real-time, two-way connection.¹³⁰

According to J. Koch, the choices recognised under § 118 (2) of AktG that regulate the ordinary (in-person) general meeting, namely whether the transmission should be only among shareholders, or whether the meeting should also be publicly broadcasted, also apply to a virtual general meeting. J. Koch states that, at least in the case of companies with a large, broadly distributed group of shareholders, transmission will generally be a live stream via the website. This corresponds to the previous practice where the access was usually opened via the Shareholder Portal.¹³¹ J. Koch also explains that access to the Shareholder Portal is usually limited to shareholders with an access code and the public is excluded, but a freely accessible Internet transmission as well as a mixed form are also permissible, in which individual sections are public and other sections are only accessible to shareholders. While large public companies have used the portal to hold their general meetings during the pandemic, small companies have rather used various video conferencing services (in particular, Zoom). J. Koch also points out that although the language of the general meeting is German, the online format also offers translation possibilities, some of which are already being used in practice.¹³²

The requirement that the entire general meeting is to be transmitted means that the meeting must be made accessible by the chair from the opening to the end. This means that general debates as well as the voting must be transmitted. Nevertheless, the counting of votes does not necessarily have to be broadcast. The literature has, however, expressed the view that there are no legal prerequisites that the transfer must be without technical disturbances and to reach every shareholder.¹³³ The view that the transmission of the meeting does not need to be undisturbed and reach every shareholder can yet be considered controversial.

¹³⁰ M. Habighorst. Das Gesetz zur Ermöglichung virtueller und hybrider Mitgliederversammlungen im Vereinsrecht. – NZG 2023, S 358.

¹³¹ U. Hüffer, J. Koch (see Note 84) – J. Koch, AktG § 118a, Rn 17.

¹³² U. Hüffer, J. Koch (see Note 84) – J. Koch, AktG § 118a, Rn 19.

¹³³ U. Hüffer, J. Koch (see Note 84) – J. Koch, AktG § 118a, Rn 19.

Indeed, resolutions adopted during a virtual meeting cannot be challenged based on technical deficiencies; however, in a situation where the majority of shareholders are unable to observe the meeting for technical reasons, it cannot be said that they have had the opportunity to participate in the decision-making process.

4.7. Identification of shareholders and the list of attendees

Another important issue when conducting a virtual meeting is the question concerning the identification of attendees. Exercising shareholders' rights is inseparably connected to the person's status as a shareholder.¹³⁴ Thus, owning a share gives a shareholder the rights and obligations prescribed in applicable law.¹³⁵ Therefore, only a person who owns the company's shares at the time of the meeting (or their representative) has the right to attend a meeting and exercise the respective rights.

In German legal literature, it has been stated that to ensure the identification of shareholders, it is advisable to use a special mechanism that allows logging into the system used to conduct the meeting.¹³⁶ The author finds that establishing such requirements does not completely exclude the possibility that someone else will participate in the meeting instead of a shareholder. On the other hand, the complicated identification formalities may be too burdensome for smaller companies. The practical problems are the overall costs and the general complexity of the administration of the identification process, especially for smaller companies that know their shareholders and may have easier solutions to identify them. Therefore, the introduction of identification rules should be approached in a rather flexible way, with the assumption that they must ensure that only authorised persons can participate in a virtual meeting.

The author finds that the identification problems described in German legal literature are probably slightly exaggerated. First, if the company knows its shareholders, identification via video does not differ much from the same procedure in a physical meeting. Second, in a situation where the company may not know all its shareholders, entry into the meeting environment must be ensured in such a way that only authorised persons can enter.

In every general meeting it is also obligatory to document the attendance and to compose the list of shareholders present in the meeting. The participants' list aims to prove the legitimacy of the meeting.

As regards German law, the requirement that a list of participating shareholders must be drawn up is regulated in § 129 of AktG. The regulation is similar under Estonian law. Sections 171 (4) and § 294 (3) of the CC stipulate that a list of shareholders participating in the meeting must be drawn up, in which the

¹³⁴ Under § 170 (3) and § 297 (4) of the CC, a shareholder may participate in a meeting personally or through a representative.

¹³⁵ See also: the Supreme Court decision in civil case No 3-2-1-114-13 of 6 November 2013, p. 11.

¹³⁶ U. Hüffer, J. Koch (see Note 84) – J. Koch, AktG § 118, Rn 12.

names of the attending shareholders and their representatives, the number of votes resulting from their shares as well as the method of participation in the general meeting, are entered. If a shareholder has voted electronically or by mail before the general meeting, the voting date must also be indicated in the list. The list is signed by the chair and recording secretary, as well as each shareholder or his or her representative who is physically present at the general meeting.

Under § 33¹ (2) of the GPCCA, a meeting held by electronic means is subject to the usual provisions (meaning those that apply in the case of a regular meeting). However, all the requirements set by law for physical meetings are not always applicable because of the different nature of participation. For example, it has been debated in legal literature that according to § 171 (4) of the CC, all shareholders or their representatives physically present at the meeting must sign the list of participants. It is rather unclear whether and how these requirements can be applied to the shareholders who participate electronically.¹³⁷ However, the author argues that this problem can be overcome. The purpose of the rules governing the participants list is to ensure that attendees are identified and documented. Hence, in the context of electronic participation, it is feasible to employ alternative methods of identification and recording, thereby guaranteeing the attainment of the same objective. For instance, combining the identification of shareholders upon logging into the virtual environment with the confirmation of their presence by electronic signature in the appropriate environment.

When implementing permanent rules on virtual general meetings of public companies, § 129 of AktG, which in addition to the list of attendees regulates the rules of procedure and the proof of votes having been counted, was also amended so that it now expressly stipulates that the shareholders who are electronically connected to the meeting or represented are to be included in the list of participants. The author of the dissertation finds that although such a provision is systematic and consistent, it would, however, have likely been possible to interpret the previous law the same way and to conclude that shareholders who participate in a virtual meeting must also be included in the list of attendees.¹³⁸

German legal literature points out that composing the list of participants will usually not present technical problems since it is sufficient for identification if the shareholders are connected in a way that enables them to exercise their participation rights. Neither German nor Estonian law regulates the standard of identification. It has been argued that it could be sufficient for the company to include in the list of participants persons whose access data was entered when connecting to the meeting and that although the notary is present at the meeting, the high level of legal certainty of identification by the notary is not required. It has also

¹³⁷ P. Varul *et alia* (see Note 33) – K. Saare, § 33¹, comment 3.3 (in Estonian).

¹³⁸ Sections 171 (4) and 294 (3) of the CC stipulate that the list of participants is, among others, signed by the shareholders who are physically present in the meeting, or their representatives and it can, therefore, be concluded that those shareholders who participate by electronic means of communication must also be considered as participants. The only difference is that they do not have to sign the attendance list drawn up at the physically held meeting.

been pointed out that in the case of identification of the participants by the company in the virtual general meeting, the requirements generally foreseen for notaries need not be followed and, therefore, the identification procedure corresponds more to the one carried out in the physical general meeting.¹³⁹

German legal scholars have expressed the view that the list of participants must be kept up to date during the meeting. Therefore, one can ask how to deal with possible arrivals and departures during the meeting. According to A. Walch and S. Häuslmeier, the arrivals and departures are to be documented through supplements to the list of participants. The authors argue that if shareholders are visibly registering and de-registering from the transmission platform during the meeting, such documentation will be possible without further ado, and it may even be easier to handle than monitoring a large meeting of shareholders in person.¹⁴⁰

A. Walch and S. Häuslmeier also point out that a registered shareholder with technical problems who has been connected to the meeting and has not left, but nevertheless cannot hear or see anything, should be considered present since the law does not allow to contest the resolutions on technical grounds. Moreover, 130a (6) of AktG stipulates that the company has the authority to verify the functionality of the video communication between the shareholder and the company before granting the floor to the shareholder and to decline it if the functionality is not ensured.¹⁴¹

A question can be raised as to whether this approach is justified. The law provides, among other things, that a shareholder who wants to contest a resolution, must submit an objection during the meeting, whereby the objection must also be recorded in the minutes. Namely, according to § 245 subsections 1 and 2a of AktG, a shareholder attending the general meeting has the right to file a claim, provided he or she raised an objection concerning the resolution and had it recorded in the minutes. A shareholder not attending the general meeting may file a claim only if he or she was not admitted to said general meeting without justification or if the general meeting has not been duly and properly convened or if no proper notice has been published/sent of the subject matter of the resolution to be adopted.¹⁴² One can argue that if a shareholder has logged into the

¹³⁹ A. Walch, S. Häuslmeier (see Note 26), S 121. § 16c of the Notarization Act (BeurkG; 100. Beurkundungsgesetz vom 28. August 1969 (BGBl. I S. 1513), zuletzt geändert durch Gesetz vom 08.10.2023 (BGBl. I S. 271). Available at: <https://www.gesetze-im-internet.de/beurkg/>) foresees much stricter requirements on the identification and only electronic means of identification of the highest security level can be used.

¹⁴⁰ A. Walch, S. Häuslmeier (see Note 26), S 121.

¹⁴¹ A. Walch, S. Häuslmeier (see Note 26), S 121–122.

¹⁴² The right to challenge the resolutions is similarly regulated under Estonian law. Sections 178 (3) and 302 (3) of the CC provide that a shareholder who participated in the general meeting may demand the revocation of the resolution only if the shareholder's objection to the resolution has been entered in the minutes of the meeting. The shareholders who gave their votes prior to the meeting may demand revocation of a resolution also without entering the objection in the minutes.

environment of the virtual meeting, but does not leave after realising that he or she does not see or hear anything, he or she is considered a participating shareholder and loses the right to challenge the resolutions adopted in the meeting.

At the same time, for the company, being merely the organiser of the meeting, it may be difficult to determine whether a certain shareholder in fact has technical problems. If a shareholder was considered a non-participant in this situation, he or she would have the right to challenge the resolution of the meeting regardless of objecting to the resolution. Considering a shareholder as a participant or non-participant in such a situation depends on whose rights should be prioritised – whether the shareholder should be protected against losing his or her rights, or the company against the possible abuse of shareholder rights. One possible interpretation, which would consider the interests of both parties, would be that a shareholder in this situation should have the possibility to challenge the decisions without objecting to them. However, to do so, he or she would have to prove that he or she was considered to have participated in the meeting without justification.

The German legal literature has dealt with voting methods in greater detail than Estonian, but the same principles apply to Estonian law. Namely, when exercising his or her voting right, a shareholder has three options: approval, rejection, and abstention. If the so-called “subtraction method” is used when counting votes, only the votes of shareholders who do not vote, and no-votes (i.e. votes against the draft resolution) are counted. The total number of votes cast is determined by subtracting the abstentions and the votes covered by a voting ban from the total attendance. The yes-votes in turn result from the subtraction of the no-votes from the number of votes cast. The meeting chair must point out that if a shareholder remains silent (not wishing to vote and not voting against the draft) this will be counted as a yes-vote. It has been pointed out that the subtraction method is generally considered permissible provided that a sufficiently reliable determination of attendance is guaranteed. The addition method, on the other hand, means that the „yes“ and „no“ votes are counted separately; their sum is the votes cast within the meaning of § 133 (1) of AktG. Abstentions from voting (i.e. votes of shareholders who do not vote) are considered irrelevant. The addition method guarantees a reliable determination of outcomes; however, it may prove to be a time-consuming process in larger general meetings unless the votes are recorded electronically.¹⁴³

It has been noted in the legal literature that when the subtraction method is employed for the counting of votes of online participants, it is imperative that the chair of the meeting is aware of the number of shareholders who are actually present during the voting process. However, it is disputable whether or not the presence of online participants can be continuously and reliably recorded. The decisive factor may be whether the connection of the online participants remains

¹⁴³ W. Hölter, M. Weber (Hrsg.) *Aktiengesetz. Kommentar. Verlag C. H. Beck, Verlag Franz Vahlen München. 4. Auflage 2022* – Krebs. AktG § 133, Rn 19; H.C. Grigoleit (see Note 87) – Sebastian Herrler. AktG § 133, Rn 14; W. Goette *et alia* (see Note 5) – Arnold, AktG § 133, Rn 33–35.

active or has been terminated. For the voting process, it is possible to temporarily block the possibility of logging in and out, corresponding to the closure of the entrances and exits of the meeting room in the event of a physical meeting. In this way, however, the “cold” logout is not recorded, i.e. the removal of the online participant from the PC during the voting process.¹⁴⁴ A comparison with a physically present but mentally absent shareholder who is assumed to have voted in favour of the resolution is questionable. Therefore, it would be wise to use either the addition method or a combination of the subtraction method for those attending in person and the addition method for online participants. The main decisive factor is that the selected voting methods ensure a reliable determination of the voting result.

4.8. Shareholders’ right to receive information and ask questions

As previously mentioned, a crucial aspect of electronic participation is the protection of shareholder rights. Specifically, it can be distinguished between the right of access to information, the right to challenge decisions, and the right to vote.¹⁴⁵ When examining the exchange of information between the company and its shareholders in connection with the decision-making process, three main elements can be identified: shareholders’ right to ask questions, their right to receive answers, and their right to express an opinion.

According to German and Estonian law, shareholders of a public limited company are entitled to receive information about the company’s activities at the general meeting.¹⁴⁶ According to § 33¹ (1) of the GPCCA, the person participating in a meeting via electronic means must be able to follow the meeting and speak at the meeting. Section 2 of the same provision provides that a meeting held by electronic means is subject to the same provisions applicable to the adoption of resolutions at a regular meeting. When interpreting the two provisions, one must conclude that all the rules of a physical meeting apply when a shareholder participates via electronic means. For example, the shareholder is granted the right to receive information and answers from the management board. Consequently, the shareholder is not only entitled to speak but also to receive answers to his or her questions.

¹⁴⁴ H.C. Grigoleit (see Note 87) – Sebastian Herrler. AktG § 133, Rn 14.

¹⁴⁵ The first two are examined in this subsection, while voting rights are analysed in the fourth substantial part (Chapter 5).

¹⁴⁶ The relevant regulations are § 131 (1) of AktG and § 287 (1) of the CC. As regards private limited companies, a shareholder’s right to information under § 166 of the CC is somewhat broader, i.e. it is not limited to the possibility of obtaining information at a shareholders’ meeting. However, this does not mean that a meeting is not a place for shareholders of private limited companies to obtain information.

According to the new German regulation on virtual meetings, the situation is the same. Namely, shareholders must be granted full right to information. It is also important to note that the temporary law that regulated virtual shareholder meetings during the pandemic only allowed shareholders to ask questions.¹⁴⁷

The right to receive information in a virtual meeting is regulated in § 131 (1a) of AktG. The main principle is that a virtual general meeting must grant the shareholders basically the same rights as in a face-to-face meeting. A refusal to provide information must be recorded at the request of the shareholder participating electronically (§ 131 (5) sentence 2 of AktG). Section 131 (1a to 1f) of AktG includes specific regulations for this type of meeting to strengthen the shareholders' right to information. However, the management board can determine that the shareholders should submit their questions through electronic communication (for example via a website or an e-mail address set up specifically for this purpose) no later than three days before the meeting. Questions that are not submitted by the deadline may be discussed in the meeting, but they are not required to be discussed.

According to the legal literature, information requests and statements can be limited to the scope as well as to the persons (i.e. shareholders who are properly registered for the meeting).¹⁴⁸ The possibility of limiting the right to request information to the circle of shareholders who have registered to participate in the meeting in time can generally be considered proportional and purposeful. However, the question can be raised whether the same applies to the limitations as regards the scope of questions. Allegedly, the purpose of the limitation is to ensure that the virtual general meeting is properly prepared and held within a reasonable time frame. Therefore, the board is given the right to avoid the "flood" of irrelevant questions. The restrictions as regards the scope of the questions would, therefore, be appropriate if the limitation aimed to prevent the abuse of the right to information, enable all questions to be properly answered, and follow the time frame of the meeting. In this respect, the principle of equal treatment of shareholders and the principle of proportionality must be observed. The legal literature mentions a maximum number of questions per person or meeting or the limitations of questions to certain matters as possible proportional restrictions. It is pointed out that the limit should be considered appropriate if it is based on the average number of questions submitted in previous virtual general meetings, provided that the items on the agenda and the extent are generally similar.¹⁴⁹

Estonian legislation does not explicitly provide for the possibility of such restrictions. Although the provisions in question were introduced in German law with the introduction of the virtual meeting, they have a broader meaning and the

¹⁴⁷ The management board had the discretion to decide which questions it would answer and how. (See: Article 2 § 1 (2) of Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht).

¹⁴⁸ A. Walch, S. Häuslmeier (see Note 26), S 114–115.

¹⁴⁹ A. Walch, S. Häuslmeier (see Note 26), S 114–115.

board should be given more discretion, as the submission of a request for information is often used as a means of pressure by oppositional minority shareholders.

Section 130a of AktG also regulates shareholders' right to comment and speak at a virtual meeting. According to § 130a (1) of AktG, shareholders are entitled to make statements regarding the agenda items through electronic communication before the meeting, using the address specified in the invitation. Similarly, this right may be limited to shareholders who are duly registered for the meeting, and the scope of the statements may be appropriately limited in the invitation. According to § 130a (2) and (3), comments must be submitted no later than five days before the meeting and they must be made available to all shareholders at least four days before the meeting. Section 130a (5) of AktG also provides that all shareholders who take part electronically must be granted the right to speak at the meeting using video communication. To speak, the shareholders must use the form of video communication offered by the company.

According to § 130a (6) of AktG, the company can reserve the right to verify the functionality of the video communication between the shareholder and the company before the speech and to reject it if the functionality is not ensured. H. Heckschen and B. Kress have expressed doubts about how such a test would look in practice and whether it would have any adverse effects, especially in regions with poor Internet coverage. The above-mentioned authors also note that there are still unresolved questions about data security, especially as regards the protection of shareholders' personal data. Nevertheless, they also acknowledge that comprehensive protection appears impracticable due to the numerous technical possibilities.¹⁵⁰

It follows from the above that shareholders must be guaranteed the same information rights in the case of electronic participation (including in a fully virtual meeting) as in the regular meeting. However, the board in general has the right to adapt the way questions are asked and answered to the specificities of virtual participation. Although such principles are not explicitly stated in Estonian law, the author considers that the same conclusions can be drawn from the interpretation of similar Estonian rules.

4.9. Shareholders' right to object to resolutions

To file a claim to challenge the resolution of a general meeting, a shareholder attending the meeting must submit an objection to the resolution at the meeting and the objection has to be recorded in the minutes of the general meeting. This requirement is stipulated in both Estonian (§ 178 (3) and § 302 (3) of the CC) and German law (§ 245 subsection 1 of AktG) and it applies to all resolutions

¹⁵⁰ H. Heckschen, B. Kress. Aktuelle Entwicklungstendenzen des Gesellschaftsrechts 2021/2022 – GWR 2023, 1, S 2.

regardless of the type of the general meeting.¹⁵¹ The objection must be submitted during the (virtual) meeting and, therefore, there must be a technical solution enabling it. The right to choose the technical solution is at the discretion of the company. It has been pointed out in German legal literature that one of the possibilities is to use the Shareholder Portal that includes the “objection button”; however, creating a special e-mail address for this purpose is also a conceivable possibility. The objection can also be sent to the chair of the meeting or to the notary. However, the legal literature argues that the best option is to use the Shareholder Portal as collecting objections by an e-mail address has various disadvantages when it comes to actual implementation: e.g. an “overflow” with e-mails from unauthorised persons or the loss of individual e-mails. Furthermore, it may be difficult to reliably check the authorisation of the sender.¹⁵²

As regards Estonian law, § 33¹ (1) of the GPCCA does not specifically state that the shareholder should have a right to object to decisions. However, according to section 2 of such provision, it can be concluded that the shareholders must have all the rights they would have if they were to attend the meeting physically. Since the CC foresees an objection as a prerequisite for the annulment claim, the same applies in the case of virtual participation. For example, in the case of a Zoom video conference, it is possible to allow all participants to submit objections in the chat window, which, in principle, can (and should) be recorded, for example, by making screenshots. To prevent disputes, the way of submitting objections should be made known to the participants already at the beginning of the meeting. The possibility of sending an objection by e-mail should rather be allowed only if the circle of shareholders is small and the participants and the e-mail addresses used by the shareholders are known to the company.

