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# Shareholders' Draft Resolutions in Estonian Company Law:

## An Example of Unreasonable Transposition of the Shareholder Rights Directive

### 1. Introduction

For decades, the European Union has been focusing on the question of how to involve shareholders of public limited companies in corporate governance. Shareholders' right to participate in corporate governance has always been one of the most general conceptual issues in the development of company law provisions.<sup>\*1</sup> Already in 2002, the High Level Group of Company Law Experts emphasised that, among other issues, the processes related to shareholders' information, communication, and decision-taking should be modernised.<sup>\*2</sup>

The action plan for modernising company law and enhancing corporate governance in the European Union<sup>\*3</sup> also pointed out that one of the most important areas for attention in the Member States is to ensure the rights of shareholders of public limited-liability companies. Subsection 3.1.2 of the action plan pointed out that it is necessary to enhance the exercise of a series of shareholders' rights in listed companies (the right to ask questions, table resolutions, vote in absentia, participate in general meetings via electronic means, etc.). There has been a need to offer all those facilities to shareholders across the EU.

For fulfilment of the above-mentioned intentions, the Shareholder Rights Directive<sup>\*4</sup> was adopted in 2007, and the date for complying with the requirements of the directive set out for Member States was 3 August 2009. It has been pointed out in legal literature that the directive was intended to facilitate the exercise of voting rights across borders and that it includes a number of other provisions intended to facilitate

<sup>1</sup> See also: M. Vutt. Shareholder's Derivative Claim - Does Estonian Company Law Require Modernisation? – *Juridica International* 2008 II, p 76.

<sup>2</sup> Report of the High Level Group of Company Law Experts on a Modern Framework for Company Law in Europe. Brussels, 4 November 2002. Available at [http://www.ecgi.org/publications/documents/report\\_en.pdf](http://www.ecgi.org/publications/documents/report_en.pdf). See, for example, p. 7.

<sup>3</sup> Commission of the European Communities. Communication from the Commission to the Council and the European Parliament: Modernising Company Law and Enhancing Corporate Governance in the European Union – a Plan to Move Forward. Brussels, 21 May 2003. COM (2003) 284 final. Available at [http://www.europarl.europa.eu/RegData/docs\\_autres\\_institutions/commission\\_europeenne/com/2003/0284/COM\\_COM%282003%290284\\_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2003/0284/COM_COM%282003%290284_EN.pdf).

<sup>4</sup> 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, pp. 17–24.

voting in other jurisdictions.<sup>\*5</sup> It has been argued in addition that the main aim for the directive was to set up certain minimum standards for protecting investors and promoting the free exercise of voting.<sup>\*6</sup>

The European Model Company Act Group also shares the view that company law rules on general meetings should encourage the shareholders to be active and improve their possibilities for acting as the company's highest decision-making body.<sup>\*7</sup>

One can conclude that European initiatives highlight several measures for purposes of ensuring that shareholders can have an active role in the company's decision-making process. One of the measures foreseen in the directive for enhancement of the rights of shareholders is the regulation of shareholders' right to submit draft resolutions. This article addresses the central question of whether the extent of the implementation of the requirements regulating draft resolutions and their disclosure in Estonian company law has been justified. The purpose of the research is to analyse whether the transposition of the rules on draft resolutions derived from the directive has contributed to the attainment of the objectives set out in the directive and in other European initiatives. The authors therefore compare the respective Estonian legal regulation with the legislation of some other Member States to examine whether the approach has been similar therein. The relevant Estonian case law that has developed since the adoption of the new rules will also be studied.

## 2. The aims in transposition of the Shareholder Rights Directive and the discretion of the Member States

According to the preamble of the Shareholder Rights Directive, the main aims for the directive were:

- 1) to enable shareholders to cast informed votes at the general meeting, as well as before the meeting, no matter where they reside;
- 2) to give shareholders 'sufficient time to consider the documents intended to be submitted to the general meeting and determine how they will vote their shares'<sup>\*8</sup>;
- 3) to enable shareholders to 'put items on the agenda of the general meeting and to table draft resolutions for items on the agenda';
- 4) to ensure that 'shareholders should in every case receive the final version of the agenda in sufficient time to prepare for the discussion and voting on each item on the agenda'<sup>\*9</sup>; and
- 5) to enable shareholders' electronic participation in the general meeting.<sup>\*10</sup>

Article 1 (1) states that the directive establishes requirements in relation to the exercise of specific shareholder rights with regard to general meetings of companies that have their registered office in a Member State and whose shares are admitted to trading in a regulated market situated or operating within an EU member state. This means that the measures foreseen in the directive are mandatory for Member States only with regard to listed companies.

