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DECISION-MAKING BY SHAREHOLDERS OF SLOVENIAN COMPANIES DURING COVID-19

As a result of recently enacted COVID19-related legislation (referred to as "ZIUOPDVE")¹, Slovenian companies are now permitted to carry out general meetings without the requirement of the physical presence of shareholders or their proxies. Shareholders can participate by electronic means or the general meeting can be held virtually. This applies for general meetings convoked before the enactment of the new legislation (i.e., before 28 November 2020) and shall remain available as an option until the official revocation of the declared state of the COVID-19 epidemic in Slovenia. While the rules are intended to facilitate general meetings during the pandemic, they limit the shareholders' right to ask questions.

The option of decision-making via electronic or virtual general meetings can be used by public and private joint stock companies (*d.d.*) (regardless of whether their shares are listed on a regulated market), partnerships limited by shares (*k.d.d.*) and the *Societas Europaea* (SE), as well as (as explained below in point 9.) by limited liability companies (*d.o.o.*).

1. PARTICIPATION OF SHAREHOLDERS BY ELECTRONIC MEANS

Under the current corporate law² (based on the Shareholder Rights Directive³), Slovenian joint stock corporations (listed and non-listed) have already had the option to allow the participation of shareholders in shareholders meetings by electronic means if they included such rules in their articles of association. However, most Slovenian companies have not made use of this option. During the COVID19 epidemic, the newly adopted legislation has enabled companies to allow the electronic participation of shareholders, even if they have not provided for this option in their articles of association.

¹ *Zakon o interventnih ukrepih za omilitev posledic drugega vala epidemije COVID-19* [Law on Intervention Measures for the Softening of Consequences of the Second Wave of the COVID-19 Epidemic], OJ No. 175/2020 ("ZIUOPDVE"), published on 28 November 2020.

² *Zakon o gospodarskih družbah (ZGD-1)* ("Companies Act").

³ 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 ("Shareholder Rights Directive"). Although the time prescribed for its implementation has expired, Slovenia has not yet implemented Shareholder Rights Directive II (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).

Following the supervisory body's approval, the management of a company may stipulate in the convocation of a general meeting that shareholders may attend or vote (prior to, or during the general meeting) by electronic means without their physical presence. The ZIUOPDVE refers to such general meetings as "electronic general meetings".

The management shall determine the rules of procedure of a general meeting and the manner of exercising the right to vote, and shall publish such information at the places where the company is obliged to publish the convocation of general meetings, no later than on the day of the convocation.

Attendance and voting by electronic means shall be subject only to such requirements and constraints as are necessary to ensure the identification of shareholders and the security of the electronic communication, and only to the extent that they are proportionate to achieving those objectives.

2. VIRTUAL GENERAL MEETING

The new legislation allows the management (upon approval of the supervisory body) to decide to call a general meeting as a virtual general meeting without the physical presence of shareholders, their proxies or other persons, under the following conditions:

- the company shall ensure the real time transmission of the image and tone of the entire meeting;
- the company shall set appropriate conditions for the identification of the participating shareholders or proxies;
- shareholders or their proxies must have the possibility to cast their votes by electronic means, and the company must ensure secure electronic communication; and
- the shareholders must have the possibility to exercise their right to be informed (i.e., by asking questions during the meeting).

However, ZIUOPDVE restricts the right of shareholders to ask questions:

- the management has the discretion to restrict the shareholders' right to be informed by choosing to which questions posed by shareholders it will respond, and how it intends to respond to them;
- the management may also stipulate in the convocation of the shareholders' meeting that the shareholders must submit their questions to the company using electronic means no later than two days before the general meeting.

The abovementioned restrictions are problematic and likely violate European law: Asking questions and receiving responses is a core right of shareholders of companies limited by shares which may, under the Shareholder Rights Directive, only be limited by measures to ensure the identification of shareholders, the good order of general meetings and their preparation and the protection of confidentiality and the business interests of companies.⁴

⁴ See Art 9 of the Shareholder Rights Directive and Art 305 Para 2 of the Companies Act.

The management does not have the free discretion to determine which questions it responds to.

The company's management shall determine the rules of procedure of a virtual general meeting and the manner of exercising the right to vote, and shall publish such information at the places where the company is obliged to publish the convocation of general meetings, no later than on the day of the convocation.

3. MEMBERS OF MANAGEMENT AND SUPERVISORY BODIES

Members of management or supervisory bodies may participate in general meetings convened in the form of electronic or virtual general meetings.