4.10. Exercising shareholder rights in a digital form – who has the competence to decide?

4.10.1. The division of competencies between shareholders, the management board, and the supervisory board

As can be seen above, in Germany, the company’s right to hold a virtual general meeting requires a corresponding provision in the articles of association. The articles of association can either specify a mandatory virtual general meeting or authorise the management board to decide whether a general meeting will be held in person or virtually (§ 118a (1) of AktG). German legal literature emphasises that the requirement for a provision in the articles of association is systematically consistent as the same clause is required for electronic participation of share-

¹⁵¹ Only shareholders who have voted before the meeting may request the annulment of the resolution without recording an objection (See: third sentence of § 178 (3) and § 302 (3) of the CC).

¹⁵² A. Walch, S. Häuslmeier (see Note 26), S 119.

holders in a physical general meeting (§ 118 (1) of AktG) and for enabling postal voting (§ 118 (2) of AktG). Therefore, the same must apply to a virtual general meeting, considering it is an even clearer deviation from the default physical form of meeting.

The legal requirements are again different in Estonia, as § 33¹ of the GPCCA stipulates that unless otherwise provided for by law or by the articles of association, shareholders may participate in the meeting using electronic means. Nonetheless, the objective of this provision remains ambiguous as to whether it confers upon shareholders the authority to opt for electronic participation or if it is solely in the competence of the management board as the convening body to determine whether and to what extent virtual participation is permissible.

One should note that the German law on virtual general meetings does not grant shareholders the right to request a different form of meeting (e.g. a hybrid or in-person) in individual cases. Section 122 (1) of AktG provides that the general meeting is to be convened whenever shareholders, whose shares represent at least one-twentieth of the share capital, request it. However, the above-mentioned regulation does not allow the minority shareholders to demand an in-person meeting instead of a virtual one. It has been found in German legal literature that the enforceability and validity of such regulations are questionable as some shareholders may still want to participate in person regardless of whether they could have access via electronic means. It has been argued that if the articles of association foresee only virtual meetings, the minority shareholders who did not agree to such regulation should be provided appropriate compensation as such provision strongly infringes shareholders' constitutionally protected right to ownership (art 14 of the Constitution of Germany (*Grundgesetz*)¹⁵³).¹⁵⁴ This approach is, in fact, plausible, as the law grants the majority the authority to approve a fully virtual general meeting. Furthermore, if some minority shareholders have no access to electronic means necessary to participate, they are deprived of the opportunity to participate in the company's matters. It remains uncertain whether this will suffice to validate the loss of ownership and the significant violation of constitutional rights.

Therefore, the question can be raised as to whether the law should, at least in some circumstances, grant shareholders the right to demand either the opportunity to physically participate in the meeting or that the entire meeting was held physically. For example, a conceivable approach would be that the right of physical participation was granted to minority shareholders with a certain shareholding in a situation where the issues to be decided are of particular importance (e.g. restructuring, merger, acquisition or liquidation). At present, neither Estonian nor German law provides that shareholders have such an extraordinary right to demand

¹⁵³ Grundgesetz für die Bundesrepublik Deutschland in der im Bundesgesetzblatt Teil III, Gliederungsnummer 100-1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 1 des Gesetzes vom 19. Dezember 2022 (BGBl. I S. 2478) geändert worden ist. Available at: <https://www.gesetze-im-internet.de/gg/BJNR000010949.html>.

¹⁵⁴ L. Beck (see Note 117), S 165.

a physical meeting or at least physical attendance. Expanding the minority rights and allowing shareholders to request a physical meeting or at least physical participation could be justified by the fact that in many cases, an in-person meeting might be more inclusive and, therefore, more informative.

As mentioned above, after the adoption of § 33¹ (1) of the GPCCA, Estonian company law has become rather minimalistic as regards both electronic participation and virtual shareholder meetings. Unless otherwise provided for by law or the articles of association, every shareholder may participate in a meeting and exercise his or her rights by electronic means without being physically present at the meeting. This includes two-way real-time communication or other similar electronic means that allow the shareholder to follow the meeting while at a remote location. It also applies to the shareholders' entitlement to attend a general meeting without physically participating. This is an opt-out regulation, and shareholders have the right to specify differently in the articles of association.

Before § 33¹ of the GPCCA entered into force, it was debatable whether electronic participation for non-listed public and private companies was even allowed, although, in practice, many companies already held virtual meetings. However, one may ask whether the regulation authorises the board to decide that the meeting can only be attended by electronic means of communication, or whether it means that the board may only decide that, in addition to physical attendance, shareholders are granted the option of choosing whether to participate in person or online.

According to the explanatory memorandum to the draft law introducing § 33¹ of the GPCCA, the main aim of the new regulation was to unequivocally allow companies to organise meetings using electronic means and to exclude possible disputes over whether this right could only exist if provided for in the articles of association. It was explained that the amendments equalise physical participation and participation via electronic means, while simultaneously allowing shareholders to adopt resolutions both partially and fully electronically.¹⁵⁵

As regards German public limited companies, in case the articles of association of a public limited company provide for a virtual meeting, the board has no discretion to decide otherwise. The situation is naturally different if the articles of association authorise the board to decide whether to hold a general meeting virtually or in person. German legal literature has expressed the view that due to the extraordinary character of this decision, it should be made by the entire board.¹⁵⁶ This point of view must be – at least partly – accepted, as the possibility that some board members decide to organise a virtual meeting while another part organises a regular meeting to decide on the same issues, should be excluded.¹⁵⁷

¹⁵⁵ Tsiviilseadustiku üldosa seaduse ja teiste seaduste muutmise seaduse eelnõu SE 180 (see Note 18), p. 4 (in Estonian).

¹⁵⁶ U. Hüffer, J. Koch (see Note 84) – J. Koch. AktG § 118a, Rn 10.

¹⁵⁷ This approach is understandable under German law since the management board essentially functions as a body, so individual members of the board have less opportunity to perform binding legal actions for the company.

The board does not need the consent of the supervisory board to hold a virtual meeting, and the shareholders have no right to object to the board's decision. The legal literature expresses the view that neither the supervisory board nor the minority shareholders or other subjects are entitled to decide otherwise even if the law exceptionally grants them the right to convene a meeting.¹⁵⁸ It has also been pointed out that when choosing the type of meeting, the board must observe the requirements of § 118a (1) of AktG but is otherwise only bound to the welfare of the company and the decision must be in accordance with the general business judgement rule.¹⁵⁹ However, it is also indicated in the legal literature that the assumption of the consent of the supervisory board may still be established, taking into account the general regulations on the division of competence between the management board and the supervisory board. Namely, according to § 111 (4) subsection 2 of AktG, the articles of association or the supervisory board can determine that certain types of transactions may only be carried out with its consent.¹⁶⁰ Therefore, the statement that the supervisory board has no right to intervene in the selection of the type of meeting is not fully true.

Section 317 (1) of the CC also provides that the supervisory board has the right to give directions to the management board of a public limited liability company regarding matters of organisation of the management. The approval of the supervisory board is also required for transactions conducted on behalf of the company that are beyond the scope of its day-to-day operations, provided that the articles of association do not exclude this requirement. If the organisation of the management of a public limited liability company is interpreted broadly, it can be concluded that the supervisory board is entitled to instruct the management board to organise the general meeting of shareholders in a certain specific way. The selection of the meeting format cannot generally be regarded as an out-of-the-ordinary business transaction, which is why it is not feasible to exclude the supervisory board's authority to issue instructions in this matter in the articles of association.

4.10.2. Time limit and the obligation to reconsider

According to § 118a (3) of AktG, the provision in the articles of association or the authorisation of the management board to hold a virtual general meeting must be limited to a maximum of five years, irrespective of whether it is a stipulation in the initial articles of association or is introduced by amending the already

¹⁵⁸ For example, § 122 (3) of AktG provides that the minority shareholders have the right to request the general meeting to be convened and if the request is not complied with, the court can authorise the shareholders to convene the general meeting. Section 292 (2) of the CC provides for the same minority right, with the difference that the minority shareholders do not have to apply to court for authorisation.

¹⁵⁹ U. Hüffer, J. Koch (see Note 84) – J. Koch. AktG § 118a, Rn 11–13.

¹⁶⁰ A. Hoppe. Die Transposition der virtuellen Hauptversammlung in die Satzung der AG. – NZG 2023, S 589.

existing articles of association. The five-year period starts with the registration of the company or with the registration of the amendment to the articles of association in the commercial register.¹⁶¹ According to J. Koch, if the articles of association provide for holding a virtual meeting but foresee no time limit, the regulation in the articles of association is void¹⁶² and the resolutions adopted in such general meetings are contestable.¹⁶³

It has been pointed out in German legal literature that the time limit is the same as it is for authorised capital (§ 202 (1) and (2) sentence 1 of AktG) and for issuing of convertible bonds (§ 221 (2) sentence 1 of AktG).¹⁶⁴ The time limit has been justified with the need for a new legitimacy and the resulting strengthening of the decision-making process of a virtual general meeting, for example, if the shareholder structure has changed over time or if the shareholders simply no longer want to use this form of meeting. The maximum period is five years, but the shareholders are free to agree on a shorter one.¹⁶⁵

J. Koch points out that in practice, companies tend to apply the maximum time limit. He explains that after the expiry of this limit, the shareholders must renew their decision; however, it is not clear whether this must be done by changing the articles of association or simply by confirming the previous decision. One must agree with the prevailing opinion of German legal scholars that the shareholders should rather explicitly decide on setting a new deadline as the time period starts with the registration of the amendments to the articles of association.¹⁶⁶ This approach may appear formalistic; however, it can be deemed justifiable given the principle of legal clarity and the preponderance of the shareholders' decision-making rights in this matter.

As Estonian law is founded on the opposite presumption, namely that virtual participation is an opt-out regulation, it must be held that there is no need for distinct opt-out deadlines in the law.

4.11. Conclusive remarks

If one compares German and Estonian company law as regards the exercise of shareholder rights using electronic means of communication one can conclude that in Germany, the choice to use both electronic participation and a virtual general

¹⁶¹ B. Gsell *et alia* (see Note 25) – Paschos, AktG § 118a, Rn 34.

¹⁶² He refers to § 23 (5) of AktG which states that the articles of association may deviate from the provisions of law only if it has been expressly permitted. It is, however, permissible to supplement the articles of association with additional stipulations, unless the law is conclusive.

¹⁶³ U. Hüffer, J. Koch (see Note 84) – J. Koch, AktG § 118a, Rn 48.

¹⁶⁴ Similarly, § 194² (1) and 349 (1) of the CC foresee the possibility to authorise the management board (in private companies) or the supervisory board (in both private and public companies) to increase share capital for five years.

¹⁶⁵ B. Gsell *et alia* (see Note 25) – Paschos, AktG § 118a, Rn 34.

¹⁶⁶ U. Hüffer, J. Koch (see Note 84) – J. Koch, AktG § 118a, Rn 48.

meeting is left to the ultimate discretion of shareholders and to use this form of a participation, they are first forced to express their will and to authorise the board. Shareholders of a public limited company have the right to stipulate in the articles of association that the meetings are only held virtually or to give the right to decide on the form of the meeting to the management board (§ 118a of AktG). The same applies to electronic participation in general (§ 118 of AktG). As regards German private limited companies, the rules are even more rigid as under § 48 (1) of GmbHG, a shareholders' meeting may be held virtually only if all shareholders declare their consent to it in a written form. However, the shareholders of a private company have the right to specify issues related to electronic participation in the articles of association.

This approach derives from the deep-rooted understanding that it is up to the majority shareholders to decide the most important issues related to the company and that the form of participation is one of them. Therefore, even though German company law admits that not every meeting has to take place with the physical presence of shareholders, the division of competence within the company still results in the understanding that a meeting should be by default physical unless the shareholders themselves have decided otherwise by allowing virtual meetings or electronic participation in the articles of association. This view has also been expressed in German case law.¹⁶⁷

In Estonia, too, it is ultimately up to the shareholders to decide whether electronic participation and virtual meetings are allowed. However, the Estonian assumes that the form of a meeting is more of a technicality than a particularly important issue of the internal organisation of the company and, therefore, it presumably lies within the competence of the board. In this sense, the Estonian concept is more like the German law that was temporarily in force during the pandemic, since according to it, the default rule was that the board (along with the supervisory board) had the right to decide in what form the meeting should be held. German temporary law authorised the board to decide on whether to call a virtual meeting, a physical meeting with facilitated electronic participation, or a traditional physical meeting.¹⁶⁸ However, the Estonian legislator has designed § 33¹ (1) of the GPCCA as a dispositive clause and, therefore, the shareholders of Estonian companies (both private and public) are of course allowed to exclude the virtual participation with the articles of association. According to the Estonian approach, the assumption is that a physical and virtual meeting are deemed equal, and the shareholders are not required to authorise the board to utilise this form. Since the physical and virtual meetings are to be considered equivalent, one can also conclude that a virtual meeting as well as the electronic participation in general allows the shareholders to exercise the same right to the same extent as in case of virtual participation at the meeting.

¹⁶⁷ LG München I (5. Kammer), Beschluss vom 26.05.2020 – 5 HK O 6378/20. – BeckRS 2020, 11280.

¹⁶⁸ See also: P. Stelmaszczyk. Die virtuelle Hauptversammlung nach dem COVID-19-Gesetz vor dem Start in die Hauptversammlungssaison 2022. – DNotZ 2021, S 934.

Considering the understanding expressed in Estonian legal literature that the regulations of the CC are rather imperative even as regards the internal relations of a company,¹⁶⁹ one can also ask to what extent the shareholders have the right to regulate the details of the electronic participation or fully virtual meeting in the articles of association. The author of the dissertation finds that the shareholders should have the right to shape the internal relationship by a majority vote and to specify issues related to virtual participation (e.g. the requirements for the environment of the meeting, drawing up the minutes of the meeting, procedures for identifying participants and raising objections). Nevertheless, it does not mean that these specifications should be always necessary since excessive regulation can make the operation of a company less flexible. Moreover, the detailed regulation of the forms of meetings in the articles of association provides additional opportunities to challenge the resolutions of the meeting for procedural reasons, as the law allows shareholders to apply for the annulment of the resolution in the case of a violation of any provision of the articles of association (§ 178 (1) and § 302 (1) of the CC). Since Estonian law does not contain substantive restrictions on contesting resolutions, the violation of technical conditions stipulated in the articles of association would probably give the possibility to contest the resolutions on formal grounds. Such an extension of the right to contest cannot be considered justified.

As regards Estonian law, one can also ask whether a shareholder has the right under § 33¹ (1) of the GPCCA to demand a specific way of participation or if the participation modalities are to be decided by the management board as the convening body.

It has been noted in Estonian legal literature that, in general, a shareholder does not possess the right to request electronic participation in the meeting as it is determined by the body convening the meeting. This view is also supported by § 33¹ (2) of the GPCCA, according to which, the general rules on decision-making apply also in case the meeting is held by electronic means. The organiser of the meeting is responsible for its proper conduct. It has been stated in case law that the decision on how to conduct a meeting is made by the management board which is responsible for organising the meeting.¹⁷⁰ However, Tartu Circuit Court (being the court of the second instance) also emphasised that the members of a company who do not have the technical ability and means to participate in the meeting electronically must be granted the right to participate physically. The author of the dissertation agrees that holding a meeting in a certain way or allowing participation in a certain way may also derive from a general principle of good faith. Although the court mentioned the options of participating physically, it did not analyse whether, under the law, a shareholder has the right to demand the possibility of attending the meeting virtually. Neither did the court address the board's right to decide whether or not to hold the meeting only face-to-face, partially physically, or only electronically.

¹⁶⁹ P. Varul *et alia* (see Note 13) – P. Varul, § 5, comment 3 (in Estonian).

¹⁷⁰ Tartu Circuit Court ruling in civil case No 2-22-708 of 23 March 2022, p. 11.

In summary, one can conclude that the approaches of Estonian and German law to virtual participation are somewhat different. Since German law has been a model for Estonian law in many company law matters, one could ask whether it would be justified to supplement the CC as regards issues of electronic participation and a fully virtual meeting, following the example of German law. The author of the dissertation finds that, at present, there is no need for it. To the author's knowledge, there have been no significant litigations pertaining to these matters. The default rule that the way of holding a meeting is to be decided by the board is in accordance with the general distribution of competences between the shareholders and the board. Therefore, the shareholders do not generally have the right to demand a certain modality of participation.

5. ELECTRONIC VOTING IN THE PROCESS OF ADOPTING RESOLUTIONS OF A LIMITED COMPANY

5.1. General remarks on the decision-making of a limited company

As mentioned above, one of the shareholders' most important rights is the right to participate in the decision-making process of a company and to vote when adopting resolutions. German legal literature expresses the view that adopting a resolution (*Beschlussfeststellung*) is considered the "articulation of the company's will" and that the introduction of virtual meetings does not change much in the general dogmatism of the shareholders' resolution.¹⁷¹

Among shareholder rights, the right to vote can be considered the most important. At the same time, an equal sign cannot be drawn between an electronic meeting and electronic voting. One must note that "electronic participation" is a broader concept than "electronic voting". Participation includes questions such as how the meeting is organised, which means of communication will be available to shareholders to grant attendance, how the identity of shareholders is checked, and whether shareholders are guaranteed the same rights at a virtual meeting as they would have in a physical meeting. The process of adopting resolutions includes issues such as methods of voting, voting procedure, restrictions on voting rights, determination of voting results and formalisation of the decision. Since there are two ways to adopt resolutions – either in a meeting or without calling a meeting, electronic voting does not necessarily have to take place in a meeting. Additionally, the scope of using electronic means to exercise voting rights can be very different – from just sending one's vote by e-mail to the use of various virtual voting platforms.

The author of the dissertation is of opinion that both Estonian (for both types of limited companies) and German law (for public limited companies) provide for the following three main possibilities:

- 1) The management board convenes a shareholders' meeting, and the shareholders vote in a meeting (the so-called traditional meeting).
- 2) The management board convenes a shareholders' meeting, and in addition to the possibility to vote in the meeting (either physically or electronically), the shareholders are granted the possibility to vote before the meeting – either by letter or by electronic means of communication.
- 3) The meeting will not be convened, and the voting will take place solely by means of communication provided for that purpose.

¹⁷¹ H. Altmeyen (see Note 68), S 1567.

The electronic component may be present in all three situations since even in the case of a traditional face-to-face meeting, voting may be carried out through electronic platforms, e-mails, etc.

As regards voting modalities, the central issues to be discussed are first, what are the legal standards of the electronic voting methods and second, which body has the right to choose the voting method.

5.2. Voting modalities and the legal standards of electronic voting

Before 24 May 2020, the CC included rules on electronic voting in § 170¹ (as regards private limited companies) and § 298¹ (as regards public companies). Section 170¹ (1) of the CC allowed to provide in the articles of association of a private limited company that shareholders may vote on the draft resolutions using electronic means before or during the meeting if technical security was guaranteed. According to § 170¹ (3) of the CC, the exact procedure for organising electronic voting had to be prescribed either in the articles of association or determined by the board. Additionally, the CC stipulated two main prerequisites for the voting procedure: first, it had to ensure the security and reliability of the identification of shareholders and second, it had to be proportionate to achieve these goals. Section 170¹ (4) of the CC provided that electronic voting must take place in electronic form and that the articles of association may determine the time until which it is possible to vote electronically before or during the meeting. The CC also provided similar regulation for public companies in § 298¹ (1), (3) and (4), specifying that in listed companies, electronic voting must take place in a form that enables written reproduction.

