

General Meeting of Members with Online Participation in the Limited Liability Company - A "Legislative Fantasy"

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Abstract: *Society must constantly adapt to face all the challenges of the business environment, under the influence of the changing economic and legal context. Whenever the measures taken to adapt the company to new economic conditions concern elements of the company provided for in the memorandum of association, the memorandum of association must be amended in accordance with the formalities laid down by law.*

In the light of developments in information technology, members may also be able to attend general meetings remotely, subject to certain conditions, in particular in order to ensure that participants can be identified using video equipment (videoconferencing via websites dedicated exclusively to this purpose). In this way, the resolutions adopted by remotely organised general meetings retain their character as collective legal acts, an expression of the company's will subsumed under the social interest.

Keywords: *associate, general meeting of associates, administrator, convocation.*

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Introductory considerations

The decision-making process is triggered by the convening of shareholders' meetings, which is the responsibility of the administrators. If the company has several directors, they may act individually or jointly to convene general meetings, depending on what is laid down in the articles of association. If no such specification is made, each director, having full management powers, may convene the meeting without the other directors objecting.

Alternatively, one or more members holding at least $\frac{1}{4}$ of the share capital may initiate the calling of a general meeting. Although there is no legal provision, it is stated in the literature that the right of shareholders to take the initiative to convene a general meeting arises if the directors fail to fulfil this legal obligation, either through negligence or even with malice aforethought, in order to postpone or even prevent consideration of the management acts committed in the period since the last general meeting. The members may not convene the general meeting directly, but are obliged to submit a reasoned request to the administrators. The law does not stipulate the form that the shareholders' request must take, but in practice, for reasons of pre-constitution of evidence, it is considered that the request must be sent in the form of a registered letter with acknowledgement of receipt. If the administrators of the limited liability company persist in their inaction and do not comply with the shareholders' request, the provisions relating to the joint-stock company are deemed to be fully applicable, by analogy (C. Lefter, p.98). Thus, at the request of the shareholders, for whose benefit the method of convening and publicising the convening is regulated (I.C.C.J., Com. section, dec.1112 of 2.04.2009) as stated in case law, applying the same threshold as in the case of the request for convocation, the court at the company's registered office may authorise it to convene the general meeting, by setting the agenda, the date of the meeting and the person who will chair it (Article 119, paragraph (3) of Law 31/1990).

Legislative and doctrinal aspects of the conduct of general meetings

The directors must convene a general meeting at the registered office at least once a year (with reference to the ordinary meeting) or whenever the factual circumstances require a decision adopted by this supreme body (extraordinary general meeting) (Art.195, para. (1) Law no.31/1990).. In this respect, too, the rule laid down in the case of a joint-stock company, which leaves it to the discretion of the administrator to determine the actual place

of the general meeting by means of a notice, may be applied (Article 110(2) of Law No 31/1990). Since only in exceptional circumstances is the general meeting not held at the company's registered office (I.C.J., Com. Section, Dec. 1112, p. 1. of 2.04.2009), as the Supreme Court has emphasised in numerous decisions, the administrators must identify it precisely in the notice of meeting so that the members can actually attend the general meeting in question (I.C.J., Commercial Division, dec.966 of 9.03.2007), otherwise the meeting will be deemed to have been held at the seat (I.L. Georgescu, vol. II., p.391). In the latter case, there is a risk that the administrator may choose a place that is difficult to access, which is likely to prevent the general meeting from taking place, which entails cancelling the meeting and ordering the guilty administrator to pay damages.

With regard to the date of the general meeting, a distinction must be made between the general meeting which has to approve the annual financial statement and decide on the distribution of the net profit within a certain period each year and the other general meetings which have on their agenda matters involving amendments to the articles of association, which are to meet on the date on which these situations arise in the life of the company. Case law has made it clear that this reference date must be subsequent to the communication of the notice of meeting and is a condition for access to, and participation in, the meeting for shareholders entitled to receive dividends or exercise any other rights (Î.C.C.J., Com. section, dec.3503 of 8.11.2011).

Accordingly, a period of at least 10 days must elapse between the date of convocation and the reference date for the general meeting (Art.195, para.(3) Law no.31/1990) in order to allow shareholders to exercise their right to inform themselves about the general meeting and to request information on the company's activity, in addition to that contained in the convocation, before the date of the meeting (Art.1172, para.(3) Law no.31/1990).