Shareholders' right to receive information about draft resolutions is regulated in Article 5 of the directive. According to Article 5 (3) d), the convocation notice shall, *inter alia*, indicate where and how the full, unabridged text of the draft resolutions and other documents' submitted to the general meeting may be obtained. Article 5 (4) d) foresees that, among other relevant information, the draft resolutions should be made available (either on the company's website or otherwise) for a continuous period beginning not later than on the 21st day before the day of the general meeting including the day of the meeting.<sup>\*11</sup> In case no

<sup>5</sup> M. Gelter. EU Company Law Harmonization between Convergence and Varieties of Capitalism. ECGI Working Paper Series in Law. Working Paper No. 355/2017, June 2017. Available at [http://www.ecgi.global/sites/default/files/working\\_papers/documents/3552017.pdf](http://www.ecgi.global/sites/default/files/working_papers/documents/3552017.pdf), p. 32.

<sup>6</sup> A. R. Pinto. The European Union's Shareholder Voting Rights Directive from an American Perspective: Some Comparisons and Observations. – *Fordham International Law Journal* 32 (2009), p. 607.

<sup>7</sup> P. K. Andersen et al. European Model Companies Act. First edition, 2017. – Nordic & European Company Law LSN Research Paper Series, No. 16–26. Available at <https://ssrn.com/abstract=2929348>, p. 244.

<sup>8</sup> Shareholder Rights Directive, preamble, para. 6.

<sup>9</sup> *Ibid.*, para. 7.

<sup>10</sup> *Ibid.*, para. 9.

<sup>11</sup> In cases wherein the convocation notice for the general meeting is issued later than on the 21st day before the meeting, the period specified in this paragraph shall be shortened accordingly (Article 5 (4) (e) of the directive).

resolution is proposed to be adopted, a comment from a competent body within the company must be available for each item on the proposed agenda of the general meeting. Draft resolutions tabled by shareholders shall be added to the Internet site as soon as practicable after the company has received them.

Article 6 regulates shareholders' right to put items on the agenda of the general meeting and to table draft resolutions. According to paragraph 1 p a and b, shareholders must be granted the right to put items on the agenda of the general meeting, provided that each such item is accompanied by a justification or a draft resolution, along with the right to table draft resolutions for items included or to be included on the agenda of the general meeting. Paragraph 3 of Article 6 stipulates that each Member State shall set a single deadline, with reference to a specified number of days prior to the general meeting or the convocation, by which shareholders may put items on the agenda. In the same manner, each EU member state may set a deadline for exercising the right to table draft resolutions for items included or to be included on the agenda of a general meeting. The revised agenda must be made available to all shareholders in the same manner as the previous agenda in advance of the applicable record date. The directive thus gives the Member States the opportunity to distinguish, on the one hand, between supplementing the agenda and the draft resolutions submitted with supplementary proposals, and on the other hand, so-called counter draft proposals in case the draft is submitted with regard to an item already on the agenda.

The directive was amended and largely extended by a new directive, 2017/828/EU, of 17 May 2017, for the encouragement of long-term shareholder engagement,<sup>\*12</sup> but the main principles in respect of the convocation of a general meeting, drafting of resolutions, and making them available to shareholders have remained the same.<sup>\*13</sup>

One can conclude that the main aims for the above-mentioned rules were to ensure that all the shareholders get informed about the items (and drafts) to be voted upon at the general meeting and to grant them the possibility of putting items on the agenda and/or proposing their own draft resolutions. The purpose with those rules was to enable the shareholders of large listed companies with thousands of shareholders, residing in different Member States and having only loose connections to the company, to have more information and to be more involved in corporate governance. As has been stressed in German legal literature, the directive focuses mainly on shareholders' information rights and on participation in general meetings by means of electronic communication.<sup>\*14</sup> The authors of this article are of the opinion that the main aim behind the strongly formalised rules on draft resolutions has been to enable those shareholders not physically present at the general meeting to submit their votes before the meeting.

### 3. Estonian statutory law on draft resolutions since November 2009

Estonia introduced the Shareholder Rights Directive rules when the Commercial Code's and Other Acts' Amendment Act<sup>\*15</sup> was adopted, on the 21 of October 2009. The above-mentioned law entered into force on 5 November 2009.

Firstly, §293<sup>1</sup> of the Commercial Code<sup>\*16</sup> (hereinafter 'CC') was added to the code so as to regulate the draft resolutions submitted to the general meeting. Subsection 293<sup>1</sup> (1) of the CC provides that if the management board convokes the general meeting, the management board shall prepare a draft of the resolution in respect of each item on the agenda. According to §293<sup>1</sup> (2) of the CC, if the general meeting is convoked by the shareholders, they also have an obligation to prepare a draft of the resolution. The drafts shall be

<sup>12</sup> 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, pp. 1–25.

<sup>13</sup> The new directive deals mainly with such issues as the identification of shareholders (as shares in listed companies are often held through complex chains of intermediaries), institutional-investor engagement, institutional-investor investment strategy, transparency of asset managers and proxy advisers, shareholders' right to vote on the policy for remuneration of the management, and the transparency and approval of related-party transactions.