The amendments to the CC that came into force on 24 May 2020 abolished the previous regulations (i.e. § 170¹ and § 298¹ of the CC) and since then, the above-mentioned provisions are no more identified as “electronic voting” but “electronic participation in a general meeting,” referring to the general regulation of the GPCCA.¹⁷²

Under § 33¹ (1) of the GPCCA in force as of 24 May 2020, shareholders may exercise, among others, the voting right via electronic means, without being physically present at the meeting, unless otherwise provided for by law or by the articles of association. Section 33¹ (2) of the GPCCA lays down that a meeting held via electronic means is subject to the same provisions applicable to adopting resolutions at a regular meeting. It can, therefore, be concluded that, when conducting an electronic vote, the same requirements apply as when conducting a physical meeting. Given that the GPCCA does not foresee specific rules as regards electronic voting and the previous provisions have been replaced only

¹⁷² Section 170¹ (1) as well as § 298¹ (1) of the CC merely stipulate that participation in the shareholders’ meeting by electronic means must take place in accordance with the procedure provided for in § 33¹ of the General Part of the Civil Code Act.

with a reference to the GPCCA, the question arises as to how much has the law in fact changed.

Estonian CC distinguishes between voting before the meeting and in the meeting and although the CC no longer regulates electronic voting in general, § 298² of the CC includes rules for electronic voting carried out before the meeting. Section 298² (1) of the CC foresees that a shareholder may vote on draft resolutions prepared in respect of the items on the agenda by submitting their vote before the general meeting at least in a format which can be reproduced in writing, unless otherwise prescribed in the articles of association. The prerequisite of such voting is that the identification of shareholders as well as the security and reliability of voting is ensured. The right of shareholders of a private limited company to vote before a meeting is regulated in the same way (§ 170 (5) of the CC). According to § 298² (3) of the CC (also applicable for private limited companies), a special form designated by the company must be used when voting before the meeting. This may raise the question of whether the requirement of using a form leaves any possibility of voting before a meeting in a specially designated electronic environment. The author finds that a voting form can also be understood as a ballot in an electronic environment if it complies with the requirements of the law and the articles of association.

As regards German law, the second sentence of § 118 (1) of AktG stipulates that the articles of association may provide or may grant authority to the management board to provide that the shareholders of a public limited company may exercise, among others, the voting right by means of electronic communication.¹⁷³ According to § 118 (2) of AktG, the articles of association may provide or authorise the management board to provide that shareholders may cast their votes in writing or by using electronic means of communication without attending the meeting. Both voting modalities are defined as “postal voting” (in German: *Briefwahl*). This term has, however, been criticised in legal literature since it includes not only voting in a written form but also different types of electronic voting, which generally do not take place in the form of a letter. The above-mentioned provision was added to AktG with the adoption of the Law on Implementation of Shareholder Directive.¹⁷⁴ It implemented art 12 of the Shareholder Rights Directive as far as postal voting is concerned. It applies not only to listed, but also to non-listed public limited companies, which art 1 of the Directive does not require. It has been pointed out that in practice, this option – unlike electronic participation – has already been used by numerous companies and their

¹⁷³ Section 118 (1) of AktG adds that if the voting right is exercised by electronic means, the receipt of an electronic vote must be confirmed electronically by the company. The objective of this requirement is to enhance legal certainty for shareholders voting electronically, who will be able to track the receipt of their vote in the future. The addressee of the provision is the company, which can use a third party or an automated device to fulfil this obligation. See: W. Goette *et alia* (see Note 5) – Kubis, AktG § 118, Rn 95.

¹⁷⁴ Gesetz zur Umsetzung der Aktionärsrechterichtlinie. Vom 30. Juli 2009. – BGBl I, S 2479. UMAG. Available at: https://dejure.org/BGBl/2009/BGBl_I_S_2479.

shareholders; however, the technical and legal framework of these regulations, especially for the cross-border exercise of voting rights, is still criticised and found deficient.¹⁷⁵

Under German law, similar to electronic participation, shareholders have been granted the authority to permit postal voting by regulating the matter in the articles of association. This means that shareholders can permit postal voting or authorise the management board to decide to use this option. It has been pointed out that most companies prefer to authorise the management board in this respect as it is probably a more flexible option.¹⁷⁶ The articles of association can also exclude postal voting. If postal voting is allowed, the articles of association may make the exercise of voting rights dependent on the shareholders registering before the meeting (§ 123 (2) sentence 1 of AktG). The articles of association should also provide procedures for identifying postal voters. In the case of electronic voting, a special identifier, login mask, or electronic signature can be used.¹⁷⁷ Postal voting can be exercised either in writing or by means of electronic communication.

Section 298² (1) of the CC prescribes the following requirements for voting before the meeting:

- 1) casting a vote must be possible at least in a format reproducible in writing,
- 2) identification of shareholders must be ensured,
- 3) security and reliability of voting must be ensured.

Considering these three prerequisites, it may be asked which electronic communication methods are compatible with the requirement that “voting must be feasible at least in a format reproducible in writing”. According to § 78 of the GPCCA, the requirement for a form that is reproducible in writing is fulfilled if the vote is cast in a manner that enables it to be recorded permanently in writing; however, unlike the written form, it needs no handwritten signatures. Second, it must be possible to link the vote as a declaration of intention with a certain shareholder and this connection must be trustworthy. Therefore, the vote usually must contain the name of the voting shareholder, and it must be convincing for the company that it was the shareholder who cast the vote. The author finds that when voting by e-mail, the above three requirements are normally met: first, the e-mail can be reproduced in writing, i.e. it can be saved and if necessary, later printed. Second, the company can identify whether the voter is a shareholder based on the data of the sender of the e-mail since the company usually has information about the contact addresses of its shareholders. Third, the reliability of the vote given by email cannot be questioned, considering the general standards applicable to the exchange of emails.

¹⁷⁵ U. Hüffer, J. Koch (see Note 84) – J. Koch. AktG § 118, Rn 15.

¹⁷⁶ U. Hüffer, J. Koch (see Note 84) – J. Koch. AktG § 118, Rn 16.

¹⁷⁷ U. Hüffer, J. Koch (see Note 84) – J. Koch. AktG § 118, Rn 16.

Another option is to use an online voting platform. It may be asked 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 fulfilled.

Considering the mandatory characteristics of electronic voting, the online voting environment must facilitate a permanent record that can be replicated. It has been noted in the legal literature that a website meets the requirement of reproducibility in writing if the information on the relevant website can be downloaded and saved. A voting environment, therefore, enables reproduction in writing if printouts from it can be made and/or data can be saved on an external data carrier. If the website content is presented in a way that enables only reading, the requirements of the written reproduction are not met since, in this case, the information stays within the sphere of influence of the website administrator.¹⁷⁸ On this basis, the author concludes that a voting ballot used in the electronic environment can also be considered a form reproducible in writing on the precondition that the voting data can be saved on an external data carrier.

Another important prerequisite of online voting is the identification of voters. Therefore, sending shareholders a link to the voting environment without the capability to verify who used it is not sufficient to identify the individuals who voted. Hence, the author finds that it is not feasible to use a conventional poll conducted in an electronic setting, wherein each person who receives the link can merely enter a name and indicate their support or opposition to the resolution. Furthermore, it cannot be considered compatible with the purpose of the law if the voting environment did identify the persons entering it but did not reflect who voted how because the data about who voted in favour of the resolution constitutes an important part of the voting record according to the law. An electronic voting environment must also consider personal voting restrictions.

Thus, to ascertain the voting results, the necessary personalisation requirements are somewhat higher in the case of online voting than they are in the case of voting by e-mail, 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 § 299¹ and § 173 of the CC, which regulate the adoption of resolutions without convening a meeting. These rules are similar to voting before a meeting. Namely, § 299¹ (4) and § 173 (3) of the CC lay down the form requirements of the voting record and 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 (§ 299¹ (4) subsection 3 and § 173 (3) subsection 3 of the CC). The purpose of this precondition 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. Whether a vote is cast before a meeting or without convening a meeting should not involve significant distinctions as regards legal regulation.

¹⁷⁸ P. Varul *et alia* (see Note 33) – K. Sein, § 79, comment 3.2 (in Estonian).

Furthermore, the application used for electronic voting should be designed so that the voter can verify whether the application used for voting has duly submitted their vote to the voting environment in line with their intention. 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.¹⁷⁹

Since the CC contains provisions on electronic voting before the meeting but does not directly regulate electronic voting in the meeting, the question arises as to what requirements apply to voting in the meeting. The author finds that it derives from the purpose of the norms governing voting that the same principles apply if electronic means of communication (e.g. e-mail, voting platform, *etc.*) are used when shareholders vote during the meeting.

One can also conclude that the law no longer stipulates that electronic voting needs an electronic signature. Therefore, electronic voting as a general term within the meaning of § 33¹ of the GPCCA and the CC now includes both the transmission of votes with an electronic signature and the use of other electronic means of communication. However, it must be held that the requirements of electronic voting are met only if it can be reliably ascertained that only shareholders can vote, and the voting results can be accurately determined. This follows, *inter alia*, from §§ 148 (5) and 226 of the CC, which link shareholder rights to shareholding, along with §§ 169, 236 (1) and 304 (1) subsection (5) of the CC, which provide that the minutes of the meeting must include not only the resolutions passed but also the results of the voting, including the number of votes cast for and against the resolution.

Similar requirements apply under German law – postal voting does not require a handwritten signature, but it must be possible to attribute a vote to a certain shareholder. Therefore, as regards postal voting, secret voting is not possible.¹⁸⁰

¹⁷⁹ According to § 177 (1) and 303 (1) of the CC, a shareholder may not vote on a decision to release him or her from liability or responsibility, to approve the transfer of his or her shares, to enter into a transaction between a shareholder and a company or to enter into a legal dispute with a shareholder, or to appoint a representative of the company in such a transaction or dispute, or on any matter concerning the verification or assessment of the performance of the shareholder or his or her representative as a member of the management board or the supervisory board. The purpose of these rules is to exclude shareholder votes on decisions where they are presumed to act in a conflict of interests and to vote in favour of their own interests over those of the company.

¹⁸⁰ However, as regards the question of whether voting should be public or secret, German legal scholars are not unanimous on whether secret voting is legally acceptable. For example, it has been found that in the case of larger general meetings, only the secret voting will be purposeful, as this is the only way to ensure a reliable, timely determination of voting results, considering shareholders' different voting rights and possible voting restrictions (H.C. Grigoleit (see Note 87) – Herrler, AktG § 134, Rn 51). It has also been pointed out that if a shareholder is economically or socially dependent on the company or there is a reason for concern on other grounds (e.g. in the case of a small group of shareholders or family-owned companies) that the pressure from the meeting will impair the shareholder's freedom of decision and shareholders, therefore, have legitimate confidentiality interests, the secret voting could be requested (H.C. Grigoleit (see Note 87) – Herrler, AktG § 134, Rn 51; W. Goette *et*

German legal literature points out that “electronic communication” is a non-technical generic term that covers electronic form (§ 126a BGB), but also text form (§ 126b BGB) and any other form of unilateral electronic declaration of intention, especially using an Internet form provided by the company.¹⁸¹

As regards the time limits for voting before the meeting the only requirement under Estonian law is that it must take place “before the meeting” (§ 298² (1) of the CC). According to German legal literature, the voting should be open from the announcement of the convocation at the earliest.¹⁸² As about the time until which postal voting should be allowed, the German legal literature has expressed different opinions. It has been argued that the phrasing of Art 12 of the Shareholder Rights Directive (“vote by letter before the general meeting”) and the need to distinguish between online participation and postal voting support the view that postal voting can be carried out only until the opening of the general meeting. However, it has also been pointed out that § 118 (2) of AktG contains neither corresponding restrictions nor a clear distinction between postal voting and online participation (voting during the meeting). Therefore, every vote, cast until the beginning of the respective voting process in the meeting, should be valid.¹⁸³ The prevailing opinion, therefore, appears to be that taking into account modern technical solutions, electronic pre-voting should be permitted until the start of the respective voting process in a meeting.¹⁸⁴ However, it is debatable whether shareholders can change their previously given votes in the general meeting until the start of voting.¹⁸⁵ To assure legal clarity, the author supports the position that the opportunity to vote before the meeting ends with the opening of the meeting and that it should not be possible to change the vote already given. This interpretation is in accordance with the general rules that regulate the making and becoming valid of declarations of intention, according to which a declaration of intention addressed to a specific person cannot be changed after it has become valid (§ 69 and 70 of the GPCCA). The vote given before the meeting becomes valid when it has reached the sphere of influence of the company. Additionally, to avoid disputes, further voting rules can be formulated by the shareholders in the articles of association, considering the needs of the specific company.

alia (see Note 5) – Arnold, AktG § 134, Rn 95). Contrary to these views it has been pointed out that there is, in fact, no right to a secret vote. It has been argued that a fully secret voting is ruled out because, first, compliance with voting restrictions must be verifiable and second, in case a resolution is contested, it is important to know whether the contesting shareholder has objected to the resolution as it is the general prerequisite of challenging the resolution. In smaller companies or in companies where shareholders know each other complete secrecy can hardly be achieved anyway, as conclusions about how each shareholder voted can usually be drawn from the number of votes (B. Gsell *et alia* (see Note 25) – Rieckers AktG § 134, Rn 88).

¹⁸¹ U. Hüffer, J. Koch (see Note 84) – J. Koch, AktG § 118, Rn 17.

¹⁸² H.C. Grigoleit (see Note 87) – Herrler, AktG § 118, Rn 23.

¹⁸³ H.C. Grigoleit (see Note 87) – Herrler, AktG § 118, Rn 23.

¹⁸⁴ U. Hüffer, J. Koch (see Note 84) – J. Koch, AktG § 118, Rn 17.

¹⁸⁵ U. Hüffer, J. Koch (see Note 84) – J. Koch, AktG § 118, Rn 28–29.

Voting during a virtual shareholder meeting is briefly regulated in § 118a of AktG. Section 118a (1) subsection 2 of AktG foresees that one of the prerequisites of a fully virtual general meeting is that shareholders exercise their voting rights via electronic communication (electronic participation within the meaning of § 118 (1) sentence 2, or electronic postal voting within the meaning of § 118 (2) of AktG). In addition to the two forms of electronic communication, granting a power of attorney must also be possible. It has been pointed out in legal literature that the management board is also free to provide for both options regarding the exercise of voting rights by means of electronic communication. J. Koch has explained that there is no need to regulate it in the articles of association, and since the general meeting of shareholders can only decide on “whether” and not on “how”, such regulation can be considered inadmissible.¹⁸⁶ According to German legal literature, irrespective of how voting rights are exercised, it is possible to vote until the time the “voting window” is closed by the chair and when it is closed, the chair must issue a corresponding notice. The beginning and the end of voting on individual resolutions must be communicated in a way that is perceptible to all participants.¹⁸⁷ One must agree with this position.

5.3. The competence to choose the voting modality and conclusive remarks

Similarly to electronic participation in a general meeting, electronic voting is allowed under Estonian law from 24 May 2020 in both private and public limited companies, unless the articles of association exclude this option. According to the law, it is irrelevant whether electronic voting takes place at the meeting or before the meeting. The final competence lies in the hands of shareholders, who may exclude the possibility of electronic voting from the articles of association. In contrast, in Germany, the organisation of electronic voting requires the shareholders to have provided for this voting method in the articles of association. Once again, this principle applies similarly to voting during a meeting and voting before a meeting.

For public companies, § 134 (4) of AktG stipulates that the form in which voting rights are exercised depends on the articles of association. German legal literature has expressed the view that because of the intended flexibility, the articles of association usually contain only the provision that the chair of the meeting determines the specific voting method and that in cases where the articles of association contain no rules in this matter, the determination of the voting modalities falls within the competence of the chair.¹⁸⁸ However, the general

¹⁸⁶ U. Hüffer, J. Koch (see Note 84) – J. Koch. AktG § 130, Rn 21.

¹⁸⁷ U. Hüffer, J. Koch (see Note 84) – J. Koch. AktG § 118a, Rn 27.

¹⁸⁸ U. Hüffer, J. Koch (see Note 84) – J. Koch. AktG § 134, Rn 34–35.

meeting may obligate the chair by adopting a procedural resolution before voting on substantial matters.¹⁸⁹

Regardless, one cannot agree with the view that the chair of the meeting is also entitled to decide whether to use electronic voting. The author finds that the chair may possess the authority to select the voting method solely to the extent that it is not necessary to notify the shareholders before the meeting. The shareholders must be informed before the meeting whether or not it is sufficient to attend the meeting to vote or whether additional technical measures are required.

Section 121 (3) subsection 2b of AktG prescribes a requirement for listed companies that a possible electronic or postal voting procedure must be announced to the shareholders already in the notice of the meeting, which means that the chair has no competence to decide otherwise. As regards Estonian limited companies, the informational requirements of the notice of the meeting are comparable to those of German listed companies – if the company allows electronic or postal voting in a meeting, the notice of the meeting must include information about the procedure and deadline of the voting (§ 294 (4) subsection 7 and § 172 (2) of the CC). Therefore, it is not possible to conclude that the chair of the meeting has the right to decide whether to hold electronic or regular voting at the meeting.

Thus, while it can be argued that the chair has the right to decide on technical matters related to the organisation of voting (for example, whether to vote by ballot or by raising hands, or how to organise the counting of votes), it is usually up to the board to decide whether voting should take place before the meeting or at the meeting, and whether voting at the meeting should be electronic or not, insofar as the articles of association do not already prescribe clear rules in this matter.

In summary, it can be concluded that at the first level, it is up to the shareholders to decide whether to permit voting by electronic means. The articles of association may also provide for more specific rules or the circumstances in which a particular voting method should be used. In Estonia, this issue is regulated as an opt-out, which means that the shareholders have the right to exclude electronic voting (adopting relevant regulations in the articles of association by a 2/3 majority of votes). If this voting modality is not excluded, the power of decision is transferred to the board, which decides which voting method should be used. If the board decides to hold a meeting, the fact that the vote will be taken by electronic means must be indicated in the notice of the meeting.

One can agree with the view expressed in German legal literature that the voting method should be chosen so that the voting process takes as little time as possible, allowing the voting results to be determined as reliably as possible. Therefore, in the case of small gatherings, the sufficient method can be simply raising hands, standing up, or speaking one's mind. The number of votes can then be easily and quickly determined. At large meetings, using voting cards¹⁹⁰ or

¹⁸⁹ W. Goette *et alia* (see Note 5) – Arnold, AktG § 134, Rn 89.

¹⁹⁰ About this voting method see: W. Goette *et alia* (see Note 5) – Arnold, AktG § 134, Rn 93.

electronic voting platforms could be a more suitable option.¹⁹¹ It has also been referred to that if online participation within the meaning of § 118 (1) subsection 2 or postal voting within the meaning of § 118 (2) of AktG is permitted, the voting behaviour of the online participants or postal voters must be made known to the shareholders in attendance and – in the absence of restrictive requirements – generally also *vice versa*. In contrast to purely online participation, the chair of the meeting is entitled and obliged to examine the procedure of electronic voting carefully due to his or her exclusive power to determine the voting results.¹⁹² Another important aspect emphasised in legal literature is that if voting takes place using electronic means of communication, any kind of management influence is prohibited.¹⁹³

It can be concluded that voting by electronic means of communication is only one of the options and it is possible that considering the circumstances of a specific meeting or a specific company it is not necessarily the best solution for either virtual or hybrid meetings. However, the possibility of voting by electronic means significantly complements the procedure for adopting decisions without convening a meeting. The use of different means of communication also allows shareholders to vote before the meeting.