The law also establishes for joint-stock companies the time limit for a second general meeting with the same agenda, if the first one could not be held, which cannot be held on the same day as the first meeting, but within 8 days, (Art.118 Law no.31/1990) fully applicable also to limited liability companies. The French doctrine also analyses the situation where the members decide during the general meeting to continue the debates on another day, either because of unforeseen incidents which make it necessary to postpone the discussions or because it is impossible to exhaust the set agenda. Postponement of the general meeting means that the debates must be continued at a later date with the same agenda and quorum conditions, and the formalities for convening the meeting must be repeated. The

postponement of the general meeting should not be confused with its adjournment, which is merely a temporary halt to the debates, which are resumed at the same meeting, which continues in this way (X. Delpech, p.303). In conclusion, as a general rule applicable to limited liability companies, although the law establishes this obligation only with regard to capital companies, (Art.111, paragraph (1) of Law no. 31/1990) the directors must convene a general meeting of the shareholders at least once a year, within a maximum of 5 months after the end of the financial year, to approve the financial statements for the previous financial year and to discharge the directors, as well as to decide on the distribution of dividends to shareholders. Exceptionally, whenever a decision has to be taken concerning the proper functioning of the company or other matters affecting the very existence of the company, the directors shall also convene a general meeting of the members. In all cases where a general meeting of members is required, the notice must specify both the date and the time at which the general meeting is to be held (I.L. Georgescu, p.392.).

The High Court of Cassation and Justice has specified that the general meeting must be convened in the manner specified in the memorandum of association or, in the absence of any conventional rule, by registered letter, within the period prescribed by law (I.C.C.J., Com. section, dec.2250 of 2.10.2009) of at least 10 days before the date on which this supreme social forum takes place. The general meeting may also be convened by e-mail provided that an extended electronic signature is incorporated, attached or logically associated, unless this is prohibited in the articles of association (Article 117, paragraphs (4) and (5) of Law no. 31/1990).

If one of the addressees of the summons has changed his address and has not notified the company of this change, then the sending of the summons to the old address is considered valid (Art.117, paragraph (4), last sentence, Law no.31/1990). All shareholders, including those who are unable to exercise their right to vote in the deliberations in question, are entitled to receive the convocation; the right to vote cannot be confused with the right to participate in the life of the company. If the company shares are held in joint ownership, all co-owners must be summoned; and if a usufruct has been established over them, the bare owner must be summoned in all cases, while the usufructuary must be summoned only if the agenda includes matters relating to his right of usufruct. The general meeting may also be attended by the directors, the auditors, if any, and, if necessary, the company officials, if their presence is necessary to clarify the issues on the agenda.

It is clear from the wording of the legal text that the convocation must at least contain the following information: the date and place of the general meeting and the agenda, without the need for a signature (X. Delpech, *op. cit.*, p.305). The agenda, which consists of all the matters to be discussed at a particular general meeting, is drawn up by the directors and must be set out in detail in the notice. Members representing at least 5% of the share capital may request the administrators to add new items to the agenda, which will be brought to the attention of the other members before the meeting. We emphasise that the agenda is of particular importance as it is "binding and limited in scope". (I.L. Georgescu, p.396) as it determines the limits of the general meeting, which may deliberate exclusively on the matters on its agenda; any decision on matters not on the agenda is null and void. This mandatory provision may be derogated from on the basis of the agreement of all the members directly present or represented at the meeting (Art.129, para. (7) Law no.31/1990).

The French doctrine has developed a theory of "meeting incidents", according to which matters not explicitly on the agenda, but which have emerged spontaneously from the debates, may also be discussed in the meeting. A decision on the dismissal of the director which does not appear explicitly on the agenda, but which arose in the context of discussions on the current situation of the company, which is on the agenda of the shareholders' meeting, is considered valid (X. Delpech, p. 301).

As a rule, with the exception of miscellaneous matters of minimal importance, which can only be mentioned, all matters on the agenda must be explicitly and clearly stated in such a way that there is no need to consult other documents, as stated in a decision of the Supreme Court (Art.117, para. (6), first sentence, Law no.31/1990; I.C.C.J., com. section, dec.1134 If the agenda of the general meeting includes proposals to amend the articles of association, the convocation must contain the full text of the proposed amendments (Art.117, para.(7), Law no.31/1990) and if the meeting is to appoint administrators, the convocation must specify that all information on the persons proposed for this position is to be made available to the members (Art.117, para.(6), final sentence, Law no.31/1990). However, it is pointed out in case law that, although the agenda did not specify the determination of the directors' remuneration, the general meeting was obliged to decide on this aspect, since it was not fixed by the articles of association (I.C.J., com. section, dec.2144 of 1.06.2007).

Another aspect concerns the irrevocable nature of the agenda, which cannot be withdrawn or amended once it has been included in the convocation and communicated to the members. This is what the French

doctrine calls the principle of the fixity of the agenda of general meetings of members (I.C.C.J., com. section, decree 2144 of 1.06.2007).

