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IMPACT OF THE COVID LAW OF 20 DECEMBER 2020 ON THE ORGANISATION OF GENERAL MEETINGS IN COMPANIES AND ASSOCIATIONS

During the first wave of the Covid-19 pandemic, the question arose of the possibility to organise remote general meetings by electronic means, in the absence of statutory provisions. Royal Decree No. 4 of 9 April 2020, as amended by Royal Decree of 28 April 2020, provided for temporary solutions.

In the meantime, the Belgian legislator acknowledged the progress made in relation with remote general meetings and decided to make certain rules permanent.

On 20 December 2020, the law on temporary and structural provisions in the field of justice in the context of the fight against the spread of the coronavirus COVID-19 (the Covid Law) has been adopted. It provides for both final and temporary rules, in particular with respect to the organisation of general meetings of shareholders/members. Regarding this topic, the Covid Law entered into force on the day of the publication in the Belgian State Gazette, i.e. on 24 December 2020.

1. New final rules

Resolutions in writing

Prior to the Covid Law, the BCCA provided that shareholders of BV/SRL, CV/SC and NV/SA could, unanimously and in writing, take all decisions which belong to the powers of the general meeting, except those which must be taken before a notary public. The BCCA did not provide for this possibility for (international) not-for-profit associations.

Now, the Covid Law admits this possibility for both companies and associations, except for decisions that require the amendment of the articles of association (articles 22, 26, 31, 36 and 40, amending articles 5:85, 6:71 and 7:133 of the BCCA and inserting new articles 9:14/1 and 10:6/1 in the BCCA).

The impact of this amendment is limited for companies since, on the one hand, this possibility already existed and, on the other hand, decisions of the general meetings that require a notarial deed practically coincide with amendments by the general meeting of the articles of association.

However, this amendment is far-reaching for associations as it introduces a new way for general meetings to take decisions, except for amendments of the articles of association, which continue to require a meeting, even if no notarial deed is required. The requirement of unanimity might however be difficult to achieve in big associations.

E-voting

Prior to the Covid Law, the BCCA provided that shareholders of BV/SRL, CV/SC and NV/SA could participate and vote remotely by electronic means of communication (for example, via videoconference, conference call, webcast, etc.). However, the possibility to use this procedure in the absence of an explicit authorization in the articles of association was disputed. In addition, the BCCA contained several restrictions: (i) this procedure required to control the quality and the identity of the shareholders; (ii) it required to allow shareholders to follow directly, simultaneously and continuously the discussions (but shareholders could participate in the deliberations and ask questions only when the articles of association so provided) and (iii) members of the bureau, directors and statutory auditor(s) could not participate remotely. The BCCA did not expressly provide for this possibility for (international) not-for-profit associations.

Now, the Covid Law expressly admits the possibility for the administrative body to organise electronic general meetings in both companies and associations, even in the absence of provisions in the articles of association. In addition, electronic participation is now available to directors and statutory auditors (but not to members of the bureau). The electronic means of communication must always enable shareholders/members to participate remotely in the deliberations and ask questions (and not only when the articles of association so provide) (articles 23, 27, 32, 37 and 41, amending articles 5:89, 6:75 and 7:137 of the BCCA and inserting new articles 9:16/1 and 10:7/1 in the BCCA), subject to the temporary exception below.

This procedure still requires the identification of shareholders/members and the real-time monitoring of the meeting.

As in the past, electronic participation is optional: shareholders/members remain free to participate physically in the meeting (subject to sanitary rules).

Where the company/association has a website, the procedures relating to remote participation have to be made available on such website to those entitled to participate in the general meeting (and in listed companies, to all).

2. New temporary rules

According to the Covid Law, until 30 June 2021, the administrative body can justify in the convening notice of an electronic general meeting that it will not be possible for shareholders/members to participate remotely in deliberations and ask questions (articles 24, 28, 33, 38 and 42, temporary amending articles 5:89, § 1, par.3, 6:75, § 1, par.3, 7:137, § 1, par. 3, 9:16/1, § 1, par. 3 and 10:7/1, § 1, par. 3 of the BCCA).

In that case, shareholders/members will only be able to follow the discussions and to vote electronically; questions will have to be asked in writing in advance, and answers will be given during the general meeting without enable shareholders/members to participate actively to the deliberations.

This temporary rule is intended to enable companies/associations to hold remote general meetings in the coming months even if they do not yet have an electronic means of communication that allows all shareholders/members to take part in the deliberations and ask questions during the remote meeting.

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