Since the new regulation now allows the use of different technological solutions for voting and no longer requires the existence of specific provisions in the articles of association, Estonian law has become more flexible. While scarce regulation may give rise to different interpretations, the author of the dissertation finds that it is possible to overcome all potential legal ambiguities if the basic principle is kept in mind, according to which the same rights must be guaranteed to the shareholders in the case of electronic voting as they have when using other voting modalities. In situations where, for whatever reason, it is necessary either to hold a meeting by electronic means of communication or to organise an electronic voting, any company may use this possibility. Given that a large number of private limited companies are founded online using a standardised form of articles of association,¹⁹⁴ the opt-out is undoubtedly a more flexible form of regulation than the opt-in, which is a distinctive feature of German company law.

¹⁹¹ U. Hüffer, J. Koch (see Note 84) – J. Koch, AktG § 134, Rn 34–35.

¹⁹² W. Goette *et alia* (see Note 5) – Kubis, AktG § 118, Rn 95.

¹⁹³ H.C. Grigoleit (see Note 87) – Herrler, AktG § 134, Rn 51.

¹⁹⁴ See: Kohtule dokumentide esitamise kord. – 28.12.2005. – RT I, 02.04.2024, 8 (§ 11¹ and Annex 15).

6. CHALLENGING SHAREHOLDER RESOLUTIONS ADOPTED USING ELECTRONIC COMMUNICATION

6.1. Systematics of challenging resolutions and general remarks

Previously, the author analysed the rights that must be guaranteed to shareholders in the decision-making process. In this subsection, further development of the subject is set out concerning the legal remedies available to shareholders in the event of a breach of their rights since this is a central issue in private law. As the exercise of shareholders' rights using electronic means of communication is subject to certain specific features, it is important to analyse these particularities also from the point of view of the main legal remedy available to shareholders, which, under Estonian law, is challenging the resolutions.

In case either the rules of convening and conducting a meeting have been violated or the adopted resolutions are contrary to the law or the articles of association, such resolutions can be challenged in court. Estonian law distinguishes between nullity (respectively § 177¹ (1) § and 301¹ of the CC) and revocation of a shareholder resolution (§ 178 (1) and § 302 of the CC).¹⁹⁵ According to § 178 (3) and § 302 (3) of the CC, the revocation of a resolution may be requested by every shareholder who did not participate in a meeting as well as by a shareholder who participated, objected to the resolution and the objection was entered in the minutes of the meeting. The shareholders who gave their vote before the meeting¹⁹⁶ have the right to demand revocation of a resolution without entering the objection in the minutes.

The action to establish the nullity of a resolution can be submitted at least by the same persons who may demand the revocation of a resolution.¹⁹⁷ Estonian

¹⁹⁵ The third legal remedy available to shareholders is the claim to establish the absence of a resolution. Submission of the respective claim is primarily possible if the resolution does not contain the declarations of intention of the persons entitled to adopt it. This remedy has a limited practical value, and it is applicable in case the resolution has not been adopted by the shareholders. See: the Supreme Court decision in civil case No 2-16-11216 of 6 November 2019, p. 15. It has been pointed out in legal literature that the demarcation of a 'non-decision' from a null decision may be problematic; however, the distinction does not have any significant practical meaning as the legal consequences of a non-decision are the same as those of a null decision, i.e. neither have no legal consequences. (K. Saare *et alia* (see Note 1), p. 203 (in Estonian).

¹⁹⁶ According to § 170 (5) and § 298² of the CC, a shareholder may vote on the draft resolutions prepared concerning the items on the agenda by submitting his or her vote to the company before the meeting at least in a format which can be reproduced in writing unless otherwise prescribed in the articles of association, provided that the identification of shareholders and the security and reliability of voting is ensured.

¹⁹⁷ The Supreme Court decision in civil case no 3-2-1-28-16 of 18 May 2016, p. 11; civil case No 3-2-1-82-15 of 30 September 2015, p. 13; civil case No 3-2-1-55-14 of 11 June 2014, p. 25; civil case No 3-2-1-65-08 of 8 October 2008, p. 16.

Supreme Court has stated that since the claim to establish the nullity of a shareholders' resolution is a claim seeking declaratory relief, under § 368 (1) of the Code of Civil Procedure (CCP),¹⁹⁸ it may be filed by a person who has a respective legal interest, i.e. whose rights or obligations may depend on the content of the resolution. However, as regards the nullity of a resolution, the relevant legal interest is at least generally derived from the membership status of a shareholder.¹⁹⁹ Therefore, generally, all shareholders are entitled to apply for the nullity according to § 177¹ and § 301¹ of the CC.

As regards procedural violations, the main principle is that errors that violate the shareholders' right to participate in the decision-making process of the company, or that otherwise significantly impede the exercise of the right to participate and/or violate the right to be present at the meeting, to adopt a considered decision and to vote, entail the nullity of a resolution. The same applies to the resolutions adopted without convening a meeting.²⁰⁰ Violation of other legal provisions of the law and the articles of association are grounds for requesting the revocation of the resolution.

The systematics of contesting resolutions is essentially the same under German company law. AktG provides the grounds for nullity (§ 241 of AktG) and the revocation of a resolution (§ 243 of AktG), and although there are no such provisions in the GmbHG, the regulations of AktG are applied using analogy.²⁰¹

One of the questions discussed in the earlier²⁰² German legal literature is whether recording an objection as a prerequisite for revocation of a resolution should also apply in the case of a virtual meeting. Namely, it has been debated whether the shareholders' right to contest resolutions should depend on the manner of participation and whether a shareholder attending the meeting virtually should have the right to contest the resolutions without submitting a respective objection.²⁰³ The opinions have been different; however, they all seemed to support the company's right of self-determination. It has been discussed that the shareholders should be allowed to agree on such matters in the article of association²⁰⁴ and that the company should have the right to decide which rights should be awarded to the shareholders who attend the meeting using the means

¹⁹⁸ Tsiviilkohtumenetluse seadustik. – 20.04.2005. – RT I 2005, 26, 197; RT I, 11.03.2023, 30.

¹⁹⁹ The Supreme Court decision in civil case No 3-2-1-76-14 of 14 October 2014, p. 18. See also: V. Kõve *et alia*. Tsiviilkohtumenetluse seadustik II. Kommenteeritud väljaanne. [‘Code of Civil Procedure II. Annotated Edition’] Tallinn: Juura 2017. – I. Järvekülg, V. Kõve, § 368, comment 3.1.2.5.b (in Estonian).

²⁰⁰ K. Saare *et alia* (see Note 1), p. 205 (in Estonian).

²⁰¹ T. Drygala *et alia* (see Note 79), S 249.

²⁰² Earlier legal literature hereby refers to sources published prior to the implementation of the virtual meeting institute in Germany in 2022.

²⁰³ Under AktG § 245 (1) and CC § 302 (3), only a shareholder who participated in the general meeting and raised an objection to the resolution, also having it recorded in the minutes, may seek annulment of the resolution.

²⁰⁴ U. Hüffer, J. Koch (see Note 84) – J. Koch, AktG § 118, Rn 13.

of electronic communication.²⁰⁵ The current view is, however, that all shareholders should have uniform rights, among others the right to contest resolutions regardless of their way of participation.²⁰⁶ Under Estonian law, this question has a clear answer – according to § 33¹ (2) of the GPPCA, in case a meeting is held by electronic means, all relevant regulations of a physical meeting apply.

Before the permanent provisions governing the virtual general meeting of public limited companies were introduced, German case law had to analyse several questions regarding the legality of this form of meeting. Among others, the question arose as to whether the temporary COVID-19 regulations allowing to hold shareholder meetings virtually are in accordance with the constitution. The Regional Court of Cologne²⁰⁷ and the Regional Court of Frankfurt am Main²⁰⁸ both found that the regulations of the temporary law allowing the management board to conduct virtual shareholder meetings even without the authorisation of the shareholders are in accordance with the constitution.²⁰⁹

German case law has also addressed the issue of whether a scenario where a virtual meeting is conducted instead of a physical meeting can be considered “contradictory to the nature of a public limited company”.²¹⁰ Namely, § 243 subsection 4 of AktG provides that a resolution that “is incompatible with the nature of the public limited company” is null and void. Regional Court of Frankfurt am Main explained that “the nature of the public company” is largely shaped by the provisions of company law and since the temporary regulations of the COMVG are (although temporarily) part of this law they also reflect the essence of the public company, so that compliance with them cannot violate the essence of the public limited company.²¹¹ Although Estonian law does not foresee the possibility that a shareholder resolution could be null and void due to a conflict with the nature of a public limited company, all three above-mentioned cases raise a much more general question, namely: can a physical meeting and a virtual meeting be considered equivalents? It appears that German legal theory has been reluctant to treat them as equal forms of participation. The situation is less complicated under Estonian company law since the general regulations are designed to ensure that both forms of participation are equal. Therefore, it would not be possible to challenge the resolutions solely on the ground that an electronic form was chosen instead of a face-to-face meeting.

The Regional Court of Stuttgart had to solve a case where four plaintiffs (shareholders of a private limited company) applied for an interim injunction,

²⁰⁵ W. Hölters Aktiengesetz. Kommentar. Verlag C. H. Beck, Verlag Franz Vahlen München. 3. Auflage 2017. – Drinhausen, AktG § 118, Rn 16.

²⁰⁶ U. Hüffer, J. Koch (see Note 84) – J. Koch, AktG § 118, Rn 14.

²⁰⁷ LG Köln (2. Kammer für Handelssachen), Beschluss vom 26.02.2021 – 82 O 53/20.

²⁰⁸ LG Frankfurt a. M. (5. Kammer), Urteil vom 23.02.2021 – 3-05 O 64/20.

²⁰⁹ P. Jaspers, P.-E. Pehrsson. Die virtuelle Haupt- und Mitgliederversammlung im Praxistest. – NZG 2021, S 1246.

²¹⁰ P. Jaspers, P.-E. Pehrsson (see Note 209), S 1246.

²¹¹ LG Frankfurt a. M. (5. Kammer), Urteil vom 23.02.2021 – 3-05 O 64/20.

requesting the cancellation of a shareholders' meeting that had been called as an in-person meeting, at which, among other things, one of the plaintiffs was to be removed from the board. The plaintiffs explained that it was impossible for them to take part in the physical meeting as three of them were in Israel and unable to return due to a travel ban, and one of them had just returned from Spain and had to stay in quarantine for 14 days. The court decided that an interim injunction was appropriate as the temporary law did not foresee the possibility of holding a virtual meeting for a *GmbH*, unlike for an *AG*, unless it was foreseen in the articles of association.²¹² In the context of Estonian law, one may ask whether a shareholder has the right to challenge the resolutions in a situation where the shareholders have exercised the opt-out provided for in § 33¹ (1) of the GPCCA and it is provided in the articles of association that virtual participation is excluded, but the meeting is nevertheless held virtually. The author finds that in this situation, the shareholders are entitled to contest the resolutions since the contradiction of the resolution with the procedural rules foreseen in the articles of association is a clear ground for revocation.

P. Jaspers and P.-E. Pehrsson argue that theoretically, it would also have been conceivable to view the shareholders who were prevented from participating as obliged to ensure representation at the meeting. The author argues that such an obligation is highly questionable, especially taking into account the circumstances. P. Jaspers and P.-E. Pehrsson also point out that overall, a question arises as to whether it would not have been more consistent to at least temporarily allow private limited companies to adopt resolutions virtually.²¹³ This position is reasonable and confirms the previous view that the default rules that apply to the decision-making process of a German private limited company are excessively inflexible as regards virtual participation. At the same time, § 33¹ (1) of the GPCCA provides for the general possibility for all types of legal persons to hold their meetings by electronic means of communication, so that under normal circumstances the question cannot arise whether a virtual meeting could *per se* constitute an infringement that gives grounds for challenging the decisions. Also, as far as the author is aware, there have been no significant disputes in Estonian case law regarding the legality of a virtual meeting.

6.2. The impact of technical errors on the validity of decisions

If the shareholders' meeting is held either entirely or partially virtually, there is always a certain risk of technical malfunctions. This problem has also been referred to in German legal literature.²¹⁴ This raises the question of whether and to

²¹² LG Stuttgart, Urteil vom 11.11.2020 – 40 O 46/20 KfH.

²¹³ P. Jaspers, P.-E. Pehrsson (see Note 209), S 1249–1250.

²¹⁴ A. Walch, S. Häuslmeier (see Note 26), S 110–111.

what extent technical errors during a meeting provide grounds for challenging the resolutions adopted in the meeting.

Estonian law prescribes only a few prerequisites for virtual participation. First, according to § 33¹ (1) of the GPCCA, any absent member must be able to follow the meeting in real-time. It has been pointed out in legal literature that this precondition is fulfilled, in particular, if the respective audio and video-communication solution is used.²¹⁵ Second, shareholders must be able to present suggestions, dissenting opinions and objections, and third, they must be able to vote. However, Estonian law does not regulate the effects of technical errors. Therefore, the effect of such errors must be interpreted using other rules that govern the holding of meetings and adopting resolutions. For example, if shareholders are unable to observe the meeting due to technical disturbances, or to ask questions, it is possible to argue that the disturbance can be considered a significant violation of exercising shareholder rights that gives them the right to request the revocation of a resolution on the grounds that it was adopted in breach of the law. The author argues that giving so much weight to technical errors (which, moreover, are mostly not of a permanent nature) would lead to a situation where it would be too easy to challenge the resolutions and unduly encourage protest actions. The obligation to ensure a high standard of technical reliability may also be unreasonably burdensome for smaller companies.

The German legislator has recognised this problem and, in § 243 (3) of AktG, ruled out the contestability of resolutions due to technical problems during the transmission, provided they are not based on intent or gross negligence on the part of the company. For example, it is not possible to contest a resolution if, for technical reasons, the course of the meeting is not fully transmitted or if the materials of the meeting are not available to the participants.²¹⁶ It has been referred to that the regulation is intended to ensure that technical problems do not lead to an expansion of contestation possibilities. Among other things, this means that all disruptions attributable to the shareholders' sphere of influence are ruled out as a ground of contestability since in this case, any fault on the part of the company is excluded. It has been explained that gross negligence can be assumed if the minimum level of technical and organisational care that is obvious to everyone is significantly neglected. The burden of proof lies with the plaintiff.²¹⁷ However, when conducting a meeting that will be attended fully or partially via electronic means, the management board as the convening body must ensure that the meeting is conducted in accordance with the law.

It has also been argued in German legal literature that dogmatically, the connection to the categories of culpability is not categorical because, in terms of contestability, according to § 243 (1) of AktG, only the objective violation of the law is relevant. Therefore, it has been stated that it would probably be more

²¹⁵ P. Varul *et alia* (see Note 33) – K. Saare, § 33¹, comment 3.2 (in Estonian).

²¹⁶ B. Gsell *et alia* (see Note 25) – Drescher, AktG § 243 Rn 241.

²¹⁷ W. Goette *et alia* (see Note 5) – Schäfer AktG § 243, Rn 110.

convincing to generally exclude contestability on these grounds to rule out any blockage potential. Unacceptable cases such as intentional actions by shareholders can be adequately addressed through a general duty to act in good faith which helps to avoid the abuse of shareholders' rights. It has also been pointed out that the fear associated with the relatively lenient regulation has not yet materialised, but only due to the obvious reluctance to enable online voting in practice.²¹⁸

Additionally, I. Drescher argues that technical malfunctions can only occur when the technology fails, not when there is a human error in the sphere of the company (e.g. accidental or intentional shutdown). However, a technical malfunction can also be assumed if there is a misconduct of a third party that does not derive from the company's sphere of risk, such as a network or power failure caused by employees of the network operator or other third parties (e.g. cable damage due to excavation operations). Since the contesting shareholder does not know the cause of the malfunction, the company must, according to the general rule of the burden of proof, demonstrate that the cause of the malfunction is technical, i.e. that the human error was excluded from the company's sphere of responsibility.²¹⁹

To increase the attractiveness of electronic participation, the articles of association may, however, set a stricter standard of culpability (second sentence of § 243 (3) of AktG). I. Drescher explains that an intentional violation of shareholder rights by causing a technical disruption that is not due to human error is hardly conceivable and the only situation that can be imagined is the case when intentionally nothing is done to remedy a legal infringement that has occurred due to a technical malfunction. According to the justification for the law, intent or gross negligence of a company cannot be assumed if a professional service provider is commissioned to carry out the technical operation of the meeting. This suggests that the law does not assume that the fault of assistants is *a priori* attributable to the company. Neither does the "fault of the selection of an operator" lead to such attribution. A particularly careful selection of professional service providers and a plausibility check of the preparatory measures are, therefore, not required. However, the company in whose sphere the disturbance occurred must explain the cause in accordance with the principles of the secondary burden of proof. Furthermore, the technical disruption must have had an impact on the voting results. This is not the case if the general meeting was only interrupted for a short time and the disrupted exercise of shareholder rights is repeated and if the interruption is not relevant to the result (the adoption of a resolution).²²⁰

Overall, the management board must ensure that the technical conditions for the transmission are as free of interference as possible, but the board can generally rely on the service providers. It has been advised that the board should pay special

²¹⁸ W. Goette *et alia* (see Note 5) – Schäfer, AktG § 243, Rn 110.

²¹⁹ B. Gsell *et alia* (see Note 25) – Drescher, AktG § 243 Rn 238.

²²⁰ B. Gsell *et alia* (see Note 25) – Drescher, AktG § 243 Rn 239.

attention to the possible occurrence of technical faults from the sphere of the company and, as soon as they detect one, interrupt the meeting and, after the problem has been rectified, continue the meeting from where it was interrupted.²²¹

The same principles have been also described in Delaware, the United States, where the law foresees that a company must take reasonable measures to ensure that each shareholder who is deemed to be present has a reasonable opportunity to participate and vote.²²² Although it is the law of a different legal system, this rule is worth noting as it is a simply stated principle that every company must be able to follow if it decides to hold a virtual or hybrid meeting. It has also been argued that when holding a virtual meeting, one must consider the technical capability of both the company and its shareholders and to successfully hold a virtual meeting, the possibilities must be mutually compatible.²²³

One can conclude that it would be justified, similarly to German law, to provide for restrictions in Estonian law that would exclude the possibility to challenge shareholders' resolutions adopted in a virtual or hybrid meeting solely on the grounds of technical failures occurring at the meeting. Although there are currently no significant disputes in courts on these issues, the possibility of such disputes arising cannot be ruled out, and the introduction of clear restrictions would also help to avoid protest actions and ensure legal certainty.

Since the advanced technical solutions help to reduce the costs and provide legal certainty, the author suggests that Estonian business environment could benefit from creating a specific digital environment that allows companies, their management, and shareholders to hold meetings and enable electronic voting all in one. This environment should enable the management board to verify whether the persons attending are the shareholders or their representatives, to allow the shareholders of the company to exercise all the decision-making rights and to conduct safe voting with an automatic solution that generates the minutes of the meeting and enables the chair and the secretary of the meeting to sign it. Using such an environment could be made available for at least those companies whose shareholders and board members have sufficient methods for authentication, e.g. Estonian ID-card.²²⁴ Setting up a uniform system of this kind would also help to reduce the technical problems and disputes that can arise as regards electronic participation.

²²¹ A. Walch, S. Häuslmeier (see Note 26), S 110–111.

²²² F. Brochet *et alia* (see Note 116), p. 9.

²²³ A. van der Krans. A. The Virtual Shareholders' Meeting: How To Make It Work. – Journal of International Commercial Law and Technology, 2007, Vol.2, Issue 1, p. 35.

²²⁴ For example, in the United States, there are different service providers who offer the possibility to use platforms to conduct virtual shareholder meetings. See: F. Brochet *et alia* (see Note 116), p. 9.

6.3. Significant violation of the procedure of convening a meeting

According to the CC, a shareholders' resolution may be null and void if the procedure for convening a meeting has been significantly violated (§ 177¹ (1) and § 301¹ (1) subsection 4 of the CC). The procedure for convening a meeting includes several issues, but among others, a significant violation of the procedure for convening a meeting can be affirmed if the notice of the meeting does not indicate the place of the meeting. If the meeting is to be held in a virtual room, the aforementioned violation occurs, for example, if the notice includes no link to the virtual room or if the link is inaccurate and does not enable the shareholder to join the meeting.