In order to inform members as accurately as possible, the notice of meeting must be accompanied by certain documents relating to the subject on the agenda. Moreover, at the same time as the notice of meeting is sent out, the financial statements, the report of the administrators, the auditors, the proposal for the distribution of the net profit or the proposals concerning the persons to be appointed as administrators or auditors, etc. are deposited at the company's registered office for the benefit of the shareholders. Copies of these documents may be issued to the shareholders at their request, with the exception of information concerning the persons standing for the office of administrator or auditor. In addition, in order to ensure rapid and free access to information for shareholders, both the convocation and the related documents may be published on the company's website, provided that the secrecy of this information is respected (Art.1172, para. (1) Law no.31/1990).

For the same purpose, the law provides for the possibility for each shareholder to address questions in writing to the administrators concerning the manner in which the company's activity has been carried out, to which the latter are to reply during the general meeting or to post the reply on the company's website, before the date on which the shareholders meet in the meeting. As the right to ask written questions is an aspect of the members' essential right to be as well informed as possible about the company's affairs, the articles of association cannot provide otherwise. Directors are obliged to answer questions put to them, provided that they relate to the agenda of the general meeting in question.

Failure to comply with the provisions concerning the convening of general meetings shall render null and void the general meeting which has been convened in this vitiated manner. By way of exception, regardless of the formalities required for convening a general meeting, all associations, holding all the shares in the company together, may, by mutual agreement, hold a general meeting and decide on matters falling within the competence of this corporate body (Jora, C., 11/2006). Given that this derogation refers strictly to the convocation, the other rules concerning the general meeting must be respected (I.L. Georgescu, p.397).

The French legislator, taking into account the most modern means of communication, has provided for the possibility of organising general meetings by videoconference or by other equivalent means of telecommunication allowing the identification of persons, in order to facilitate the effective, interactive and real-time participation in the debates

also of members who are at a distance from the place where the general meeting takes place. (Law No 2008-776). on the modernisation of the economy, published in the Official Gazette of 5 August 2008). The law also provides for the possibility for the company to set up a website dedicated exclusively to the general meeting, which members can access after identifying themselves by means of a code (password) provided before the general meeting begins (Art.223-27, paragraph 3, of the French Commercial Code;(www.legifrance.gouv.fr)) All these innovative ways of conducting the decision-making process are aimed at simplifying the operation of the company and are all the more necessary as voting by correspondence is not allowed at general meetings of a limited liability company (X. Delpech, p.298).

With regard to the manner in which debates take place in the general meeting, the law lays down a number of rules relating to joint-stock companies, which may also be applicable to limited liability companies in so far as the specific situation requires a certain procedure for the conduct of the meeting and the establishment of a body to oversee its application. In other words, the procedure for organising general meetings is particularly suitable for limited liability companies with a large number of members, which require a certain discipline.

All the operations carried out at the general meeting are coordinated by the administrator appointed as chairman of the general meeting, who in turn appoints one or more technical secretaries from among the company's employees, who will draw up the minutes of the general meeting, as well as any other necessary work (Sălăgean, M., 6/2007) .French law prohibits the chairing of general meetings by a simple administrator if he is not also a shareholder, and the shareholder holding the highest number of shares or the oldest shareholder if there are two shareholders holding an equal number of shares is elected chairman of the meeting (Art. R.223-23, French Commercial Code; (www.legifrance.gouv.fr)). The members shall elect from among themselves one to three secretaries who, together with the chairman and the technical secretaries, shall form the "bureau of the meeting" (I.L. Georgescu, p. 398). The bureau of the general meeting shall check the attendance list of the members, which shall also indicate the share capital held by them, in order to establish the quorum and majority requirements required by law for the valid adoption of resolutions; it shall coordinate the debates and the voting process; it shall supervise their recording in the minutes of the meeting.

The minutes of the meeting are a privately signed document, essential for the validity of the decisions of general meetings, which record:

the date and place of the meeting, the identification of the members present or represented and the number of shares held by each, the documents and reports submitted for consideration by the members, a summary of the debates, the decisions adopted, including statements made by the members at the meeting at their request.

In the event of voting by correspondence, or if the general meeting is held by written consultation of the members or by means of video telecommunications, which ensures certainty as to the identity of the members, minutes shall also be drawn up, to which shall be annexed the documents recording the opinion and decision of the members on the items on the agenda. The minutes shall be signed by the chairman and the members of the bureau of the meeting and then entered in the register of general meetings (Pascu, M. Pârvu, L., 4/2005). As a rule, for the minutes to be enforceable against third parties, they must be entered in the commercial register and published in the Official Gazette (Article 131(4), Law 31/1990). If this text is combined with the provisions concerning the time limit within which the decision of the general meeting of both the joint-stock company (Article 132(2) of Law No 31/1990) and the limited liability company (Article 196 of Law No 31/1990) may be challenged, it can be concluded that the rule concerning disclosure formalities must be complied with only in the case of the joint-stock company. By way of exception, the resolutions of general meetings amending the articles of association of a limited liability company are subject to registration in the commercial register and may be relied on against third parties from the moment of registration (C. Lefter, p.104). In conclusion, the minutes are the only document which confirms that all the formalities required by law and by the articles of association for the organisation and adoption of resolutions of general meetings have been fulfilled (Jora, C, 6/2006). In view of the evidential value of the minutes concerning the legality of the general meeting and the resolution taken, the doctrine has stressed the need to keep a register of general meetings in which the minutes of each meeting of the general meeting are recorded, and in the case of limited liability companies, the provisions of Article 131 of the Companies Act relating to joint stock companies apply (C. Lefter, p. 105).