<sup>14</sup> D. Zetzsche. Die neue Aktionärsrechte-Richtlinie: Auf dem Weg zur Virtuellen Hauptversammlung. – *Neue Zeitschrift für Gesellschaftsrecht* 2007, p. 687.

<sup>15</sup> Äriseadustiku ja teiste seaduste muutmise seadus (Commercial Code's and Other Acts' Amendment Act). – RT I 2009, 51, 349 (in Estonian).

<sup>16</sup> Äriseadustik (Commercial Code). – RT I 1995, 26, 355; RT I, 17.11.2017, 22 (in Estonian).

submitted to the management board before issuing of the convocation notice for the general meeting, and the drafts may be additionally included in the convocation notice.

Subsection 293<sup>1</sup> (3) of the CC regulates shareholders' right to demand the modification of the agenda, and Subsection 4 foresees the threshold required for the exercise of those rights (1/10 for non-listed public companies and 1/20 for listed companies).<sup>\*17</sup> Subsection (4) also provides that the right to submit a draft of the resolution may not be exercised later than three days before the general meeting.

According to §293<sup>1</sup> (5) of the CC, a public limited company shall make the drafts and their substantiations (either prepared by the management board or submitted by the shareholders) available to the shareholders in the location determined by the public limited company. Subsection 5 points out that if the general meeting is convoked by the shareholders and they fail to make drafts available, this shall not constitute a material violation of the procedure of calling a general meeting.

Subsection 293<sup>1</sup> (6) of the CC stipulates the company's obligation to make the shareholders' drafts and substantiations, together with the drafts prepared by the management board with respect to additional items on the agenda, available to the shareholders immediately after their submission if these are submitted after the convocation notification.

Although the directive provides that the above-mentioned rules should be applicable only to listed companies, Estonia expanded the same regulation to all public companies and to a certain extent even to private limited companies. As of 22 April 2018, Estonia has 17 listed companies.<sup>\*18</sup> The number has remained more or less the same for several years now, and it is therefore clear that the above-mentioned changes in EU legislation were actually targeted at quite a few Estonian companies.

Estonian draft-resolution rules for private limited companies are mostly the same as for public limited companies.<sup>\*19</sup> The main difference is that the regulations pertaining to drafting and disclosure of resolutions consist of an opt-out set that can be excluded by the articles of association of a private company. As for the content of the regulations foreseen in the CC, the shareholders of a private limited company have the right to submit draft resolutions only when they request the amendment of the agenda.

According to the explanatory memorandum<sup>\*20</sup> on the law on the amendments, such an expansive introduction was justified by the need to offer electronic participation to all shareholders of Estonian companies, to give shareholders the opportunity to exercise their rights better, to simplify companies' management, and to allow shareholders to access the necessary information through the Internet.<sup>\*21</sup> The explanatory memorandum neither justifies the choice of implementing detailed regulations for shareholders' meetings for private limited companies nor explains why the opt-out regulation was chosen. When one takes into account that freedom of contract should apply to Estonian private limited companies in general,<sup>\*22</sup> a clear justification should have been presented in the explanatory memorandum, to clarify why such intensive intervention in a company's internal affairs was necessary.

The authors of this paper are of the opinion that the opt-out rules cannot be considered a reasonable choice for private limited companies. In practice, it has produced a number of problems. Among others, it meant that for all private limited companies already in existence, these rules came into force by the adoption of the new law. This meant, for example, that if a private limited company wanted to exclude the formalised rules for draft resolutions via its articles of association, the meeting of shareholders in order to change the articles of association had to be convened in compliance with the same unwanted rules foreseen in the law. There was another problem with regard to the online formation of companies. In cases of online registration, founders can use only a template form<sup>\*23</sup> for the articles of association, but for a long time that template form did not allow for the possibility of excluding the rigid rules for draft resolutions. Therefore, if the company was established online, it had, in order to exclude the above-mentioned rules, to change the articles of association after the company was entered in the commercial register.

<sup>17</sup> The threshold of 1/20 for listed companies is derived directly from the requirements of the directive.

<sup>18</sup> This includes the Baltic Main List and Baltic Secondary List (see <http://www.nasdaqbaltic.com/market/?pg=issuers&lang=en>).

<sup>19</sup> See Article 171<sup>2</sup> of the CC, respectively.

<sup>20</sup> Draft Law on Amendments to the Commercial Code and Other Acts (466 SE). Explanatory memorandum. Available at <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/041369ed-82db-4840-cb2a-28eb744989d2/%C3%84riseadustiku%20ja%20teiste%20seaduste%20muutmise%20seadus> (in Estonian).

<sup>21</sup> *Ibid.*, para. 2.

<sup>22</sup> K. Saare, U. Volens, A. Vutt, M. Vutt. *Ühinguõigus I. Kapitaliühingud* ['Company Law I: Limited Companies']. Tallinn: Juura 2015, pp. 110–111.