In this situation, the question can be raised whether, assuming that a shareholder was unable to join the meeting through the link shown in the notice, the company has a chance to avoid the nullity of the resolutions. The author finds that due to the general principle of good faith arising from § 32 of the GPCCA,²²⁵ the shareholder should be expected to contact the board member immediately and report the impediment. In case at least some of the shareholders participate electronically, the board has the heightened duty of care to be available and do everything possible to ensure the participation of all those who wish to participate. However, if the shareholder does not contact the board, contesting the resolution can be considered contrary to the principle of good faith. This follows from the fact that in a company law relationship (as in any other contractual relationship), the parties have, *inter alia*, a reciprocal duty to cooperate.²²⁶

An even broader legal question has been detected in German case law. Namely, Landgericht München (being the court of first instance) has argued²²⁷ that it is, in theory, conceivable to challenge a resolution adopted in a virtual meeting if the company has a manageable number of participants and it is possible to hold a physical meeting, but the board convenes a virtual meeting instead. In this case, as explained by the court, the management board might have misused its discretion. However, the court did not have to take the final position in this matter as the decision was made as regards an interim injunction in a proceeding aimed at prohibiting holding a virtual general meeting. The court expressed the opinion that in this specific case, the plaintiff did not present plausible evidence that the resolutions of the upcoming virtual meeting would be null and void *per*

²²⁵ According to § 32 of the GPCCA, shareholders or members of a legal entity and as members of the governing bodies of a legal entity must observe the principle of good faith in their relations and consider each other's legitimate interests.

²²⁶ According to § 23 (2) of the LOA, a party to a contract must cooperate with the other party to the contract to the extent necessary for the other party to perform its obligations. As stated in § 1 (1) of the LOA, this applies not only to contractual relations but all other similar relations in private law.

²²⁷ LG München I (5. Kammer), Beschluss vom 26.05.2020 – 5 HK O 6378/20. – BeckRS 2020, 11280.

*se.*²²⁸ It follows from the foregoing that German law did not, at least during the pandemic when these issues were regulated by the temporary legislation, preclude a shareholder resolution from being challenged on the grounds that a virtual meeting was held instead of a physical meeting. Under Estonian law, however, such an approach would, in the author's opinion, be questionable since § 33¹ (1) of the GPCCA would only render a virtual meeting illegal if such a form was excluded by the articles of association.

However, from the author's viewpoint, it can be considered a significant violation of the procedure for convening a meeting if the meeting is organised only electronically in a situation where the convener of the meeting (presumably the board) knows that some shareholders have no access to the necessary virtual environment.

Estonian Supreme Court has resolved a dispute where the main legal question was whether a shareholders' resolution can be challenged if the board intentionally convenes the meeting at a time when the majority of shareholders cannot participate. The Supreme Court found that it may be contrary to the principle of good faith.²²⁹ In this legal dispute, however, the central problem was the indistinctness of the agenda and not the evidently unsuitable time. Although the court did not specify what are the consequences of the resolutions adopted in a meeting that is intentionally convened at an unsuitable time, the author finds that such an infringement should be considered a significant violation of the procedure for convening a meeting, and the resolutions adopted in the meeting should be considered null and void. The same principle should be applicable if the meeting is deliberately convened in a way that excludes the participation of some shareholders. For example, if the board is informed that a shareholder has no means to participate electronically but decides to call a fully virtual meeting regardless of the possibility to hold a hybrid meeting, the shareholder's right to participate is significantly violated and the resolutions should be considered null and void.

6.4. Violation of the general principles of company law

As mentioned above, the legal consequence of violating the procedure for convening a meeting is the nullity of the resolutions adopted at the meeting. Infringement of other regulations stipulated in law or in the articles of association gives shareholders the right to request that the court declares the resolution in question invalid. In other words, the annulment of the resolution can only be requested if some provision of law or articles of association has been violated. This principle is similar in both Estonian and German law.²³⁰

²²⁸ P. Jaspers, P.-E. Pehrsson (see Note 209), S 1247.

²²⁹ The Supreme Court decision in civil case No 3-2-1-22-08 of 8 April 2008, p. 15.

²³⁰ The main difference between Estonian and German law is that German law excludes some infringements as grounds for contesting resolutions. Estonian law, on the other hand, does not contain such restrictions.

Given that Estonian law does not regulate the details of virtual participation, the question can be raised as to which extent can errors (assuming they are not purely of technical nature) give ground to challenge the resolutions and request their revocation.

First, § 33¹ (1) of the GPCCA allows shareholders to exclude electronic participation by the articles of association and if the shareholders have opted for this limitation, but the board nevertheless convenes a virtual meeting, the resolutions are, of course, contestable. It may, however, be debatable whether such an infringement is a violation of the procedure for convening a meeting which, therefore, leads to the nullity of the resolutions, or whether this violation results rather in the possibility of requesting the nullification (revocation). In the opinion of the author, such resolutions are rather contestable in the sense of § 178 (1) and § 302 (1) of the CC, above all in a situation where the nature of the violation is not the violation of participation rights of a shareholder.

According to German legal literature, the *law* that must be violated in regard to the contestability of a resolution can be any legal norm. *Every legal norm* includes formal laws, legal regulations, and statutes of public legal persons (insofar as they are relevant for the company), written and unwritten, among others, customary norms, not just company law regulations, but regulations of all areas of law.²³¹

German legal scholars emphasise that there is a consensus in legal theory that general clauses of law should be included in the concept of law, regardless of whether they are clear legal norms or (written or unwritten) principles. It has been explained that the legal remedies and the defence against interference by the deciding majority would otherwise depend on the comprehensiveness of written regulations in the law, which, in turn, would impede the further development of company law. Among others, shareholders' general duty to act in good faith can be considered an important principle when assessing the right of shareholders to contest resolutions.²³² The author agrees with the position that the violation of general principles of law must also give the right to challenge the resolution and finds that the provisions of the CC and GPCCA should be interpreted in the same way. This means that if a resolution is adopted in a way that violates the principle of good faith and loyalty, shareholders have the right to apply for its revocation.

Another important legal principle of company law is the principle of equal treatment of shareholders. Under § 154 (1) and § 272 (1) of the CC, shareholders must be treated equally under equal circumstances. It has been stated in the legal literature that the general aim of a limited company is to follow members' general common interest, and this includes ensuring equal treatment of shareholders.

²³¹ W. Goette *et alia* (see Note 5) – Schäfer, AktG § 243, Rn 16.

²³² W. Goette *et alia* (see Note 5) – Schäfer, AktG § 243, Rn 16.

Hence, the shareholders are obligated by law to act in the best interests of the company and other shareholders, and vice versa.²³³

The same legal principle is regulated in § 53 a of AktG. Similarly, German legal literature has expressed the view that the requirement of equal treatment is an expression of the comprehensive duty of loyalty that the company owes to its shareholders. It does not provide the shareholder with any subjective right that is independent of his or her property rights and participation rights; however, it contains a standard that the company must follow when structuring all the corporate relationships with its shareholders. This principle applies to how the rights of shareholders are met, as well as when imposing obligations on shareholders and also to the overall behaviour of the company towards its shareholders.²³⁴

The principle of equal treatment is relevant concerning the topic of the dissipation when it must be assessed whether the shareholders were provided equal rights in different stages during reaching the adoption of a shareholder resolution. Different scenarios of unequal treatment can arise in this situation.

First, one may ask whether it is possible to force the disagreeing shareholders to attend the meetings virtually or should the shareholders still have the chance to choose whether they want to attend in person or via electronic means.

Considering different opinions expressed in Estonian legal literature,²³⁵ it is debatable whether, under Estonian law, shareholders have the right to foresee a mandatory procedure for attending the meetings in the articles of association. Formally it is possible to introduce a fully virtual meeting in the articles of association by 2/3 of the votes (§ 175 (1) and § 302 (1) of the CC); Nevertheless, the question is whether such a provision is substantially legal. The author argues that the provisions of the articles of association, which by their nature supplement the rules prescribed by law, cannot be considered in conflict with the law and at least the shareholders of a private limited company should be allowed to specify the inner relations of the company. It can be concluded that at least in the articles of association of a private limited company, it must be possible to agree on the way of holding the meeting and a more precise procedure for the meeting. If this procedure has been violated, the shareholders are granted the right to demand the annulment of resolutions.

However, the author supports the position that if some shareholders for some objective reason are not able to participate electronically, the company must guarantee them a physical opportunity to attend the meeting. This position follows directly from the general principle of good faith (§ 32 of the GPCCA).

²³³ K. Saare. Kapitaliühingu kõrgeima otsustustasandi liikmete lojaalsuskohustus. [‘The Duty of Loyalty of the Members of the Highest Decision-Making Level of a Capital Company’] – *Juridica* 8/2022, p. 598 (in Estonian).

²³⁴ W. Goette *et alia* (see Note 5) – Götze, § 53a, Rn 6; P. J. Herz. Informationelle Gleichbehandlung und Informationsprivilegien im Aktienrecht. – *NZG* 2020, S 285–286.

²³⁵ Compare: K. Saare *et alia* (see Note 1), p. 90 (in Estonian); and P. Varul *et alia* (see Note 13) – P. Varul, § 5, comment 3 (in Estonian).

Nevertheless, it must be noted that if a shareholder has in some way agreed to unequal treatment, there is no basis for challenging resolutions based on the violation of this principle. The principle of equal treatment is not infringed if a shareholder has expressed his or her consent to unequal treatment compared to other shareholders.²³⁶ The same principle has also been confirmed by the Supreme Court of Estonia.²³⁷ The author finds that the shareholder's consent to their unequal treatment can be given, for example, with the shareholder's vote in favour of a resolution to approve the articles of association of the company that includes a certain procedure for adopting resolutions. Furthermore, it is possible to ask whether one can affirm the consent to the unequal treatment when the shareholder has not voted in favour of the resolution but has not challenged it in court. As regards this example, the author supports the conservative interpretation. Namely, according to § 68 (4) of the GPCCA, silence or inactivity can only be considered the declaration of intention if provided for by law, an agreement between the parties, or by the practice established between them. Assuming there is no such agreement or practice, the inactivity of the shareholder in the above-mentioned situation does not mean the acceptance of unequal treatment.

As previously stated, the board has the authority to determine the way the meeting is conducted; however, it must ensure that all shareholders are treated equally. This implies that if shareholders are provided with the option to participate either electronically or physically, they must be able to make a choice. All shareholders must be afforded equal chances to attend the meeting and exercise all associated rights. This duty derives also from the principles of equal treatment and the obligation to act in good faith (§ 32 of the GPCCA).

According to § 171 (2) subsection 3 and § 292 (1) subsection 2 of the CC, shareholders whose shares represent at least one-tenth of the share capital, can demand calling a shareholders' meeting. The author finds that the above-mentioned regulations must be interpreted in a way that if a meeting is requested, voting cannot be arranged in another manner (i.e. without calling a meeting and/or adopting a written resolution). In this situation, the management board is obliged to arrange a meeting. However, the requirement to hold a meeting does not mean that the meeting should necessarily take place physically. Under Estonian law, the management board has the right to decide whether to hold a virtual, hybrid, or physical meeting.

It follows from the principle of equal treatment that, in the case of a hybrid meeting, both physical and virtual participants must be guaranteed the same rights – the right to see and hear what is happening in the meeting, the right to ask questions and receive answers, and the right to vote and object to the resolutions. Should the shareholders be denied the right to object, they should have the right to challenge the resolutions regardless of an objection. This also stems from the principle of equal treatment.

²³⁶ K. Saare *et alia* (see Note 1), p. 221 (in Estonian).

²³⁷ The Supreme Court decision in civil case No 3-2-1-6-03 of 29 January 2003, p. 15.

In Germany, the topic of providing equal rights for participation has been highly debated concerning hybrid meetings. This type of meeting is regulated by § 118 (1) of AktG, which permits the shareholders to stipulate in the articles of association that they can participate in a general meeting without being present at the location (and without an authorised representative) and exercise all or part of their rights through electronic communication. In this respect, the regulation of a German hybrid meeting is largely similar to Estonian general regulation.

German legal literature has expressed different opinions on this matter. In earlier legal literature it has been explained that AktG enables shareholders to establish in the articles of association that exercising some rights are excluded for the shareholders attending the meeting via electronic means or that only some of the rights are provided compared to the shareholders attending the meeting in person.²³⁸ According to this view, putting online participants and the shareholders present at the meeting in two different situations was generally allowed.²³⁹ L. Beck pointed out that it was also allowed to provide additional advantages to the shareholders physically present at the meeting if such advantages were laid down in the articles of association.²⁴⁰

On the other hand, in 2021, P. Stelmaszczyk argued that shareholders participating via electronic communication must be able to exercise all the rights to at least approximately the same extent as in the traditional face-to-face meeting.²⁴¹ However, it is understandable that the real-time exercise of the rights to present proposals, speak, and ask questions in large public companies with several thousand participating shareholders might reach its technical limits, and, thus, the legally secure way of adopting resolutions might become questionable.

It can be concluded that the different opinions above primarily express the development of legal understanding and practice. With the implementation of the temporary law in Germany during the pandemic, coupled with practical experience and the subsequent introduction of the concept of a fully virtual meeting, the legal approach to virtual participation has significantly advanced.

Under Estonian law, different treatment of the shareholders attending the meeting physically and those joining the meeting by electronic means of communication is inadmissible. This follows directly from § 33¹ (2) of the GPCCA. Of course, there may be special features in the exercise of shareholders' rights in one form or another; however, the author finds that these special features can and must always be taken into account *mutatis mutandis*. Therefore, the author concludes that shareholders have the right to challenge a resolution that was adopted in a meeting where the virtual participants were not granted the same rights as physical participants. The resolutions adopted in such a meeting would be

²³⁸ U. Hüffer, J. Koch (see Note 84) – J. Koch, AktG § 118, Rn 12.

²³⁹ W. Goette *et alia* (see Note 5) – Kubis, AktG § 118, Rn 82.

²⁴⁰ L. Beck (see Note 117), S 160.

²⁴¹ P. Stelmaszczyk (see Note 168) S 963.

contrary to § 33¹ (2) of the GPCCA and, therefore, contestable (§ 178 (1) and § 302 (1) of the CC).

As discussed above, the articles of association may deviate from the principle of equal treatment; however, a shareholder may only be treated unequally compared to others if he or she has agreed to it. Any violation of the rights of the majority at the expense of the minority, exploiting the fact that the organisation of the meeting is generally under the control of the majority, is unacceptable, and shareholders have the right to challenge the resolutions regardless of the violation of specific regulations of law or articles of association. It is sufficient to challenge the resolutions if they violate general clauses of company law, the principles of loyalty, and equal treatment.

CONCLUSIONS

The author of the dissertation concludes that the requirements set for a virtual shareholders' meeting allow to ensure the same rights to attend and vote at the meeting as the shareholders would have at a regular meeting. More detailed conclusions as regards to the research questions are set out below.

The author firstly analysed the question **which modern electronic means of communication can be used to deliver notices of shareholders' meetings**.

On the basis of the analysis carried out in the dissertation, one can conclude that the notice of a meeting is a declaration of intention to which special rules from the CC apply. Regarding public limited companies, the meeting notice is sent to the shareholders' address entered in the share register by registered mail. If the company has more than 50 shareholders, it may instead publish a notice of a meeting in at least one daily national newspaper. For listed companies, the law provides that the notice of a general meeting is to be published on the company's website. As regards electronic means of communication, the law stipulates the possibility of sending a meeting notice also via e-mail or fax. However, the fax or e-mail message must refer to the obligation to confirm receipt of the notice, and the notice is deemed delivered only if the recipient confirms that he or she has received it (either in writing, by fax, or electronically). It can, therefore, be concluded that although Estonian law allows sending a meeting notice to the shareholders of a public limited company via email, this method is not particularly advisable. Namely, if a shareholder fails to acknowledge receipt of the notice, it will not be considered to have been properly sent, and the shareholder may later challenge the resolutions adopted in the meeting.

The Estonian regulation for sending the notices in a public and private limited companies differ, whereas the law does not include a requirement that a notice sent by e-mail to a shareholder of a private limited company can only be deemed to have been received if the shareholder confirms that he or she has received the e-mail. Thus, the possibilities of sending the meeting notice by electronic means of communication provided for by the law are limited to e-mail, whereas as regards the public limited companies, the receipt of the e-mail requires a confirmation of a shareholder.

The next question the author of the dissertation analysed is **whether shareholders possess the authority to deviate from the statutory regulations regarding the sending of meeting notices**. The following conclusions can be drawn.

Estonian legal literature has expressed contradictory opinions on the legal nature of the provisions of the CC. The author agrees with the statement that it cannot be said that all the provisions of the CC are of the same nature. Therefore, each provision needs to be viewed separately. Nevertheless, according to §§ 139 (2) and 244 (2) of the CC, no deviation from the law is permitted in articles of association unless the law explicitly allows it. Sections 172 (1) and 294 (2) of the CC which regulate sending the notice of a shareholders meeting, do not include references to the possibility of agreeing differently in the articles

of association. However, it has also been argued that the degree of flexibility of the regulations applicable to a private limited company's internal affairs cannot be determined solely by the provisions in respect of which the shareholders have been given an explicit right to agree on something different from what is stated in the law. The author is of the opinion that it is difficult to provide justification for the shareholders of at least private limited companies not being permitted to agree upon a different procedure of communicating among themselves than the one established by the law. Nevertheless, the current rules do not provide sufficient legal clarity on this issue. The view expressed in the legal literature that the internal relations of a private limited company should be subject to broad contractual freedom has not yet been confirmed by case law.

The extent of legal regulation and freedom of agreement largely depends on the purpose of the rules. The aim of the requirements for sending a meeting notice is to ensure that a shareholder receives the notice and that the company has certainty that it has met the requirements prescribed in law by sending the notice in a certain way. The broader objective is to provide all shareholders with the opportunity to exercise their membership rights effectively.

Considering these regulatory aims, the author finds it difficult to justify prohibiting the shareholders of Estonian private limited companies from specifying in the articles of association how meeting notices should be sent to shareholders. The only relevant electronic means of communication currently provided for by law is e-mail; however, the author considers that it should be allowed to send notices in any form that allows written reproduction. The author finds that Estonian law should rather support the position that the shareholders of a private limited company should have the right to agree in the articles of association that the procedure for sending the notice of a meeting is different from that stipulated in the law, provided that it does not violate the principle of good faith and no shareholder is treated less favourably compared to others. It is, of course, possible to argue that clear rules provided by law create general legal certainty, which can sometimes be a value in itself, considering how complex relationships between people can be. However, the shareholders' right to select the internal structure and operating principles of the private limited company should not be restricted.

German company law, on the other hand, provides for contractual freedom regarding the manner of delivering the notice of a shareholders' meeting. The legal framework permits extensive contractual freedom for German private limited companies regarding the manner of delivering the notices and public limited companies are also allowed to choose more flexible ways of sending a notice, even though the rules on public limited companies can overall be described as mandatory. As per the legislation of the United Kingdom, a notice of a company's general meeting must be sent either in hard-copy form, electronic form, through a website, or a combination of those methods. Nonetheless, the company has the right to deliver a document or information in electronic format solely to an individual who has consented to its delivery in that format, and to an address designated for this purpose by the intended recipient. The same principle of agreement applies to the publication of a notice on a website.

The author finds that it can be inferred that Estonian company law has not fully utilised the potential to guarantee flexible digital solutions in communication with shareholders, despite this approach being emphasised in both EU legislation and expert reports. Due to the relatively rigid regulation and the mandatory nature of the respective rules, Estonian law cannot be considered competitive as regards sending meeting notices. The author argues that, in this case, legal clarity as a regulatory aim does not outweigh flexibility, especially concerning private limited companies. The articles of association are predictable for the parties involved in the same manner as the law that regulates the relationship between shareholders and the company.