4. APPOINTMENT OF A PROXY USING ELECTRONIC MEANS

A shareholder may appoint a proxy to represent it at an electronic or virtual general meeting, by using electronic means. A proxy may be revoked in the same manner at any time.

The management shall determine in more detail the method of providing proof of appointment of the proxy using electronic means and publish this decision at the places where the company is obliged to publish the convocation of the general meeting, no later than the day of the convocation.

5. CONFIRMATION OF MINUTES OF MEETINGS AND IDENTIFICATION

The minutes of an electronic / virtual meeting shall also stipulate the manner in which the content of the votes was determined. The chairman of a virtual meeting can sign the minutes remotely with his/her electronic signature, with an advanced electronic signature or a stamp based on a qualified confirmation of an electronic signature or stamp, or with a qualified electronic signature or stamp. The requirement of notary's physical attendance at an electronic / virtual general meeting remains unaffected. The notary must identify the person convening the virtual meeting and the chairman of the meeting.

6. VOTING BY MAIL

The management, with the consent of the supervisory body, can stipulate in the convocation of the shareholders' meeting that shareholders may also vote by post prior to the general meeting.

7. CONTESTATION OF RESOLUTIONS

A shareholder who wishes to contest a resolution passed in an electronic or virtual general meeting is not required to immediately, in the meeting, notify the company of its intention to file a contestation lawsuit.

A contestation of a resolution adopted at an electronic or virtual general meeting may not be based on a violation of rights resulting from technical disruptions of the technical means, unless the technical disruption was caused by gross negligence or intent on the part of the company which called the meeting.

The new regulation contains a rather vague restriction for contestation of resolutions: shareholders may not contest a resolution because their shareholders' right to be informed was restricted or violated, if such restriction or violation was a consequence of the fact that a general meeting was held as a virtual meeting, and the management made use of its discretion not to respond to certain questions (see point 2. above). This provision is ambiguous and at odds with the general principle of corporate law, which holds that shareholders have the right to ask questions and obtain information from management in the course of a general meeting; if a general meeting passed a resolution in violation of this principle, the relevant resolution could be contested in court.⁵

In our view, board members and directors are advised to, as much as possible, fulfil their general obligations to respond to the questions of shareholders, as we expect that case law will not rigorously follow the legal restrictions of shareholder rights as stipulated in this new piece of legislation.

8. CIRCULAR VOTING IN A LIMITED LIABILITY COMPANY (D.O.O.)

Different from the general rule applicable to limited liability companies (*d.o.o.*) which requires a unanimous approval, a (simple) majority of all shareholders' votes suffices to allow a circular vote in lieu of a physical general meeting. In this case, the shareholders shall communicate their votes to the managing director in writing, by telephone, telegram or using similar technical means. This rule applies exclusively to limited liability companies (*d.o.o.*). Circular votes are possible in all cases where the Companies Act does not require the confirmation of adopted resolutions by a notary.⁶

9. ARE THE RULES FOR ELECTRONIC / VIRTUAL GENERAL MEETINGS APPLICABLE TO D.O.O.S?

ZIUOPDVE does not stipulate clearly whether the rules for electronic / virtual general meetings also apply for general meetings of limited liability companies (*d.o.o.*). Only

⁵ Art 395 Para 2 of the Companies Act.

⁶ The decision-making in a company with a single shareholder remains unchanged. Resolutions are passed in writing and included into the company's book of resolutions.

indirectly, the new rules seem to imply the applicability for limited liability companies as well.

Firstly, the rules allowing supervisory board members to participate in electronic or virtual general meetings of joint stock corporations are explicitly extended to supervisory board members of a limited liability company. Logically, this may become relevant only under the condition that a limited liability company could make use of the new rules on electronic / virtual shareholders meeting. Secondly, the rules on the confirmation of electronic / virtual general meetings (see point 5. above) apply also for notarial minutes of electronic / virtual general meetings of a d.o.o.

According to explanations of the Government accompanying the new legislation, it had the intention to allow the application of the rules to limited liability companies as well.⁷ It would have been preferable if the ZIUOPDVE would have explicitly addressed this question.

Wolf Theiss will continue to distribute regular Client Alerts via email and publish up-to-date analysis on our website. A list of updated resources can be found here: <https://www.wolftheiss.com/covid19/>

⁷ See the Explanatory Statement to the Bill (ZIUOPDVE) by the Government of the Republic of Slovenia, p. 75; accessible at: <https://imss.dz-rs.si/IMiS/ImisAdmin.nsf/ImisnetAgent?OpenAgent&2&DZ-MSS-01/6c470dbb10079eae0ba66dfb4fb1e6109f02b8a780262ee4db69d2cba1d367cd>

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