<sup>23</sup> The template form has been set up by Appendix 15 to Regulation of the Ministry of Justice 59, from 28.12.2005, titled 'Procedure for Submitting Documents to Court' (Kohtule dokumentide esitamise kord). – RT I, 23.02.2018, 3 (in Estonian).

Before the introduction of the rules on draft resolutions and their disclosure derived from the directive, the CC already included rules for providing shareholders with information about the items put on the agenda of a general meeting. According to §294 (4) ((5)) (in force before 5 November 2009), the supervisory board had an obligation to submit its proposal for each item on the agenda. The proposal had to be included in the convocation notice. The above-mentioned section also provided that if the agenda of a general meeting includes the approval of the annual report, amendments to the articles of association, or consent to a contract, the place where it is possible to examine those documents (the annual report, the draft of the articles of association, and/or the contract) should be indicated in the notice.

One must admit as a conclusion that the legal regulation of draft resolutions in Estonian company law has been rather arbitrary. It does not take into account the difference between the legal form of a private and a public limited company. As the private limited company should be considered a legal form for small and medium-sized companies, it should not be overregulated. On the other hand, most Estonian public limited companies are rather small entities with small shareholdings as well, and therefore the overregulation of the procedural aspects of their general meeting is likewise not reasonable.

## 4. Regulation of draft resolutions in other European countries

Estonian law (including company law) is representative of the continental legal system and the German legal family. Therefore, it would systematically be relevant firstly to compare rules in respect of drafting resolutions and making them available to shareholders that are foreseen in the CC with those applicable under German company law.

In German legal literature, it has been pointed out that the law regulating public companies is strict and mostly mandatory in its nature. The law on private companies, on the other hand, is much more liberal and allows flexibility. It has been argued that the starting point and an initial model for a limited-liability company was the public company but that it soon became evident that the strict rules foreseen for public companies were not suitable for smaller companies and that overregulation can hence become a serious obstacle to business. Therefore, the main principle for a German private limited company is contractual freedom in inner relations (meaning in relations between the shareholders and in the internal constitution of the company).<sup>\*24</sup> Among German public limited companies, there is a distinction between listed and non-listed companies.<sup>\*25</sup> The distinction between listed and non-listed companies was introduced to German law with adoption of the Control and Transparency Act,<sup>\*26</sup> which came into force on 1 May 1998.<sup>\*27</sup> The legal literature has strongly expressed the view that, in fact, the legislation should be liberalised with regard to non-listed public companies as well.<sup>\*28</sup>

However, many regulations pertaining to shareholders' right to submit draft proposals, as well as the right to receive information about the drafts of either other shareholders or the management board, are expanded to all German public companies. It has been explained in German legal literature that the law regulating public companies has been designed for large listed companies and that, therefore, these strict rules might not always be suitable for smaller and non-listed public companies.<sup>\*29</sup>

The requirements arising from the Shareholder Rights Directive were introduced into the Aktiengesetz<sup>\*30</sup> (hereinafter 'AktG') with an adoption law implementing the Shareholder Rights Directive.<sup>\*31</sup>

<sup>24</sup> T. Drygala, M. Staake, S. Szalai. *Kapitalgesellschaftsrecht. Mit Grundzügen des Konzern- und Umwandlungsrechts*. Heidelberg: Springer 2012, pp. 16–17.

<sup>25</sup> The distinction is derived already from Subsection 3 (2) of the Aktiengesetz (AktG), which foresees that the companies listed on the stock exchange are those public limited companies whose shares have been admitted to a market that is regulated and supervised by state-recognised authorities and that is active regularly and is directly or indirectly accessible to the public.

<sup>26</sup> Gesetz zur Kontrolle und Transparenz im Unternehmensbereich (KonTraG) vom 27. April 1998.

<sup>27</sup> W. Goette, M. Habersack, S. Kalss. *Münchener Kommentar zum AktG, 4. Auflage*. Munich: Verlag C.H. Beck 2016. – Heider, AktG §3, Rn 41.

<sup>28</sup> T. Drygala, M. Staake, S. Szalai (Note 24), pp. 16–17.

<sup>29</sup> *Ibid.*, pp. 262–263.

<sup>30</sup> Aktiengesetz vom 6. September 1965 – BGBl. I S. 1089; BGBl. I S. 2446.

<sup>31</sup> Gesetz zur Umsetzung der Aktionärsrechterichtlinie vom 30. Juli 2009. – BGBl. I S. 2479.

The disclosure of shareholders' proposals to amend the agenda and also of draft resolutions submitted by shareholders are regulated in Section 124 of the AktG. Subsection 124 (1) of the AktG stipulates that if a minority have requested that a new item be added to the agenda, this item shall be disclosed either upon calling the meeting or immediately after the request is received. If the shareholders' meeting is required to adopt a decision on an amendment of the articles of association or on an agreement that becomes effective only with the consent of the shareholders' meeting, the text of the proposed amendment of the articles or the essential content of the agreement shall be published as well (Subsection 124 (2) of the AktG).