Considering the CC does not provide for the clear possibility of deviating from the law in the articles of association regarding the form of notification of the shareholders' meeting of a private limited company, and since different views have been expressed in the legal literature on the mandatory/default nature of the law, the law should be amended to allow shareholders the option of providing in the articles of association for the most appropriate means of communication in addition to those provided for by law. The author finds that § 172 (1) of the CC should be amended, allowing to foresee that the notice of a meeting is sent to the shareholders not only by email but by using another communication method that allows written reproduction.

Unlike private limited companies, there is no presumption that the shareholders of public limited companies should be allowed to regulate all intra-corporate relations themselves. The rules for public limited companies are based on the assumption that this type of company is an open entity with a large number of shareholders, which, to a certain extent, justifies stricter rules. Nonetheless, it can be inferred that regarding the procedure for convening a general meeting of a public limited company, a greater degree of freedom for the articles of association ought to be granted to non-listed companies.

The author found that the provision that the notice of the meeting may be sent to the shareholders by e-mail but can only be deemed to have been received if the shareholder acknowledges receipt (§ 294 (1¹) of the CC) is too rigid and it should be abolished since the shareholder will presumably receive the notifications sent to the email address he or she has disclosed to the company. Alternatively, the law could allow for the possibility that, in smaller companies with the shareholder's consent, notices may be delivered via electronic channels different from the ones currently provided for by legislation whereas the shareholder should have the option to withdraw his or her consent at any time.

One of the options that could also be considered is to set up an official platform for sending meeting notices that would serve as a good alternative to e-mail messages. Since using such a platform could probably not be made compulsory for shareholders, the author takes 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.

The above conclusions show that the first hypothesis of the dissertation that the legal rules governing the sending of meeting notices are currently too rigid

for both private and public limited companies, and do not allow shareholders to fully take advantage of modern technological possibilities, holds true.

Next, the author of the dissertation analysed **what are the features of a virtual meeting, which rights must be guaranteed to the shareholders participating in a meeting electronically and does electronic participation allow shareholders to exercise their rights to the same extent as in a physically held meeting**. On the basis of these questions, the following conclusions can be drawn.

The regulation of electronic participation in shareholders' meetings has been developed in stages. For a long time, it has been assumed that a general meeting means that all shareholders gather at the same time in the same place and that all limited companies hold a general meeting at the company's registered office or another designated place.

The most noticeable development began with the global pandemic in 2020. The legislation on virtual participation as well as on virtual meetings quickly started to evolve during that time. However, the approach to the regulation of electronic participation and virtual meetings has been different in Estonia and reference countries (Germany and the Netherlands).

Estonia chose a permanent regulation already at the beginning of the pandemic. On 24 May 2020, a new regulation was enforced, which explicitly allows electronic participation for all types of legal entities. The General Part of the Civil Code Act was supplemented with a provision (§ 33¹) according to which, every member of a body of a legal person may attend the meeting of the body and exercise their rights without being physically present, by electronic means that allow the member to observe the meeting, to speak, and to vote, unless the articles of association provide otherwise. The new law sought to provide an opportunity to hold virtual meetings regardless of the stipulations in the articles of association. Section § 33¹ of the GPCCA provides the following requirements for electronic participation:

- 1) the electronic connection used for attendance must be two-way,
- 2) it must be real-time, and
- 3) it must allow the participants to exercise their rights and obligations.

The new regulation equalises physical participation and participation through electronic means and allows the adoption of resolutions both partially and fully electronically. It allows holding both a hybrid and a fully virtual meeting.

One can conclude that according to § 33¹ of the GPCCA, the main features of electronic participation are that the shareholders are not physically present but they are granted access to the meeting through electronic means, which allows them to follow the course of the meeting and to speak and vote. The law does not distinguish between a fully virtual and a hybrid meeting.

Electronic participation must allow shareholders to participate via two-way real-time communication. The law does not prescribe more precise requirements

for this type of electronic communication. Online participation through a video call solution must meet at least three conditions to qualify as online participation in the sense of the GPCCA. First, it must enable the remote shareholders to monitor the meeting in real-time (through a video call environment), both in sound and image, (e.g. Zoom, Skype, Teams, Google Meet, etc). Second, it must make it possible for shareholders to speak, including presenting proposals, dissenting opinions and objections, for example, via a text chat window or a microphone and camera. The chair of the meeting must also be able to monitor who is speaking. Third, the shareholders must be able to vote (e.g. via a text chat window or a microphone and camera, via e-mail during the meeting or in a separate environment). It has also been noted that participation in a meeting and voting by electronic means need not take place in electronic form, which means that there is no obligation to identify the attendees via electronic signature.

One can also conclude that although Estonian company law does not define a fully virtual general meeting, a meeting where shareholder participation in the meeting is only possible via means of electronic communication should, similarly to German law, be considered a virtual meeting. Namely, German legal literature has defined a virtual shareholder meeting as a meeting where no shareholder is present at the usual meeting location and all shareholders participate by digital means of communication.

Therefore, it can be concluded that the main feature of a virtual meeting is that shareholders can only participate by electronic means. According to the author's perspective, it does not follow from Estonian law that individuals other than shareholders (e.g. the chair, the recording secretary, the notary) cannot participate in the meeting electronically. Estonian law enables the remote authentication of the minutes of a general meeting, so the electronic participation of a notary is also not excluded.

Another important feature of a virtual general meeting is technological neutrality, which means that the law does not regulate which technology must be used to arrange a virtual general meeting. The type of communication is, therefore, at the discretion of the management board. It is possible to use a video conference system, which is the closest to a face-to-face meeting, but it is also conceivable to use other applications (e.g. chat rooms or even e-mail – mostly in a supplementary way, especially for voting). The main principle is that electronic participation requires a real-time, two-way connection.

Another important issue when conducting a virtual meeting is the question concerning the identification of attendees. Exercising shareholders' rights is inseparably connected to the person's status as a shareholder. Therefore, only a person who owns the company's shares at the time of the meeting (or their representative) has the right to attend a meeting and exercise the respective rights.

Firstly, it is possible to use a special mechanism that allows logging into the system used to conduct the meeting. However, the complicated identification formalities may be too burdensome for smaller companies. The practical problems are the overall costs and the general complexity of the administration of the identification process, especially for smaller companies that know their share-

holders and may have easier solutions to identify them. Therefore, the introduction of identification rules should be approached in a rather flexible way, with the assumption that they must ensure that only authorised persons can participate in a virtual meeting. If the company knows its shareholders, identification via video does not differ much from the same procedure in a physical meeting. In a situation where the company may not know all its shareholders, entry into the meeting environment must be ensured in such a way that only authorised persons can enter.

As regards the rights to be guaranteed to the shareholders participating in a general meeting electronically, it can be concluded that the most important rights that are connected to the shareholders' meeting are the right to information, the right to challenge resolutions, and the right to vote.

When examining the exchange of information between the company and its shareholders in connection with the decision-making process, three main elements can be identified: shareholders' right to ask questions, their right to receive answers, and their right to express an opinion.

According to German and Estonian law, shareholders of a public limited company are entitled to receive information about the company's activities at the general meeting. According to § 33¹ (1) of the GPCCA, the person participating in a meeting via electronic means must be able to follow the meeting and speak at the meeting. Section 2 of the same provision provides that a meeting held by electronic means is subject to the same provisions applicable to the adoption of resolutions at a regular meeting. When interpreting the two provisions, one must conclude that all the rules of a physical meeting apply when a shareholder participates via electronic means. For example, the shareholder must be granted the right to receive information and answers from the management board. Consequently, the shareholder is not only entitled to speak but also to receive answers to his or her questions. According to the new German regulation on virtual meetings, the situation is the same. Namely, shareholders must be granted full right to information. It is also important to note that the temporary German law that regulated virtual shareholder meetings during the pandemic only allowed shareholders to ask questions. The management board was free to decide when and in which manner to respond.

It follows from the analysis carried out in the dissertation that shareholders must be guaranteed the same information rights in the case of electronic participation (including in a fully virtual meeting) as in a regular meeting. However, the board has the right to adapt the way questions are asked and answered to the specificities of virtual participation.

Another important right of a shareholder is to oppose the resolutions adopted in a meeting. Namely, to file a claim to challenge the resolution, a shareholder attending the meeting must submit an objection to the resolution at the meeting and the objection has to be recorded in the minutes of the meeting. This requirement is stipulated in both Estonian and German law and it applies to all resolutions regardless of the type of meeting. The objection must be submitted during the (virtual) meeting and, therefore, there must be a technical solution enabling

it. The right to choose this solution is at the discretion of the company but it must allow the identification of a shareholder opposing the resolution. Although the technical solution is at the discretion of the management board, to prevent disputes, the way of submitting objections should be made known to the participants already at the beginning of the meeting. The possibility of sending an objection by e-mail should rather be allowed only if the circle of shareholders is small and the participants and the e-mail addresses used by the shareholders are known to the company.

Among shareholder rights, the right to vote can be considered the most important. Therefore, the author also examined the question **which legal requirements apply to the exercise of voting rights by electronic means of communication.**

As a result of the analysis, it can be concluded that under Estonian law, shareholders may exercise, among others, the voting right via electronic means, without being physically present at the meeting, unless otherwise provided for by law or by the articles of association. Section 33¹ (2) of the GPCCA lays down that a meeting held via electronic means is subject to the same provisions applicable to adopting resolutions at a regular meeting. In the author's view, this provision should be understood as extending to situations where electronic voting takes place without a meeting.

Namely, as regards voting, both Estonian law (for both types of limited companies) and German law (for public limited companies) provide for three main possibilities:

- 1) The management board convenes a shareholders meeting, and the shareholders vote in a meeting (traditional meeting).
- 2) The management board convenes a shareholders meeting, and in addition to the possibility to vote in the meeting (either physically or electronically), the shareholders are granted the possibility to vote before the meeting – either by letter or by electronic means of communication.
- 3) The meeting will not be convened, and the voting will take place solely by means of communication provided for that purpose.

Section 298² (1) of the CC (which is also applicable to private limited companies) prescribes the following requirements for voting before the meeting:

- 1) casting a vote must be possible at least in a format reproducible in writing,
- 2) identification of shareholders must be ensured,
- 3) security and reliability of voting must be ensured.

When voting by e-mail, those three requirements are usually met: first, an e-mail can be reproduced in writing, i.e. it can be saved and if necessary, later printed. Second, the company can identify whether the voter is a shareholder based on the data of the sender of the e-mail since the company has information about the contact addresses of its shareholders. The reliability of the vote given by e-mail

cannot be questioned, considering the general standards applicable to the exchange of e-mails.

Another option is to use an online voting environment that enables reproduction in writing if printouts from it can be made and/or data can be saved on an external data carrier. However, it is questionable whether the requirements of the written reproduction are met, if the content of the website is presented in a way that enables only reading and the information stays within the sphere of influence of the website administrator. On this basis, the author finds that 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 voting data can be saved on an external data carrier.

An additional important prerequisite of online voting is the identification of voters. For example, sending shareholders a link to the voting environment without the capability to verify who used it is not sufficient for identification. Hence, in the author's perspective, it is not feasible to use a conventional poll conducted in an electronic setting, wherein each person who receives the link can merely enter a name and indicate their support or opposition to the resolution. Furthermore, it cannot be considered compatible with the purpose of the law if the voting environment identifies the persons entering it but does not reflect who voted how because the data about who voted in favour of the resolution constitutes an important part of the voting record according to the law. An electronic voting environment must also follow the rules of personal voting restrictions.

Thus, to ascertain the voting results, the necessary personalisation requirements are somewhat higher in the case of online voting than they are in the case of voting per e-mail, 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.

Furthermore, the application used for electronic voting should be designed so that the voter can verify whether the application used for voting has duly submitted their vote to the voting environment in line with their intention. 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.

Although the CC contains provisions on electronic voting before the meeting but does not directly regulate electronic voting in the meeting, the author found that it derives from the purpose of the norms governing voting that the same principles apply if electronic means of communication (e.g. e-mail, voting platform, *etc.*) are used when shareholders vote during the meeting.

One can also conclude that the law no longer stipulates that electronic voting needs an electronic signature. Therefore, electronic voting as a general term within the meaning of § 33¹ of the GPCCA and the CC now includes both the transmission of votes with an electronic signature and the use of other electronic means of communication.

In conclusion, it must, therefore, be held that the same rights that must be guaranteed to shareholders at a physical meeting must also be guaranteed when

they participate by electronic means. All the provisions of the CC governing the holding of a meeting apply *mutatis mutandis* to the virtual meeting, and for each way of exercising shareholders' rights, an electronic equivalent must be found to ensure the exercise of shareholders' rights. Hence, the second hypothesis, that according to Estonian company law, every shareholder's right to adopt resolutions can be exercised either physically or electronically, and the same rights must be guaranteed to all shareholders regardless of their manner of participation, also proved to be true.

The author of the dissertation also analysed the question of **how the powers are distributed and which body of the company should decide whether to hold a virtual, hybrid, or physical meeting**. On the basis of these questions, the following conclusions can be drawn.

If one compares German and Estonian company law regarding the exercise of shareholder rights using electronic means of communication one can conclude that in Germany, the choice to apply electronic participation and to hold a virtual general meeting are left to the ultimate discretion of shareholders. To use this form of participation (meeting), the shareholders are first forced to express their will and authorise the board. Shareholders of a public limited company have the right to stipulate in the articles of association that the meetings are only held virtually or to give the right to decide on the form of the meeting to the management board (§ 118a of AktG). The same applies to electronic participation in general (§ 118 of AktG). As regards German private limited companies, the default rules are more rigid as under § 48 (1) of the GmbHG, a shareholders' meeting may be held virtually only if all shareholders declare their consent to it in a written form. However, the shareholders of a private company have the right to specify issues related to electronic participation in the articles of association.

The German approach derives from the deep-rooted understanding that it is up to the majority shareholders to decide the most important issues related to the company and that the form of participation is one of them. Therefore, even though German company law admits that not every meeting has to take place with the physical presence of shareholders, the division of competence within the company still results in the understanding that a meeting should be by default physical unless the shareholders themselves have decided otherwise, allowing virtual meetings or electronic participation in the articles of association. This view has also been expressed in German case law.

In Estonia, too, it is ultimately up to the shareholders to decide whether electronic participation and virtual meetings are allowed. However, the Estonian approach assumes that the form of a meeting is more of a technicality than a particularly important issue of the internal organisation of the company and, therefore, it presumably lies within the competence of the board. In this sense, the Estonian concept is more like the German law that was temporarily in force during the pandemic since according to it, the default rule was that the board (along with the supervisory board) had the right to decide in what form the meeting should be held. German temporary law authorised the board to decide on whether to call a virtual meeting, a physical meeting with facilitated electronic

participation, or a traditional physical meeting. However, Estonian legislators have designed the provision regulating electronic participation as a default clause and, therefore, the shareholders of Estonian companies (both private and public) are of course allowed to exclude virtual participation with the articles of association. According to the Estonian approach, the assumption is that a physical and virtual meeting are deemed equal, and there is no need for previous authorisation of the board to utilise this form.

Considering the understanding expressed in Estonian legal literature that the regulations of the CC are rather mandatory even as regards the internal relations of a company, one can also ask to what extent the shareholders have the right to regulate the details of the electronic participation or fully virtual meeting in the articles of association. The author of the dissertation found that shareholders should have the right to shape the internal relationship by a majority vote and to specify issues related to virtual participation (e.g. the requirements for the environment of the meeting, drawing up the minutes of the meeting, procedures for identifying participants and raising objections). Nevertheless, it does not mean that these specifications should be always necessary since excessive regulation can make the operation of a company less flexible. Moreover, the detailed regulation of the forms of meetings in the articles of association provides additional opportunities to challenge the resolutions of the meeting for procedural reasons. Since Estonian law does not contain substantive restrictions on contesting resolutions, the violation of technical conditions stipulated in the articles of association would probably give the possibility to contest the resolutions on formal grounds. Such an extension of the right to contest the resolutions cannot be considered justified.

It has been noted in Estonian legal literature that, in general, a shareholder does not possess the right to request electronic participation in the meeting, as it is determined by the body convening the meeting. This view is also supported by 33¹ (2) of the GPCCA, according to which, the general rules on decision-making apply also in case the meeting is held by electronic means. The organiser of the meeting is responsible for its proper conduct. Therefore, the decision on how to conduct a meeting is made by the management board, which is responsible for organising the meeting. In case law it has, however, been pointed out that the members of a company who do not have the technical ability and means to participate in a meeting electronically must be granted the right to participate physically. The author of the dissertation agrees that holding a meeting in a certain way or allowing participation in a certain way may also derive from a general principle of good faith.

As the approaches of Estonian and German law to virtual participation are somewhat different and since German company law has been one of the models for Estonian law, one could ask whether it would be justified to supplement the CC as regards issues of electronic participation and a fully virtual meeting, following the example of German law. The author of the dissertation thinks that at present, there is no need for it. To the author's knowledge, there have been no significant litigations pertaining to these matters. The default rule that the way of

holding a meeting is to be decided by the board is flexible and in accordance with the general distribution of competencies between the shareholders and the board. One of the important objectives of legal regulation is legal certainty, and, therefore, it is necessary to provide for certain legal rules to guarantee a unanimous understanding of certain matters. If the permissibility of electronic participation is explicitly foreseen in law, companies can be sure that a meeting held in electronic form is equivalent to a physical meeting. Estonian law complies with this principle and needs no amendments.

Finally, the author further developed the research subject by **examining the legal remedies available to shareholders, analysing whether the specific errors arising from the electronic exercise of shareholder rights can be considered grounds for challenging the resolutions of a shareholders' meeting.**

It can be concluded that German law has explicitly ruled out the contestability of resolutions due to technical errors arising during the transmission, provided they are not based on intent or gross negligence on the part of the company. For example, it is not possible to contest a resolution if, for technical reasons, the course of the meeting is not fully transmitted or if the materials of the meeting are not available to the participants. This regulation aims to ensure that technical problems do not lead to an expansion of the contestation possibilities. All disruptions that are attributable to the shareholder's sphere are also ruled out as a ground of contestability as in this case, it cannot be the fault of the company. Gross negligence of the company can be assumed if the minimum level of technical and organisational care that is obvious to everyone is significantly neglected. The burden of proof lies with the contesting shareholder; however, in some cases, it can be reversed as the shareholder might not have access to the information about the technical processes.

As Estonian law does not regulate the specifics of a virtual or hybrid meeting, technical errors generally cannot be grounds for challenging resolutions under Estonian law. However, it can be concluded that since the regulation of electronic participation is rather scarce, the grounds for challenging resolutions may arise from violations of the general rules as well as legal principles.

According to the CC, a shareholders' resolution may be null and void if the procedure for convening the general meeting has been significantly violated. The procedure for convening a meeting includes several issues; however, among others, a significant violation of the procedure can be affirmed if the notice of the meeting does not indicate the place of the meeting. If the meeting is to be held in a virtual room, the violation occurs, for example, if the notice includes no link to the virtual room or if the link is inaccurate and does not enable shareholders to join the meeting. However, the author takes the position that due to the general principle of good faith arising from § 32 of the GPCCA, in this situation, the shareholder should be expected to contact the board member immediately and report the impediment. If at least some of the shareholders participate electronically, the board has a heightened duty of care to be available and do everything possible to ensure the participation of all those who wish to participate. Therefore, the board is expected to be prepared to eliminate the problems. If the shareholder

does not contact the board, contesting the resolution should be deemed contrary to the principle of good faith.

Additionally, the violation of the general principles of law gives shareholders the right to challenge the resolution. For example, a shareholder has the right to challenge resolutions that violate the general company law principle of loyalty and good faith. Infringement of the principle of equal treatment can also give grounds for applying for the nullification of the resolution.

