PARTICIPATION IN A SHAREHOLDERS' MEETING VIA MEANS OF ELECTRONIC COMMUNICATION

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1. Participation in a shareholders' meeting via means of electronic communication is otherwise called participation in a shareholders' meeting at a distance, and means participation without physical presence of a participant in a place of a shareholders' meeting of a company.

2. The first Polish regulation pertaining to this issue comes from 2009, when Art. 406(5) § 1 was added to the Polish Code of Commercial Companies. It foresaw that a statute of a joint stock company may allow participation in a shareholders' meeting via means of electronic communication. Before that amendment a physical presence at a place of a meeting was required in order to participate in a shareholders' meeting, whether in person or via a proxy. Additionally some other aspects were regulated in the subsequent paragraphs of Art. 406(5). Analogous provisions were introduced in a regulation of a limited liability company.

The new provisions were very rarely used. When we look for example at companies whose shares are listed on the main market of the Warsaw Stock Exchange, out of more than 500 companies probably only a handful (less than five) actually amended their statutes to allow participation in a shareholders' meeting via means of electronic communication. There was also not much interest among shareholders of those companies. The biggest worries, whether by companies or shareholders, circulated around potential technical issues, including the internet lag, and the resulting legal complications.

3. An important change came with the outburst of the covid pandemic. Covid became a great opportunity to familiarize companies and shareholders with participation in a shareholders' meeting via means of electronic communication. In view of sanitary regulations restricting all types of gatherings during the pandemic, including shareholders' meetings, the existing legislation pertaining to participation in a shareholders' meeting via means of electronic communication was subject to a fast track liberalization. It was almost a U-turn. Since 2020, under the new wording of Art. 406(5) § 1 of the Polish Code of Commercial Companies, participation in a shareholders' meeting via means of electronic communication became permissible by virtue of law, while a statute of a joint stock company might state otherwise, prohibiting or limiting that possibility.

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Still, it was not a full U-turn. The new second sentence of Art. 406(5) § 1 of the Polish Code of Commercial Companies foresaw that an ultimate decision, allowing participation via means of electronic communication in a specific shareholders' meeting or excluding it, is to be made, when a specific meeting is being convened, by an entity or person convening that meeting. Obviously, this serves to adjust the general rule to the real needs in a specific case, to ensure that it is not a costly overkill, overburdening companies, as well as to take into account potential technical obstacles existing in specific situations.

The opportunity afforded by the covid pandemic was not fully utilized. Simultaneously with the said amendment, a legislator prolonged the six months period after the end of a financial year to hold an annual shareholders' meeting. Consequently, before the period to hold such a meeting expired in 2020, the sanitary restrictions were already relaxed to the point it became fully possible for companies to hold annual shareholders' meetings in 2020 with physical presence of their shareholders, ie. without recourse to participation via means of electronic communications. An opportunity was somehow lost.

Today, if we gauge the popularity of participation in a shareholders' meeting via means of electronic communication on the example of companies whose shares are listed on the main market of the Warsaw Stock Exchange, among 18 companies that are Polish law governed and that are part of the main index of the Warsaw Stock Exchange WIG20, participation in the the most recent shareholders' meeting via means of electronic communication was possible in case of 7 companies. That makes around 40% of companies.

Contrary to initial expectations, the main group of those participating via means of electronic communication are not small shareholders. These continue to show the so-called rational apathy, being deterred from participation in a shareholders' meeting by numerous factors, including cost of such participation. Thus those participating in a shareholders' meeting via means of electronic communication are mainly institutional investors. They want to be active at the shareholders' meetings, but at the same time look for options to cut costs and the nuisance of traveling, in particular traveling intercity.

Analogous regulation applies to all types of companies existing under Polish law, which are now a joint stock company, a limited liability company (Art. 234(1) of the Polish Code of Commercial Companies) and a simple joint stock company (Art. 300(92) of the Polish Code of Commercial Companies).

4. What may be done in the near future to make participation in a shareholders' meeting via means of electronic communication more popular?