With respect to each item on the agenda that is to be decided on by the shareholders' meeting, the management board and the supervisory board – but in the case of the election of members of the supervisory board and auditors, only the supervisory board – shall compose drafts for the respective resolutions. The proposal for the election of members of the supervisory board or auditors shall state the name, profession, and place of residence of the proposed candidates (Subsection 124 (3) of the AktG). According to Subsection 124 (4) of the AktG, no resolution may be adopted in respect of items that have been put on the agenda but have not been duly disclosed.<sup>\*32</sup>

Section 126 of the AktG regulates the obligation to disclose the drafts submitted by oppositional shareholders in opposition to the drafts drawn up by the management board and thereby is aimed at informing shareholders of intended opposition.<sup>\*33</sup> Subsection 126 (1) of the AktG stipulates that draft proposals submitted by shareholders (together with the shareholder's name, the grounds, and the position taken by the management) should be made available. Prerequisite to the disclosure is the shareholder sending (to the address indicated in the convocation notice), at least 14 days before the meeting, a counter-proposal to a draft of the management board as regards an item on the agenda. Listed companies must provide access to this information via the company's Internet site.

Thus German law, as well as German legal literature, distinguishes between the shareholders' draft proposals and the so-called counter-proposals. If a shareholder wishes to put an additional issue on the agenda, he must submit his draft proposal before the general meeting within the time period prescribed by law. However, if a shareholder wishes to submit his proposal as an alternative to a draft of the management board on an item already included on the agenda, it is considered a counter-proposal that may also be submitted at a general meeting.<sup>\*34</sup> In comparison of Estonian and German company law, the main difference is that German law distinguishes between drafts and counter-drafts in the same way the directive does. German rules are aimed at informing shareholders without imposing restrictions as to when proposals should be submitted. Estonian law, on the other hand, focuses on the deadline for submitting any draft, and such rules do not guarantee better information for shareholders; in consequence, the opportunity to submit counter-drafts at a meeting is excluded.

It is important to note that Germany has not expanded the complicated regulation of draft resolutions, counter-drafts, and their publication derived from the directive to private limited companies. It has been expressed in German legal literature that a private limited company is an entity that will be set up with the entry into of a contract. Even though this contract does not establish an exchange of services (rights and obligations of individuals with regard to each other) in the sense of an ordinary contract, something new, a 'superindividual community of persons', is established. However, the articles of association are nonetheless of a contractual nature.<sup>\*35</sup> It has been pointed out also that German private limited companies can be characterised as companies with few shareholders, all of whom have a strong relationship with the company: they usually either participate in the day-to-day management of the company or are employees of it.<sup>\*36</sup>

German company law does not foresee any specific rules on draft resolutions for private limited companies. Subsection 51 (1) of the GmbHG<sup>\*37</sup> foresees only that a shareholder meeting shall be convened by

<sup>32</sup> However, publication shall not be required for the adoption of a resolution to call another shareholders' meeting or for proposals made in respect of items on the agenda, and for deliberations without adoption of a resolution.

<sup>33</sup> U. Hüffer, J. Koch. Aktiengesetz. 12. Auflage 2016. - Koch, AktG §118, Rn 1.

<sup>34</sup> T. Drygala, M. Staake, S. Szalai (Note 24), pp. 483–484.

<sup>35</sup> H. Gummert, L. Weipert (Herausg.). *Münchener Handbuch des Gesellschaftsrechts Bd. 14. Auflage 2014 1. Teil Die BGB-Gesellschaft* 2. Kapitel. Rechtliche Grundlagen § 6 Verpflichtung auf den gemeinsamen Zweck. Rn. 4.

<sup>36</sup> F. Wedemann. *Gesellschafterkonflikte in geschlossenen Kapitalgesellschaften*. Beiträge zum ausländischen und internationalen Privatrecht 99. Tübingen: Mohr Siebeck 2013, p. 11.

<sup>37</sup> Gesetz betreffend die Gesellschaften mit beschränkter Haftung in der im Bundesgesetzblatt Teil III, Gliederungsnummer 4123-1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 10 des Gesetzes vom 17. Juli 2017 (BGBl. I S. 2446) geändert worden ist.

an invitation sent to the shareholders by registered letter, which must be sent at least one week in advance. General minority rights in respect of the meeting are regulated in Subsection 50 of the GmbHG, which foresees that shareholders whose shares together constitute at least one tenth of the share capital shall be entitled to request that a meeting be convened, stating the purpose and the grounds therefor (Subsection 50 (1) of the GmbHG). The same applies for shareholders' right to request that matters on which resolutions are to be adopted at the meeting be disclosed (Subsection 50 (2) of the GmbHG). These are the same general rules that were already present in the Estonian CC before harmonisation for the Shareholder Rights Directive.