If the meeting is purposefully convened in a manner that excludes the participation of certain shareholders, the resolutions should be deemed null and void. This is the scenario, for instance, where the shareholder has informed the board that he or she is, for some objective reason, unable to participate electronically, yet the board deliberately opts to convene a fully virtual meeting despite the possibility of holding a hybrid meeting.

Considering different opinions expressed in Estonian legal literature, it is debatable whether under Estonian law, shareholders have the right to foresee a mandatory procedure for attending the meetings in the articles of association. The author finds that § 33¹ (1) of the GPCCA is dispositive, which means that shareholders have the right to exclude virtual participation, but also choose the preferred way of participation. However, the author supports the position that if there are minority shareholders who, for some objective reason, are not able to participate electronically, the company must guarantee them opportunity to attend the meeting physically. This position follows directly from the general principle of good faith (§ 32 of the GPCCA).

In summary, it can be concluded that in a virtual meeting, all shareholder rights must be guaranteed to the participants in the same way as in a physical meeting. It does not have to be done in the exact same way as in a physical meeting (and sometimes it is not even possible), but still, considering the aim of the rules, it must be done in a way that fulfils the same purpose. In the case of a hybrid meeting, the same principle applies. The rights related to the meeting must be guaranteed equally to everyone. The articles of association may deviate from the principle of equal treatment; however, a shareholder may be treated unequally compared to others only if he or she has agreed to it. Any abuse of the rights of the majority at the expense of the minority, taking advantage of the fact that the organisation of the meeting is under the control of the majority, is unacceptable and the respective violations give the shareholder the right to challenge the resolutions regardless of the infringement of specific regulations of law or articles of association. The violation of general clauses of company law is sufficient to apply for the nullification of the resolutions.

After considering all the factors, it can be inferred that despite the minimal regulation of exercising shareholder rights through electronic means and even though Estonian law differs from the laws of countries with a similar legal system, there is currently no requirement to supplement Estonian law in this area.

However, should the legislator intend to go into more detail with the regulation of virtual participation, it must be first analysed which infringements should give shareholders the right to contest resolutions. If, for instance, the law

should stipulate that the members of the board must be present at the location of the company during a virtual meeting, then the possibility of challenging the resolutions should be excluded if the members of the board are instead connected to the meeting, similarly to the shareholders, through a video bridge. The regulations on contesting resolutions are currently based on the general rule that any violation of the law provides a basis for annulment of the resolution. However, company law actions, especially those aimed at contesting resolutions, are characterised as being *actio pro socio*. This means that to a certain extent, they are always intended not only to protect the rights of the plaintiff who has filed the claim but also the company's interests in a broader sense. Such lawsuits can, at the same time, also often be characterised as protest actions of minority shareholders. One can, therefore, conclude that if the norms regarding virtual participation should be supplemented, the law should also proportionally limit the possibilities to challenge the resolutions. Neither pure technical errors nor violations of the law that do not infringe on anyone's rights should give grounds for contesting resolutions.

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ABBREVIATIONS

AG	Aktiengesellschaft (German public limited company)
AktG	Aktiengesetz
CC	Äriseadustik (Commercial Code)
CCP	Tsiviilkohtumenetluse seadustik (Code of Civil Procedure)
CRA	Äriregistri seadus (Commercial Register Act)
GmbH	Gesellschaft mit beschränkter Haftung (German private limited company)
GmbHG	Gesetz betreffend die Gesellschaften mit beschränkter Haftung
GPCCA	Tsiviilseadustiku üldosa seadus (An Act on the General Part of the Civil Code)
HGB	Handelsgesetzbuch
LOA	Võlaõigusseadus (Law of Obligations Act)
UmwG	Umwandlungsgesetz

ACKNOWLEDGEMENTS

I would first like to thank my supervisors Professor Janno Lahe and Associate Professor Kalev Saare for your unwavering support, insightful guidance and patience throughout this journey. I will always be grateful for your time, wisdom and expertise. My gratitude goes to Kalev Saare for believing in me when he invited me in 2020 to teach company law course at the University of Tartu, which has given me an in depth and different view of the company law field.

To my fellow researchers, thank you for being such an inspiring and supportive community and, and to my colleagues, thank you for providing me sufficient time to work on my dissertation.

I am also deeply grateful to my friends who have stood by me throughout this process. Thank you for reminding me to take breaks, and for your belief in my success in this journey.

Finally, I would like to thank my family and especially my parents Andres and Margit for your unconditional love and support. Your belief in me from the very beginning of my academic career has given me strength to pursue my dreams. I am very grateful for your valuable insight and guidance, as well as your willingness to engage in countless discussions, which had a significant impact on my dissertation.

SUMMARY IN ESTONIAN

Õiguslikud võimalused digitaalsete lahenduste kasutamiseks piiratud vastutusega äriühingu otsuste tegemisel

1. Probleemid, eesmärgid ja uurimisküsimused

Käesoleva doktoritöö teema ühendab modernse ühinguõiguse kaks olulist aspekti – esiteks osanike ja aktsionäride õigused ning teiseks ülemaailmse digitaliseerimissuundumuse. Osanike ja aktsionäride õigusi võib üldjoontes jagada varalisteks (mida võib tinglikult nimetada ka võlausaldaja õigusteks) ja juhtimisega seotud õigusteks. Kuigi need õigused võivad olemuselt erineda, lähtuvad nad samast allikast – äriühingu osaluse omamisest. Osanike ja aktsionäride varaliste õiguste keskmes on õigus saada kinnitatud majandusaasta aruande alusel dividendi. See tähendab, et kui äriühingul on jaotatav kasum ja osanikud või aktsionärid on vastu võtnud otsuse seda jaotada, tekib igaühel neist äriühingu vastu varaline nõue. Kuid selleks, et oma varalisi õigusi ka tegelikkuses realiseerida, on esmalt vaja saavutada asjakohaste otsuste vastuvõtmine. Seega sõltub varaliste õiguste jõustamine äriühingu otsustusprotsessist, täpsemalt juhtimisõiguste teostamisest, mis hõlmab muu hulgas õigust osaleda osanike koosolekul või aktsionäride üldkoosolekul, õigust saada teavet, hääletada ja vaidlustada seadusega vastuolus olevaid otsuseid.

Üks küsimus, millega Euroopa Liidu tasandil ühinguõiguse valdkonnas tegeletakse, on erinevate protsesside digitaliseerimine. Nii näiteks oli 2019. aasta digitaliseerimisdirektiivi eesmärk ühtlustada liikmesriikide õigusakte seoses äriühingute elektroonilise registreerimisega, võimaldades äriühingute asutamist, filiaali registreerimist ning dokumentide ja teabe esitamist täielikult veebipõhiselt. Ka osanike ja aktsionäride õiguste arengut on digitaliseerimine ja globaliseerumine tugevalt mõjutanud. Kuigi nii algse aktsionäriõiguste direktiivi kui ka selle uuendatud versiooni eesmärk on peamiselt olnud ühtlustada börsil noteeritud aktsiaseltside aktsionäride õiguste reguleerimist, rõhutati nimetatud dokumentides ka seda, et oluline on edendada aktsionäride õiguste kasutamist üldkoosolekutel ja soodustada aktsionäride pikaajalist osalemist ka laiemalt. Nende eesmärkide saavutamiseks pidid liikmesriigid kaotama kõik piirangud seoses elektrooniliste vahendite abil koosolekutel osalemisega.

Piiratud vastutusega kapitaliühingutes ehk osäühingus ja aktsiaseltsis tuleb selleks, et jõuda otsuse vastuvõtmiseni, läbida kolme peamist etappi, milleks on koosoleku kokkukutsumine, selle läbiviimine ja hääleõiguse teostamine. Need kolm sammu, mis on vajalikud selleks, et osanikud või aktsionärid jõuaksid informeeritud otsuse vastuvõtmiseni, ongi käesolevas väitekirjas võetud käsitluse aluseks.

Õiguskirjanduses on virtuaalset koosolekut määratletud kui koosolekut, kus ükski osanik või aktsionär ei viibi koosoleku tavapärasel toimumiskohas ja kõik osalevad koosolekul digitaalsete sidevahendite abil. Seega võib osanike koosolek

või aktsionäride üldkoosolek olla täielikult virtuaalne, kuid samuti on võimalik kasutada erinevaid elektroonilisi sidevahendeid koosoleku eri etappides. Seega tuleb virtuaalset koosolekut eristada hübriidkoosolekust, kus osa osanikest või aktsionäridest osaleb isiklikult, samas kui teised kasutavad oma õigusi elektrooniliste vahendite kaudu. Hääleõiguse teostamiseks on võimalik kasutada ka veebipõhiseid hääletusplatvorme (osanikud või aktsionärid on koosolekul kohal, kuid samal ajal on neil võimalik hääletada elektrooniliselt, kasutades digitaalseid vahendeid), aga ka posti teel hääletamist, kus hääled saadetakse äriühingule (kas enne koosolekut või selle ajal, muu hulgas ka nende poolt, kes ei osale füüsilisel koosolekul).

Doktoritöös on kasutatud mõisteid „virtuaalne (samuti elektrooniline või veebipõhine) koosolek“ ja „osalemine“ tsiviilseadustiku üldosa seaduse § 33¹ tähenduses, mis tähendab, et osanikud või aktsionärid ei ole füüsiliselt kohal, kuid neil on ligipääs koosolekule kahesuunalise reaajas toimuva side või muude sarnaste elektrooniliste vahendite kaudu, mis võimaldavad neil koosolekut jälgida, sõna võtta ja hääletada. Mõiste „elektrooniline osalemine“ tähendab osanike või aktsionäride võimalust osaleda koosolekul või teostada mõnda otsustusprotsessi jaoks vajalikku õigust elektrooniliselt. Juhul kui kõik osanikud või aktsionärid osalevad eemalt, nimetatakse koosolekut (täielikult) virtuaalseks koosolekuks. Kui osa aktsionäre osaleb koosolekul füüsiliselt ja osa virtuaalselt, nimetatakse koosolekut hübriidkoosolekuks. Samamoodi on ICLEG²⁴² määratlenud „täielikult virtuaalset koosolekut“ kui üldkoosolekut, kus osanikud või aktsionärid ei saa osaleda isiklikult ja peavad selle asemel kasutama veebipõhiseid osalemisviise.

Käesolevas doktoritöös on püstitatud kaks hüpoteesi. Esimene neist käsitleb äriühingu ja osanike või aktsionäride vahelist suhtlust koosoleku teate saatmisel ning teine koosolekul elektroonilist osalemist ja hääletamist.

Esimene hüpotees on, et koosoleku teadete saatmist reguleerivad õigusnormid on praegu nii osaühingute kui ka aktsiaseltside puhul liiga jäigad ning ei võimalda osanikel ega aktsionäridel täielikult ära kasutada tänapäevaseid tehnoloogilisi võimalusi. Kui see on nii, siis tuleks seadust muuta ja võimaldada osanikel reguleerida koosoleku teate saatmise võimalusi põhikirjas. Lisaks tuleks ka aktsiaseltside asjaomased reeglid muuta paindlikumaks.

Teine hüpotees on, et Eesti ühinguõiguse kohaselt võib iga osanik või aktsionär kasutada oma õigust otsuste vastuvõtmiseks kas füüsiliselt või elektrooniliselt ning kõigile osanikele ja aktsionäridele tuleb tagada samad õigused, sõltumata nende osalemise viisist. Selline küsimusepüstitus võib esmapilgul tunduda küll elementaarne, kuid Saksa õiguskirjanduses on see olnud vaieldav ning pandeemia ajal kehtinud ajutise seaduse alusel oli lubatud virtuaalselt osalevate aktsionäride õigusi piirata. Seega on küsimus selles, kas virtuaalselt osalevate isikute õigused võivad erineda füüsiliselt osalejate õigustest ja kui see on nii, siis kas erinevused on õigustatud koosolekul osalemise erineva olemuse tõttu.

²⁴² Äriühinguõiguse ja äriühingu üldjuhtimise mitteametlik eksperdirühm.

Doktoritöö eesmärk oli välja selgitada, milliseid nõudeid tuleb järgida osanike ja aktsionäride koosoleku elektroonilisel kokkukutsumisel ja läbiviimisel ning kas need nõuded võimaldavad tagada osanikele ja aktsionäridele koosolekul osalemisel ning hääletamisel samasugused õigused nagu tavakoosolekul. Selle eesmärgi saavutamiseks püstitati töös järgmised uurimisküsimused:

- 1) Milliseid kaasaegseid elektroonilisi sidevahendeid on võimalik kasutada koosoleku teadete edastamiseks?
- 2) Kas Eesti ühinguõigus lubab osahingutel ja aktsiaseltsidel kasutada koosoleku teadete edastamiseks kaasaegseid elektroonilisi sidevahendeid?
- 3) Millised õigused peavad olema tagatud koosolekul elektrooniliselt osalevatele osanikele ja aktsionäridele ning kas elektrooniline osalemine võimaldab osanikel ja aktsionäridel kasutada oma õigusi samas ulatuses kui füüsiliselt toimival koosolekul?
- 4) Milline on osanike koosoleku ja aktsionäride üldkoosoleku kokkukutsumist reguleerivate õigusnormide õiguslik olemus ja kas osanikel ning aktsionäridel on õigus leppida põhikirjas kokku seaduses sätestatust erinev koosoleku kokkukutsumise viis?
- 5) Millised on virtuaalse koosoleku õiguslikud tunnused ja millisel äriühingu organil on õigus otsustada, kas korraldada virtuaalne, hübriid- või füüsiline koosolek?
- 6) Millised õiguslikud nõuded kehtivad hääleõiguse teostamisele elektrooniliste sidevahendite abil?

Lisaks eelnevalt esitatakse töös uurimisteema edasiarendus, milles käsitletakse virtuaalsel või hübriidkoosolekul vastu võetud otsuste vaidlustamise eripärasid. Nimelt on eraõiguse üks keskseid küsimusi õiguskaitsevahendid, mida isikud saavad kasutada, kui nende õigusi on rikutud. Kuna osanike ja aktsionäride õiguste teostamine elektrooniliste sidevahendite abil on seotud teatud eripäradega, on oluline analüüsida neid Eesti õiguses olemasoleva peamise õiguskaitsevahendi – otsuste vaidlustamise – seisukohalt. Keskseks küsimuseks on seejuures, kas osanike ja aktsionäride õiguste elektroonilisel teostamisel asetleidvaid rikkumisi saab pidada koosoleku otsuste vaidlustamise aluseks.

Doktoritöö põhineb autori kolmel varasemal artiklil, mis on avaldatud 2020. aastal (kaks artiklit)²⁴³ ja 2022. aastal (üks artikkel)²⁴⁴. Töö koosneb kahest osast: väitekirjast ja avaldatud artiklitest. Väitekirjas võetakse kokku avaldatud artik-

²⁴³ M. Vutt. Convening the General Meeting of Shareholders of a Limited Company: Estonian Law in a Digital Perspective'. – *International Comparative Jurisprudence* 2020/6 (1), pp. 95–107; M. Vutt. Digital Opportunities for – and Legal Impediments to – Participation in a General Meeting of Shareholders. – *Juridica International* 2020/29, pp. 34–46.

²⁴⁴ M. Vutt. Electronic Voting in Adopting Resolutions of Limited Companies: the Example of Estonian Law. – *International Comparative Jurisprudence* 2022/8 (1), pp. 91–103.

lites tõstatatud põhiküsimused, esitades samas ka autori vaatenurki, analüüsides vahepealse perioodi arenguid ja arendades teemat uurimisküsimuste raames. Esimene artikkel avaldati 2020. aastal ja Eesti õigusesse (äriseadustik ja tsiviilseadustiku üldosa seadus) sisse viidud peamised põhimõtted ei ole muutunud pärast 2020. aasta maid, kui jõustusid seadusemuudatused, mis hakkasid reguleerima elektrooniliste sidevahendite kasutamist koosolekutel osalemiseks. Kõnealuseid seadusemuudatusi on autor artiklites ka käsitlenud.

2. Meetodid, allikad

Doktoritöös kasutatakse peamiselt dogmaatilist ja võrdlevat uurimismeetodit. Dogmaatilise meetodi abil analüüsitakse süstemaatiliselt Eesti ühinguõiguse ja tsiviilõiguse üldosa sätteid, mis reguleerivad elektrooniliste sidevahendite kasutamist kolmes kapitaliühingu sisese otsustusprotsessi etapis – (i) osanike ja aktsionäride (üld)koosolekute kokkukutsumisel, (ii) koosolekul osalemisel ja (iii) hääletamisel. Analüüsi tulemusena leitakse vastused uurimisküsimustele ja esitatakse järeldused hüpoteeside paikapidavuse kohta, mis omakorda võimaldavad järeldada, kas Eesti õigus vajab muutmist.

Samuti kasutab autor Eesti õiguse analüüsimisel ja tõlgendamisel võrdlevat lähenemist. Eesti õiguskirjanduses on ajalooliselt kasutatud Saksamaad kui esmast ja asjakohast võrdlusriiki. Ka Riigikohus on mitmel korral väljendanud seisukohta, et Eesti eraõiguse normide tõlgendamisel võib võrdlusmaterjalina kasutada teiste sarnase õigussüsteemiga riikide õigusakte ja kohtupraktikat. Eesti eraõigus on suures osas kujunenud Saksa õiguse põhimõtetest lähtuvalt ning ka ühinguõiguse normide väljatöötamisel on muu hulgas võetud eeskujuks Saksa õigus. Saksamaad võib pidada parimaks võrdlusriigiks ühinguõiguse regulatsioonide võrdlemisel ka seetõttu, et Saksa äriühingute süsteem on sarnane Eesti omaga. Vastavalt on doktoritöös võrdlusallikatena kasutatud Saksa *Aktiengesetz*'i (AG) ja *Gesetz betreffend die Gesellschaften mit beschränkter Haftung*'it (GmbHG) ning vastavaid ühinguorme käsitlevaid teadusallikaid. Saksamaal on hiljuti vastu võetud mitu seadust, mis reguleerivad virtuaalseid koosolekuid ja elektroonilist hääletamist, ning asjaomaseid õigusküsimusi on Saksa õiguskirjanduses palju käsitletud. Kuna ühinguõigusliku regulatsiooni lähtekoht on olnud sarnane Eesti õigusega, siis aitab Saksa õiguse analüüs tõlgendada Eesti vastavaid regulatsioone ja leida lahendusi võimalikele õiguslikele probleemidele. Eeltoodut arvestades on analüüsi läbiviimisel doktoritöös tõmmatud paralleele asjakohaste Saksa õigusnormide, kohtupraktika ja õigusteadlaste arvamustega.

Lisaks sellele on esimese hüpoteesi uurimisel kasutatud näidetena ka Hollandi ja Ühendkuningriigi seadusi. Esiteks põhinevad juriidilisi isikuid reguleerivad üldised õigusnormid tsiviilseadustiku üldosa seaduses peamiselt Hollandi tsiviilseadustikul (*Burgerlijk Wetboek*) ja teiseks on Holland osutunud Euroopa juhtivaks riigiks seaduse tasandil vastuvõetud uuendustes paljudes ühinguõiguse valdkondades. Koosoleku kokkukutsumise küsimuse uurimisel on kasutatud ka Ühendkuningriigi õigust, kuna kapitaliühingute sisemisi suhteid käsitlevad lahendused *common law* süsteemis on sageli paindlikud ja praktilised.

3. Järeldused

Alljärgnevalt esitab töö autor kokkuvõtte töös analüüsitud probleemidest, tehtud järeldustest ja pakutud lahendustest. Autor jõudis töös järeldusele, et virtuaalkoosolekule kehtestatud nõuded võimaldavad tagada osanikele ja aktsionäridele koosolekul osalemisel ning hääletamisel samasugused õigused nagu tavakoosolekul. Täpsemalt on järeldused püstitatud uurimisküsimustele toodud alljärgnevalt.