Conclusions and proposals for legislation

In dealing extensively with the legislative and doctrinal aspects of - general meetings of shareholders-, I was confronted with a regulation that is incomplete and cannot provide solutions to all the problems arising in corporate life. In the legislator's desire to create a flexible company structure whose operation is determined by the shareholders, the way in which

shareholders are convened and convened in general meetings is very loosely regulated, which means that in practice the detailed rules governing general meetings of shareholders are applied, even if they conflict with the specific nature of the limited liability company, which gives the shareholders' right to vote, exercised exclusively by the shareholders in person or by correspondence, a personal and non-financial dimension.

In this context, we propose a number of legislative amendments. Thus, in Article 192, two new paragraphs are inserted after paragraph 4, paragraphs 5 and 6, with the following content:

(5) The articles of association may specify the organisation of the general meeting of the members at a distance by means of electronic communication, the Internet and electronic mail (e-mail).

6) The electronic system used must meet the conditions laid down by law for the organisation of the general meeting of members and must not prejudice the right of members to attend, participate and vote. The electronic system (videoconferencing) must allow both the identification with certainty of the person of each member participating in the general meeting, by establishing directly and in real time the on-line video link with each member, and the acknowledgement of the exercise of the right to vote, including the determination of the weight that each vote has in the total votes cast in the general meeting.

- In Article 193, paragraph 2 is amended to read as follows:

(2) A member may not take part in the deliberations of general meetings of members and may not exercise his right to vote in respect of his contributions in kind or in respect of legal acts concluded between him and the company or in respect of specific transactions in which he has, on his own account or on behalf of another, interests contrary to those of the company; otherwise he shall be liable for damages to the company if, without his vote, the required majority would not have been obtained.

- In Article 193, paragraph 3 is amended to read as follows:

(3) If the legally constituted meeting, irrespective of its obligations, is unable to take a valid decision because the required majority is not reached, the meeting convened again may decide on the agenda, regardless of the number of members and the proportion of the share capital represented by the members present.

- Article 193 will have two new paragraphs:

- In Article 193, two new paragraphs, paragraph 4 and paragraph 5, are inserted after paragraph 3, with the following content:

(4) If the number of members of the limited liability company does not exceed 15 persons, meetings of the general meeting may also be held by correspondence. In this case, each member shall receive the text of the resolution at least 10 days before the date of the general meeting, sent by regular mail or electronic mail, on the basis of which he shall cast his vote in writing, which he shall communicate in the same way to the limited liability company.

(5) *If the number of members exceeds 15, the provisions laid down for general meetings of shareholders shall also apply to general meetings of members of the limited liability company.*

- In Article 195, two new paragraphs, paragraph 4 and paragraph 5, are inserted after paragraph 3, as follows:

(4) *If the number of members of the limited liability company does not exceed 15 persons, meetings of the general meeting may also be held by correspondence. In this case, each member shall receive the text of the resolution at least 10 days before the date of the general meeting, sent by ordinary mail or electronic mail, on the basis of which he shall cast his vote in writing, which he shall communicate in the same way to the limited liability company.*

(5) *If the number of members exceeds 15, the provisions laid down for general meetings of shareholders shall also apply to general meetings of members of the limited liability company.*

- In Article 195, two new paragraphs, paragraph 4 and paragraph 5, are inserted after paragraph 3, as follows:

(4) *Where the general meeting is held remotely by means of an electronic system (videoconferencing), the notice sent by electronic mail shall include details of the conditions required for connection to the electronic system used for the general meeting and the manner in which each member will be able to participate in the general meeting, including the time during which the connection will be made. The convocation will be sent to the electronic addresses specified by each member. Associates are responsible for the correctness of the e-mail addresses indicated to the company. The costs for the organisation of remote general meetings shall be borne entirely by the limited liability company.*

(5) *The directors may request the members participating in the general meeting by electronic means to send to the company the opinions, proposals they intend to submit for discussion, in accordance with the agenda, before the date of the general meeting. The administrators shall also send the members by electronic mail, within 7 days of the date of the general meeting, the information requested by them during the debates.*

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