The United Kingdom has implemented the rules on draft resolutions in its company law only for listed companies. The Companies Act 2006<sup>\*38</sup>'s Section 311A was added with the Shareholders' Rights Regulations, which came into force on 3 August 2009.<sup>\*39</sup> As for the drafts submitted by shareholders, the only legal requirement is that they be made available on the website of the company after the first date on which notice of the meeting is given (Subsection 311A (1) (d)). There are no specific procedural or material limitations foreseen by the law.

It is relevant to analyse in addition the rules recommended in the European Model Company Act (hereinafter 'EMCA'), so as to find out whether the model act includes guidelines foreseen for shareholders' right to submit draft resolutions alternative to those presented by the management board or supervisory board and, if so, to what extent.

The EMCA points out that in large companies with many shareholders there is the risk of opportunistic behaviour by the board. Increased internationalisation of ownership means that shareholders would rather not be physically present at the general meetings and, therefore, incentives are needed to ensure and facilitate shareholders' active participation in general meetings. Therefore, the law has to ensure that shareholders have and take the opportunity to attend and vote in the meetings by electronic means.<sup>\*40</sup>

With regard to the core topic of this article, the EMCA does not foresee any recommended rules. It only regulates electronic participation, proxy voting, etc. Section 11.13 stipulates that a shareholder shall be entitled to propose specific issues for inclusion on the agenda of the general meeting, but this is a common rule that was applicable in Estonia already before the directive was even adopted.

Section 11.19 (1) foresees that in public companies, the agenda, the full text of any proposal, and all documents are to be submitted to the general meeting and that all those documents shall be available for shareholders inspection at least three weeks prior to the date of the meeting. In companies with shares traded on a regulated market, all documents shall be available on the company's website. Section 11.19 (3) stipulates that a public company shall make available to its shareholders the draft resolution or, when no resolution is proposed to be adopted, a comment from the competent body of the company, for each item on the proposed agenda.

According to Section 11.18 (1 b), a convocation notice shall, among other matters, specify the agenda. If a proposal to amend the articles of association has been submitted, the text of the proposed alteration shall be specified too. In the same subsection, 1 d provides that a convocation notice shall also include information about where and how documents submitted to the general meeting and draft resolutions may be obtained or are available.

The comparison above shows that the Member States covered by the article have not extended the complex and technical rules on shareholder draft proposals to small companies and in most cases have not even extended them to non-listed public companies. Although Germany has introduced corresponding rules for all public companies, this has been criticised in the associated legal literature.

## 5. Estonian case law and the results of the expansive application of the draft-resolution rules to small companies

Since the introduction of the regulations pertaining to draft proposals and counter-proposals by shareholders, the Estonian Supreme Court has made three decisions on this matter. Two of them addressed shareholders' right to propose new candidates of the members of the supervisory board at the general meeting

<sup>38</sup> Companies Act 2006. Available at <https://www.legislation.gov.uk/ukpga/2006/46/data.pdf>.

<sup>39</sup> The Companies (Shareholders' Rights) Regulations 2009. – Statutory Instruments 2009, No. 1632, 'Companies'. Available at [http://www.legislation.gov.uk/uksi/2009/1632/pdfs/uksi\\_20091632\\_en.pdf](http://www.legislation.gov.uk/uksi/2009/1632/pdfs/uksi_20091632_en.pdf).

<sup>40</sup> P.K. Andersen et al. (Note 7), p. 235.

of a public (but not listed) company. One case involved drafting and disclosure of resolutions in a private limited company.

The first of the decisions was made on 28 April 2014.<sup>\*41</sup> The plaintiff was the largest shareholder of the public (but not listed) company in question, owning approx. 44% of the company's shares. The management board sent the convocation notice to the shareholders, and, according to the notice, one of the items on the agenda was the election of the supervisory board members. The general meeting took place, and the shareholders had the possibility of voting for five candidates, proposed by the management board, to fill five vacant places. The proposal received approx. 56% of the votes represented at the meeting, and the chairman of the meeting declared that the decision was adopted.

The plaintiff argued the above-mentioned decision to be unlawful because, although the plaintiff proposed his own candidates for the voting, alongside the candidates nominated by the management board, the chairman did not allow them in the voting, claiming that the plaintiff should have submitted his alternate draft decision (i.e., candidates) at least three days before the meeting.<sup>\*42</sup> The plaintiff was of the opinion that the decision of the general meeting should be declared null and void since the shareholders were not allowed to vote for his candidates.

So the parties argued about a simple legal question: may a shareholder just arrive at the general meeting and propose alternate candidates for the supervisory board there, or must he compose a formal draft resolution before the meeting and submit it to the management at least three days before the meeting?

The county court ruled that the decision of the general meeting should not be declared null and void, because a shareholder who wants to suggest alternate candidates has to follow the rules in the CC about drafting the proposal and submitting it prior to the meeting. The district court was of the opposite opinion and stated that the rules about draft resolutions derived from §293<sup>1</sup> (4) of the CC are not applicable in cases of election of persons and that alternate candidates may also be suggested directly at a general meeting. The district court pointed out that it is not in the interest of shareholders if the list of candidates were to be closed already before the meeting.