Doktoritöö autor analüüsis esmalt küsimust, **milliseid kaasaegseid elektroonilisi sidevahendeid on võimalik kasutada koosoleku teadete edastamiseks.**

Doktoritöös läbi viidud analüüsi põhjal võib järeldada, et koosoleku kokkukutsumise teade on tahteavaldus, mille suhtes kohaldatakse lisaks tsiviilseadustiku üldosa seadusele äriseadustiku erinorme. Koosoleku teate saatmise viisid on seaduses selgelt reguleeritud – osaühing võib koosoleku teate saata kas posti teel või e-kirjaga, aktsiaselts aga üldjuhul tähitud kirjaga. Eesti õigus lubab küll saata koosoleku teate ka aktsionäridele e-posti teel, kuid see meetod ei ole praktiline ega soovitatav. Nimelt ei saa olukorras, kus aktsionär ei kinnita teate kättesaamist, lugeda teadet nõuetekohaselt saadetuks ega kätte saaduks ja aktsionär võib hiljem koosolekul vastuvõetud otsused vaidlustada. Osaühingu osanikele teate saatmise reeglid selliseid piiranguid ette ei näe. Kokkuvõttes nähtus analüüsist, et koosoleku teate saatmiseks kasutatavatest tänapäevastest sidevahenditest reguleerib seadus üksnes e-kirja ja aktsiaseltsis on seegi võimalus piiratud, kuna nõuab kättesaaduks lugemiseks aktsionäri kinnitust.

Järgmiseks analüüsis autor küsimust, **kas osanikud ja aktsionärid võivad põhikirjas kalduda kõrvale seaduses sätestatust ja näha ette koosolekukutse saatmise sellise viisi, mida seadus ette ei näe.** Selle küsimuse analüüsi tulemusel saab teha järgmised järeldused.

Eesti õiguskirjanduses on väljendatud vastuolulisi arvamusi äriseadustiku sätete õigusliku olemuse kohta. Autor nõustub väitega, et kõiki äriseadustiku norme ei saa olemuslikult pidada ühesugusteks. Samas näevad AS § 139 lg 2 ja § 244 lg 2 ette, et põhikirjas ei ole lubatud seaduses sätestatust kõrvale kalduda, välja arvatud juhul, kui seadus seda otsesõnu võimaldab. AS § 172 lg 1 ja § 294 lg 2, mis reguleerivad osanike koosoleku ja aktsionäride üldkoosoleku kutse saatmist, ei sisalda viidet võimalusele põhikirjas teisiti kokku leppida. Siiski on leitud ka seda, et osaühingu sisesuhetes kohaldatava regulatsiooni dispositiivsuse ulatust ei saa määrata üksnes nende sätete alusel, mille osas on osanikele antud selgesõnaline õigus leppida kokku seaduses sätestatust erinevalt. Autor on seisukohal, et on raske põhjendada, miks vähemalt osaühingute osanikel ei ole lubatud omavahelistes sisesuhetes kokku leppida seaduses sätestatust erinevat suhtlemisviisi. Kokkuvõttes tuleb seega asuda seisukohale, et kehtiv seadus võimaldab erinevaid tõlgendusi ja see ei taga õigusselgust.

Lisaks seaduses praegu ettenähtud võimalusele saata koosoleku kutseid e-posti teel tuleks doktoritöö autori hinnangul lubada saata neid ka muus vormis, mis võimaldab kirjalikku taasesitamist. Kuigi iseenesest tagavad seaduses sätestatud normid teatud unifikseeritud reeglistiku, ei tohiks ühingu sisesuhteid regu-

leerivad sätted olla sedavõrd suure imperatiivsuse astmega ning põhikirjas peaks olema lubatud leppida kokku ka teisiti. Nimelt on põhikiri osanike ja aktsionäride jaoks siduv dokument. Kuigi aktsiaseltsse reguleerivad normid on kujundatud lähtudes eeldusest, et aktsiaselts on avatud, investeerimisele suunatud ja suure aktsionäride arvuga äriühing, mis võiks õigustada ka sisesuhteid reguleerivate normide mõnevõrra rangemat olemust, on autor seisukohal, et ka vähemalt börsil noteerimata aktsiaseltsidele tuleks anda suurem vabadus eelnimetatud küsimusi põhikirjas reguleerida. Minimaalselt tuleks seadusest kaotada nõue, et e-kirjaga saadetud teate saab lugeda kättesaaduks vaid juhul, kui aktsionär kinnitab selle kättesaamist.

Seega näitavad eeltoodud järeldused, et doktoritöö esimene hüpotees pidas paika – koosolekuteadete saatmist reguleerivad normid on praegu liiga jäigad nii osahingute kui ka aktsiaseltside jaoks ega võimalda ära kasutada kõiki tänapäevaseid tehnoloogilisi võimalusi.

Järgnevalt analüüsis doktoritöö autor, **millised on virtuaalse koosoleku tunnused, millised õigused tuleb tagada osanikule ja aktsionäriks, kes osalevad koosolekul elektrooniliselt, ja kas elektrooniline osalemine võimaldab osanikel ja aktsionäridel kasutada oma õigusi samas ulatuses kui füüsiliselt toimival koosolekul.** Nende küsimuste analüüsi põhjal saab teha järgmised järeldused.

Elektroonilise osalemise regulatsioon osanike koosolekutel on välja kujunenud etapiviisiliselt. Pikka aega on eeldatud, et koosolek tähendab, et kõik osanikud või aktsionärid kogunevad samal ajal samas kohas ja et kõik äriühingud peavad koosolekut äriühingu registrijärgses asukohas või mõnes muus määratud (füüsilises) kohas. Kõige märgatavam areng algas ülemaailmse koroonapandeemia ajal ehk 2020. a, mil hakati kiiresti täiendama nii virtuaalset osalemist kui ka virtuaalseid koosolekuid käsitlevaid õigusakte. Siiski on Eestis ja võrdlusriikides (Saksamaa ja Madalmaad) eelnimetatud küsimuste õiguslikule reguleerimisele lähenetud erinevalt.

24. mail 2020 jõustus tsiviilseadustiku üldosa seaduse muudatus, millega viidi seadusesse sisse § 33¹. Selle kohaselt on elektrooniline koosolekul osalemine lubatud, kui kasutatakse kahesuunalist reaajas toimuvat sidet, mis võimaldab osalejatel eemal viibides koosolekut jälgida, sõna võtta ning otsuste vastuvõtmisel hääletada. Seejuures ei erista Eesti seadused virtuaal- ja hübriidkoosolekut. Elektrooniline osalemine peab vastama vähemalt kolmele tingimusele. Esiteks peab see võimaldama osanikul (aktsionäril) jälgida koosolekut reaajas nii helis kui ka pildis. Teiseks peab see võimaldama osanikul (aktsionäril) sõna võtta, esitada ettepanekuid, eriarvamusi ja vastuväiteid näiteks vestlusakna või mikrofoni ja kaamera abil. Kolmandaks peavad osanikud (aktsionärid) saama hääletada kas tekstivestluse akna või mikrofoni ja kaamera abil, koosoleku ajal e-posti teel või selleks eraldi ettenähtud keskkonnas. Töös läbi viidud analüüsist nähtus, et virtuaalsel koosolekul osalejatele tuleb tagada kõik samad õigused, mis on füüsiliselt koosolekul osalejatel, muu hulgas peab neil olema ka õigus saada teavet.

Virtuaalse koosoleku (osalemise) oluline tunnus on ka tehnoloogiline neutraalsus, mis tähendab, et seaduse tasandil ei ole reguleeritud, millist tehnoloogiat koosoleku korraldamiseks kasutada tuleb. Küll aga on oluline, et see tehnoloogia võimaldaks reaajas kahepoolset sidet ja võimalust osanikke (aktsionäre) tuvastada. Järeldusena võib nentida, et isikutuvastamise reeglitele saab läheneda üsna paindlikult, sest selle kohta puudub täpsem regulatsioon. Küll aga peab olema võimalik tagada, et koosolekul osaleksid siiski vaid selleks õigustatud isikud. Eriti oluline on see näiteks olukorras, kus koosoleku kokku kutsunud juhatus kõiki osanikke (aktsionäre) või nende esindajaid ei tunne.

Osanike ja aktsionäride juhtimisõigustest kõige olulisemaks võib pidada hääleõigust, mistõttu uuris doktoritöö autor ka küsimust, **millised seadusest tulenevad nõuded kehtivad hääleõiguse teostamisel elektrooniliste sidevahendite kaudu.**

Analüüsi tulemusel saab järeldada, et Eesti õiguse kohaselt võivad osanikud (aktsionärid) muu hulgas kasutada hääleõigust elektrooniliselt, koosolekul füüsiliselt kohal viibimata, kui seaduses või põhikirjas ei ole sätestatud teisiti. Üldjoontes näeb Eesti õigus nii osahingutele kui ka aktsiaseltsidele hääletamiseks ette kolm võimalust:

- 1) juhatus kutsub kokku koosoleku, mille toimumise ajal osanikud (aktsionärid) hääletavad;
- 2) juhatus kutsub kokku koosoleku ning lisaks koosolekul hääletamisele (olgu siis füüsiliselt või elektrooniliselt) antakse osalejatele võimalus hääletada enne koosoleku toimumist kas kirja teel või elektrooniliste sidevahendite abil;
- 3) koosolekut kokku ei kutsuta ja hääletamine toimub ainult selleks ettenähtud sidevahendite kaudu.

Seejuures näeb ÄS § 298² lg 1 (mis on kohaldatav ka osahingutele) ette kolm tingimust enne koosolekut hääletamisele. Esiteks peab hääle andmine toimuma vähemalt kirjalikku taasesitamist võimaldavas vormis, teiseks peab olema tagatud osanike (aktsionäride) tuvastamine, ning kolmandaks peab olema tagatud hääletamise turvalisus ja usaldusväärsus.

E-kirja teel hääletades on need tingimused reeglina täidetud. Teine võimalus on kasutada veebipõhist hääletamiskeskonda, mis võimaldab hääli edastada kirjalikku taasesitamist võimaldavas vormis ja neid hiljem alla laadida. Küll aga ei piisa hääletajate tuvastamiseks sellest, kui neile on antud identifitseerimist mittedõudev juurdepääs hääletuskeskkonnale. Näiteks ei ole autori hinnangul võimalik kasutada hääletamiseks tavapärast elektroonilises keskkonnas läbi viidavat küsitlust, kus iga lingi saanud isik saab lihtsalt sisestada oma nime ja näidata kas oma toetust või vastuseisu mingi otsuse suhtes. Lisaks peab olema võimalik tuvastada, kes kuidas hääletas, kuna vastasel korral ei ole kõik hääletamistulemuste kindlakstegemise nõuded täidetavad. Samal ajal peab ka hääletanud isikul olema mõistlik võimalus aru saada, kas tema hääle on nõuetekohaselt edastatud. Kuna seadus ei näe enam ette, et elektrooniline hääletamine nõuaks tingimata hääle digitaalset allkirjastamist, tähendab elektrooniline hääletamine üld-

mõistena nüüd nii digitaalallkirjaga varustatud hääle edastamist kui ka muude elektrooniliste sidevahendite kasutamist hääletamiseks.

Kokkuvõttes tuleb osanikele (aktsionäridele) sõltumata koosoleku pidamise viisist tagada samad õigused, mis neil oleksid füüsilisel koosolekul (osalemisel). Seega osutus tõeseks ka teine doktoritöös püstitatud hüpotees, et Eesti õiguse kohaselt võib iga osanik (aktsionär) kasutada oma õigust otsuste vastuvõtmiseks kas füüsiliselt või elektrooniliselt ning sõltumata nende osalemise viisist tuleb kõigile tagada samad õigused.

Lisaks eelnevale analüüsis doktoritöö autor, **milline äriühingu organ on pädev otsustama, kas korraldada virtuaalne, hübriid- või füüsiline koosolek.** Selle küsimuse analüüsi põhjal saab teha järgmised järeldused.

Esmalt tuleb märkida, et Eestis on osanike või aktsionäride otsustada, kas lubada elektroonilist osalemist ja täielikult virtuaalset koosolekut. Eestis on seadusandja kujundanud elektroonilist osalemist reguleerivad sätted selliselt, et vaikivalt on kõigil eraõiguslike juriidiliste isikute organite liikmetel õigus osaleda koosolekul elektrooniliste vahendite abil, kuid selle õiguse võib põhikirjaga välistada. Eesti käsitus on seni lähtunud seega eeldusest, et koosoleku vorm on pigem tehniline ja äriühingu sisemist korraldust puudutav küsimus, mistõttu kuulub sellise otsustuse tegemine eelkõige juhatuse pädevusse. Eesti käsitluse järgi eeldatakse, et füüsiline ja virtuaalne koosolek on ekvivalendid ning ühe või teise vormi kasutamiseks ei ole juhatusele vaja kellegi eelnevat luba. Seega määrab juhatuse lubatud valikute piires, millises vormis koosolekut läbi viia. Kui aga mõnel osalejel ei ole tehnilist võimekust, et osaleda elektrooniliste vahendite abil, tuleb autori hinnangul talle tagada võimalus osaleda koosolekul füüsiliselt kohal viibides. Seega saab töö põhjal järeldada, et juhatuse otsustusõiguse piirangud võivad tuleneda ka üldisest hea usu põhimõttest. Eesti seadus on praeguses sõnastuses aga autori hinnangul piisav ega vaja suuri muudatusi – sellest on selgelt arusaadav, millised on üldreeglid, et võimaldada koosolekul elektroonilist osalemist.

Autor on lisaks ka seisukohal, et osanikel ja aktsionäridel peaks olema õigus häälteenamusega kujundada äriühingu sisesuhteid ning täpsustada elektrooniliste vahendite abil osalemisega seotud küsimusi, näiteks nõudeid koosoleku keskkonnale, protokoll koostamisele ja koosoleku üldisele korrale. Siiski ei tähenda see, et need täpsustused peaksid olema alati vajalikud, sest sisemise korralduse ülemäärane reguleerimine võib muuta äriühingu vähem paindlikuks. Veelgi enam – põhikirjas olev üksikasjalik regulatsioon tekitab täiendavaid võimalusi otsuste vaidlustamiseks, tuginedes protseduuriliste rikkumistele. Kuna Eesti seadused lubavad otsuseid vaidlustada alati, kui esineb vastuolu seaduse või põhikirjaga, võib liigne reguleerimine soodustada ka pahatahtlike hagide esitamist.

Viimaseks arendas doktoritöö autor uurimisteemat edasi, analüüsides osanikele ja aktsionäridele kättesaadavaid õiguskaitsevahendeid. Nimelt analüüsiti töös küsimust, **kas vead, mis võivad osaniku- või aktsionäriõiguste teostamisel esineda seoses elektroonilise osalemisega, on sellised, mis võimaldavad koosolekul vastu võetud otsuseid vaidlustada.**

Saksa õiguses on seaduse tasandil sõnaselgelt välistanud otsuste vaidlustamine tehniliste vigade tõttu, eeldusel, et sellised rikkumised ei ole äriühingu poolt toime pandud tahtlikult või raske hooletuse tõttu. Rasket hooletust võib eeldada näiteks siis, kui ühing on jätnud tagamata elementaarse tehnilise taseme. Koosoleku otsust ei ole aga võimalik vaidlustada näiteks siis, kui tehnilistel põhjustel ei edastata koosoleku kulgu täielikult või kui koosoleku materjalid ei ole osalejatele kättesaadavad. Samuti on välistatud vaidlustamine, kui rikkumine lähtub osaniku (aktsionäri) enda mõjusfäärist. Reguleerimise eesmärk on piirata vaidlustamise aluseid olukorras, kus rikkumise põhjustavad tehnilised vead.

Kuna Eesti seadused ei reguleeri virtuaalse ega hübriidkoosoleku eripäraseid, ei saa tehnilised vead siin vähemalt üldjuhul anda alust otsuse vaidlustamiseks. Kuid ehkki elektroonilise osalemise reguleerimine on üsna napp, saab otsuseid siiski vaidlustada siis, kui on rikutud kas üldnorme või õiguse üldpõhimõtteid. Näiteks võib olla otsus tühine koosoleku korra olulise rikkumise tõttu, kui koosoleku teates puudub virtuaalse ruumi link või see on vigane ega võimalda koosolekuga liituda. Samas peaks osanik (aktsionär) tulenevalt ühinguõiguslikust hea usu põhimõttest sellises olukorras viivitamata kontakteeruma juhatuse liikmega ja teatama osalemise takistusest. Otsus võib olla vaidlustatav ka näiteks juhul, kui sellega rikutakse üldist üksteise ja äriühingu suhtes kehtivat hea usu põhimõtet ja lojaalsuskohustust, samuti võrdse kohtlemise põhimõtet, näiteks olukorras, kus juhatust teab, et osanik või aktsionär ei saa objektiivsel põhjusel koosolekul elektrooniliste vahendite abil osaleda, kuid sellele vaatamata korraldab virtuaalse koosoleku.

Eesti seadused ei reguleeri praegu virtuaalkoosolekute tehnilisi aspekte. Kui aga seadusandja peaks soovima selliseid sätteid seadusesse lisada, tuleks eelnevalt analüüsida, millised rikkumised peaksid andma osanikele (aktsionäridele) õiguse otsuseid vaidlustada. Autor on seisukohal, et tehnilised häired, mis otseselt kellegi õigusi ei riku, ei peaks sellist vaidlustamise lisavõimalust andma.

PUBLICATIONS

CURRICULUM VITAE

Name: Maris Vutt
Date and place of birth: 20.02.1993, Tallinn
Citizenship: Estonian
E-mail: marisvutt@gmail.com

Education

2018–... University of Tartu, Faculty of Law, doctoral studies
2015–2017 University of Tartu, Faculty of Law, Master of Arts in Law
2012–2015 University of Tartu, Faculty of Law, Bachelor of Arts in Social Sciences
2010–2012 Miina Härma Gymnasium (gold medal), secondary education

Professional experience

01.03.2024–... Law Firm TGS Baltic, attorney-at-law, counsel (1,00)
01.12.2022–31.08.2023 University of Tartu, junior research fellow in private law (1,00)
08.03.2022–29.02.2024 Law Firm TGS Baltic, attorney-at-law, senior associate (1,00)
01.09.2020–... University of Tartu, adjunct lecturer (1,00)
09.03.2020–07.03.2022 Law Firm TGS Baltic, attorney, associate (1,00)
02.10.2018–06.03.2020 Law Firm Glikman Alvin LEVIN, attorney (1,00)
01.01.2018–01.10.2018 Law Firm GLIKMAN ALVIN, lawyer (1,00)
01.07.2017–31.12.2017 Supreme Court of Estonia, analyst (1,00)
15.02.2016–30.06.2017 Supreme Court of Estonia, specialist (1,00)

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ELULOOKIRJELDUS

Nimi: Maris Vutt
Sünniaeg ja -koht: 20.02.1993, Tallinn
Kodakondsus: Eesti
E-mail: marisvutt@gmail.com

Haridustee

2018–... Tartu Ülikool, õigusteaduskond, doktorantuur
2015–2017 Tartu Ülikool, õigusteaduskond, õigusteaduse magister
2012–2015 Tartu Ülikool, õigusteaduskond, sotsiaalteaduste bakalaureus
2010–2012 Miina Härma Gümnaasium (kuldmedal), keskkaridus

Ametikäik

01.03.2024–... Advokaadibüroo TGS Baltic, nõunik (1,00)
01.12.2022–31.08.2023 Tartu Ülikool, eraõiguse nooremteadur (1,00)
08.03.2022–29.02.2024 Advokaadibüroo TGS Baltic, vandeadvokaat (1,00)
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01.01.2018–01.10.2018 Advokaadibüroo GLIKMAN ALVIN, jurist (1,00)
01.07.2017–31.12.2017 Eesti Vabariigi Riigikohus, analüütik (1,00)
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