A number of actions may be considered here. Some of them need to take the form of amendments to the provisions of law. In other cases, a better way is making amendments to the respective codes of good corporate practices (typically binding on companies like stock exchange listed companies on a comply or explain basis).

a) introduction of a sufficient, minimal time for giving a vote, to make sure that even a vote that is, due to internet lag or other technical issues, slightly delayed, is obtained before voting is formally ended;

b) introduction of an obligation to organize a moot meeting to enable willing shareholders to test the system and its technical requirements before the actual meeting;

c) obligation to stream, as part of the transmission from a shareholders' meeting, also the exact time at a place of a meeting, thus allowing a shareholder participating via means of electronic communication to verify the existence of the internet lag, if any, by comparing it with his own time measurement;

d) grant of the right to appeal the shareholders' resolution to the court, to a shareholder that participated in at least part of a shareholders' meeting via means of electronic communication, but for whatever reason (including but not limited to technical obstacles as this reason may be difficult to prove) did not vote;

Please note that at present, under Polish law, in order to have the right to appeal the shareholders' resolution to the court, in principle a shareholder needs to vote against the resolution as well as demand that his opposition is minuted.

e) express confirmation in the provisions of law that the statute or other company document may in a binding manner specify which circumstances pertaining to the use of means of electronic communication are the responsibility and risk of a company and which are the responsibility and risk of a shareholder participating in a shareholders' meeting via such means;

f) express confirmation in the provisions of law that a shareholders' meeting may proceed even if further participation in a shareholders' meeting by shareholder or shareholders participating via means of electronic communication becomes impossible due to reasons that are the responsibility of neither a company nor such shareholder or shareholders;

g) introduction of appropriate measures to ensure legitimacy of participants and prevent internet scams like stolen identity;

It may take the form of registration of email addresses of shareholders as part of a shareholders' register, combined with introduction in the provisions of law of an irrefutable presumption that a person using a link sent by a company to such email address, in order to participate in a shareholders' meeting, is a given shareholder of a company or at least a person authorized to represent a given shareholder.

h) making it easier to register for participation in a shareholders' meeting via means of electronic communication, for example by registration in a shareholders' register of email addresses of shareholders or enlisting for such participation already at a time of issuance by an entity running a securities account of certificates confirming the right to participate in a shareholders' meeting.

5. Putting companies under an obligation to allow participation in a shareholders' meeting via means of electronic communication, irrespective of a position in this respect of an entity or person convening a meeting?

Simultaneously with the steps discussed before, the legislator may consider putting companies under an obligation to allow participation in a shareholders' meeting via means of electronic communication, irrespective of a position in this respect of an entity or person convening a meeting. As discussed, at present, under Polish law, it is an entity or person convening a specific shareholders' meeting that makes an ultimate decision whether participation in that meeting via means of electronic communication will be allowed, unless the statute excludes or limits such possibility.

Imposition of an obligation may bring a much needed breakthrough in popularity of participation in a shareholders' meeting via means of electronic communication. Still, it should only go side by side with the steps discussed before, so that the companies and their shareholders are not pushed towards such participation despite existing risks and inconveniences pertaining now to such participation. The idea is to ensure the institution runs smoothly before we force everybody to use it.

It does not also mean that the obligation in question should immediately apply to all companies. For example, in the first step it may apply only to companies listed on the stock exchange, or only to those being part of a major index of such stock exchange. A good criterion would also be whether a company listed on a stock exchange holds a given shareholders' meeting outside of the seat of the stock exchange, which should trigger the obligation to allow participation via means of electronic communication to offset the additional difficulties. In turn what would not make a good criterion is the subject matter of a shareholders' meeting, with certain items on the agenda triggering the obligation to allow participation via means of electronic communication.

Imposition of an obligation would also need to be structured in a way to ensure continuing technological neutrality as it is a precondition for further technological improvements. Also, some other questions remain to be answered here, like for example to what extent an obligation should apply if a shareholders' meeting is convened not by a company but by some other entity or person like a shareholder acting upon authorization from the court. On one hand it shouldn't be possible to circumvent an obligation in this way, but also it should not work as an impediment for exercise of minority rights.

Certainly, small steps are better here than one bald move, and they are also much better than doing nothing.

6. In a more distant future, a shareholders' meeting held only via means of electronic communication?

This is certainly the ultimate direction. Still, for now it should not be legally possible, because of concerns over digital exclusion, in particular of an older part of society.

In a shareholders' meeting held only via means of electronic communication there will be no physical place of a meeting and thus no possibility to take part in

that meeting physically, not even for a person opening a meeting or presiding over that meeting.

This will bring new questions to the table and revolutionize regulation over issues like minuting the meeting, position of a notary public at the meeting etc.

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