The Supreme Court of Estonia, however, agreed with the county court and ruled that the questionable resolution passed at the meeting was not null and void. The Supreme Court was of the opinion that the purpose behind the rules on shareholders' draft resolutions was to ensure that the draft is made available to all shareholders before the general meeting and thus enables them to prepare themselves better for the meeting.

The civil chamber of the Supreme Court considered that the legislator had not separately regulated the issues of draft resolutions in the case of personal elections and concluded, therefore, that the same rules apply as for other decisions. The Supreme Court admitted that the extension of the rules on draft resolutions foreseen in the Shareholder Rights Directive to all public limited companies might not have been reasonable in light of the specifics of Estonian public limited companies (small numbers of shareholders and large shareholdings) but explained that the rules established in the CC still apply to all public companies.<sup>\*43</sup>

This interpretation by the Supreme Court means that the election of supervisory board members of a public limited company has become rigid and shareholders must take into account that if they fail to submit their candidate proposals in time, they have no right to demand that their candidates be admitted to be voted for at the meeting.

The fundamental mistake in the position taken by the Supreme Court is the same that derives from Estonian statutory law – it does not distinguish between supplementing the agenda and submitting a draft proposal on an item that is already on the agenda as an alternative to the draft prepared by the management board. In the case analysed above, the question was about submitting a counter-proposal, and therefore the Supreme Court's approach whereby no candidates other than those proposed before the meeting could be voted on at the general meeting is not justified. In consequence of such an interpretation, the general meeting is no longer a forum where a substantive discussion takes place but simply a place where the votes are cast. Such an approach is in conflict with the fundamental principles of company law and the nature of a general meeting.<sup>\*44</sup> According to the point of view of the Supreme Court, the general meeting can now be considered

<sup>41</sup> CCSCd 3-2-1-23-14, *Bank of Moscow v. Aktsiaselts Eesti Krediidipank*.

<sup>42</sup> As has already been mentioned, §293<sup>1</sup> (4) of the CC provides that shareholders may submit to the public limited company a draft of the resolution in respect of each item on the agenda, but the right specified may not be exercised later than three days before holding of a general meeting.

<sup>43</sup> CCSCd 3-2-1-23-14, para. 20.

<sup>44</sup> See, for example, U. Hüffer, J. Koch (Note 33). – Koch, AktG § 118, Rn 1.



a mere formality. It has been noted in legal literature that general meetings of companies must be conducted in accordance with good practice.<sup>\*45</sup> Procedures wherein shareholders are not allowed to make any substantive proposals during the meeting and only the proposals made available before the meeting can be voted on (according to the 'take it or leave it' principle) cannot be considered good practice. The aim with the directive was to ensure greater involvement of shareholders, but the outcome of the Supreme Court's judgement is exactly the opposite. The authors of this article are of the opinion that the approach taken by the Supreme Court is therefore not justified, as it does not correspond to the original aims for the directive.

On 29 November 2017, the Supreme Court made another decision regarding the election of the supervisory board of a public limited company and submitting one's candidates via draft resolutions.<sup>\*46</sup> The circumstances of the case were the following. In a public limited (but, again, not listed) company, a general meeting of shareholders was to be held, for which the election of members of the supervisory board was on the agenda. The company's management board had submitted its proposals for the candidates for the members of the supervisory board at the calling of the general meeting. The convocation notice included a remark that in all circumstances connected with the meeting, a shareholder should contact the designated member of the management board. Also, the telephone number of that person was included in the notice.

The plaintiff (a shareholder of the company) sent his draft decision via e-mail to the management board and proposed his candidates for voting at the general meeting. At the meeting, it then turned out that another shareholder had proposed candidates for the vacant places on the supervisory board as well. At the general meeting, both the candidates proposed by the management board and the candidates of the other shareholder were put to the vote. All candidates received the same number of votes. The chairman of the meeting refused to admit the plaintiff's nominees to be voted upon, arguing that the draft decision was submitted too late.

After the meeting, the plaintiff claimed that the decisions of the general meeting should be declared null and void as:

- 1) he was not properly informed of the other shareholder's candidates before the general meeting and
- 2) the company (the defendant) refused to put the plaintiff's candidates to a vote and this is a material breach of the procedure for the convocation of a general meeting, which makes the decisions adopted at the general meeting null and void.

The county and district court agreed with the plaintiff and satisfied the claim. The courts pointed out that a public limited company has an obligation to make the draft resolutions submitted to it available to shareholders at a place designated by the public limited company. If they are not made available, this violation constitutes a material breach of the procedure for convening a general meeting, which leads to the nullity of the decisions adopted at the meeting.

Both courts were of the opinion that the fact that the plaintiff could have received information by ringing the telephone number included in the convocation notice was not relevant. The possibility given to the plaintiff to call and ask for information does not preclude the board's obligation to disclose drafts to shareholders, and the notification of the telephone number of the member of the management board indicated in the convocation notice was not enough for fulfilling of the obligation to make the drafts available to shareholders. The courts pointed out that the failure to disclose the information about the resolution drafts in the notice of the general meeting is a significant violation, which prevents shareholders exercising their voting rights, and, therefore, the decision is void for reason of a material breach of the procedure for convening a general meeting.

The Supreme Court agreed with the courts of the first and second instance and noted that, indeed, the notice of the disputed general meeting should have included information on where a shareholder could receive information about the drafts submitted by shareholders.<sup>\*47</sup> So one can conclude that with the second case the Supreme Court repeated its previous arbitrary interpretation that if a shareholder fails to submit its candidates for the supervisory board in time, it forfeits the possibility to submit its candidates at the general meeting.

On 24 May 2017, the Supreme Court made a decision on draft resolutions, concerning a private limited company.<sup>\*48</sup> The plaintiff (a shareholder of the company) alleged that a material violation of the procedure

<sup>45</sup> See, for example, K. Eklund, D. Stattin. *Aktiebolagsrätt och aktiemarknadsrätt*. Uppsala: Iustus förlag 2013, p. 170.

<sup>46</sup> CCDCd 2-16-8010, *Bütfering and Bütfering v. LOGiT Eesti AS*.

<sup>47</sup> CCSCd 2-16-8010, para. 10.

<sup>48</sup> CCSCd 3-2-1-44-17, *Sarapuu v. Vedelgaas OÜ*.

took place when the meeting of the shareholders was convened. The shareholder was of the opinion that the requirements for drawing up draft decisions and making them available were not met and that this rendered the decisions of the meeting null and void. The plaintiff pointed out that, according to the law<sup>\*49</sup>, draft decisions composed by the management must be accessible at least from the notification of the meeting to the day the meeting is held. Also, the convocation notice did not indicate the place where shareholders could acquaint themselves with the draft decisions.

The defendant argued that the procedure for convening the meeting was not violated to such an extent that the decisions should be considered null and void. Both before the meeting and at the time of the meeting, the plaintiff himself was a member of the defendant's management board, and he participated in the preparations for the meeting. Therefore, the applicant was well aware of the issues to be discussed at the meeting and, equally, of the draft decisions. The applicant also participated in the meeting.

Both the county court and the district court agreed with the defendant that, although draft decisions must be made available to shareholders, there is no obligation to send drafts to shareholders with a notice of the meeting. The district court pointed out that the plaintiff, being himself a member of the management board of the company, could not rely on the fact that drafts had not been made available. The Supreme Court annulled the decision of the district court partially, but the reason for doing so was not related to the draft-resolution rules.<sup>\*50</sup>

The authors are of the opinion that, in light of the arguments of the defendant, the above-mentioned case shows how unnecessary the rules on draft resolutions are for a simple private limited company, where the shareholders usually are also the members of the management board. Small companies do not need the same kind of legal remedies as large companies, and rules regulating draft resolutions simply provide an opportunity to file an action against the company for formal reasons.

## 6. Conclusions

The main aims for the Shareholder Rights Directive were to enhance the shareholder participation in corporate governance, to give shareholders better opportunities to be informed about the matters concerning the general meeting, and to enable them to put items on the agenda.

One can conclude that the result of the transposition of the Shareholder Rights Directive is that many Estonian private limited companies and also public but not listed companies have the rather burdensome obligation to follow the formalised rules on draft resolutions and their disclosure. It seems that Estonia has, in its position as one of the Member States, regrettably, forgotten the real objectives behind the directive, for the rules now in place have instead increased unnecessary bureaucracy in smaller companies without yielding better information and involvement of shareholders in the management. It is obvious from analysis of the rules on draft resolutions derived from the directive that those rules originally were strongly related to the opportunity given to shareholders to cast their votes before the meeting (by mail or electronically), but in drafting and implementation of the respective rules in Estonia, this aim has been forgotten.

Although the Supreme Court of Estonia had an opportunity to interpret the respective regulations reasonably, it has chosen a rather formal approach instead and applied the law in quite possibly the most burdensome way for Estonian companies and contrary to the aims for the directive as the source of those regulations.

Proceeding from the above, the authors of this article take the stance that there is a need to change the rigid rules on draft resolutions that have been forced on Estonian small companies. The present mandatory rules on draft resolutions should be applicable to listed companies only. All other public limited companies should be given an opt-in option. As for private companies, the law should clearly set out the possibility of stipulating the appropriate rules in the articles of association of the company.

<sup>49</sup> See Subsection 171<sup>2</sup> (4) of the CC.

<sup>50</sup> See CCSCd 3-2-1-44-17, paragraphs 20–26. The main reason the Supreme Court annulled the decision was mostly procedural, as the courts of first and second instance did not analyse the alternate claim of the plaintiff.