European Journal of Law and Public Administration
ISSN: 2360-6754 | e-ISSN: 2559-7671
Covered in: Erih Plus; HeinOnline; CEEOL; RePEc; CrossRef; Google Scholar; KVK; WorldCat; ICI Journals Master List - Index Copernicus; EBSCO.

2023, Volume 10, Issue 2, pages: 83-94 | https://doi.org/10.18662/eljpa/10.2/211

Decisions of the General Meeting of Shareholders in a Limited Liability Company, Legislative and Doctrinal Aspects

Gabriela LEUCIUC [1]

[1] PhD Lecturer, Faculty of Economics and Business Administration, „Ştefan cel Mare" University, Suceava;
gabriela.leuciuc@usm.ro

Abstract: *The decisions of general meetings embody the social will, which is forged in the course of debates through the joint, collegial effort of the participating members, driven by a unitary interest of the limited liability company. The resolutions of general meetings have therefore been described as collective legal acts, the manifestation of a collective will, which incorporates the individual wills of the members who participate together in its conclusion and which is formed on the basis of the majority principle, according to which the majority signifies the will of society, governed by a general interest, which justifies the sacrifice of the minority of members. This is also the reason why resolutions are binding on members who did not attend the general meeting or who voted against the majority decision and asked for it to be included in the minutes of the meeting, provided that they were validly adopted.*

Keywords: *majority shareholder, decision, social will.*

How to cite: Leuciuc, G. (2023). Decisions of the general meeting of shareholders in a limited liability company, legislative and doctrinal aspects. *European Journal of Law and Public Administration, 10*(2), 83-94. https://doi.org/10.18662/eljpa/10.2/211

©2023 Published by LUMEN Publishing. This is an open access article under the CC BY-NC-ND license

Introductory considerations

In order to be representative and to justify the presumption that the general meeting of members represents the company itself, the law lays down a number of conditions necessary for the valid adoption of resolutions. Thus, as a general rule, the general meeting decides by a vote representing an absolute majority of the members and an absolute majority of the shares (I.L. Georgescu, p.414). In assessing whether the quorum required by law has been met, votes cast by correspondence are also taken into account, if this method of voting is provided for in the articles of association (C. Lefter, p.101). The overriding of the majority principle, which is the defining principle for a public limited company, over and above the equivalence between the number of votes and the number of shares in the company, may lead to an abuse on the part of the majority. Consequently, the decision of the general meeting adopted at the first convocation solely on the basis of the vote cast by the majority shareholder, when he is the only shareholder present, must be annulled, even if the double majority required by law has been reached (X. Delpech, p. 313).

Under these quorum conditions, the general meeting may: approve the annual financial statement and decide on the distribution of dividends; appoint and dismiss the directors and auditors, determine their remuneration, discharge them from their duties and decide to bring proceedings against the directors and auditors guilty of damages caused to the company; decide on the conclusion of a financial audit contract if the audit of the company is not compulsory. (Article 194, paragraph (1), letters a)-c) of Law no. 31/1990).

Thus, "at the end of each financial year, when the balance sheet and the financial activity of the previous year are examined at the general meeting of the company, each member has the opportunity to express his opinion and to formulate the requests he deems appropriate, and if he considers that the general meeting in question is in breach of the law, he may challenge the decision in the courts;" the request for an order to carry out an accounting expert's report to analyse the management of the limited liability company being inadmissible, as has been held in case law (Î.C.C.J., Com. section, dec.190 of 21.01.2010).

The memorandum of association may also lay down other principal obligations for the general meeting, provided that they do not lead to an amendment of the memorandum of association, since any such amendment shall be a matter for the general meeting, which shall decide unanimously, unless the memorandum of association provides otherwise. For example, the

ordinary general meeting may empower the directors to conclude certain legal acts which, according to the memorandum of association or the law, exceed the powers conferred on them (X. Delpech, p.313).

If the general meeting, although legally convened, is unable to pass a valid resolution because the required majority conditions are not met, a new general meeting shall be convened and shall decide by a majority of the votes cast by those present, regardless of the number of shareholders and the part of the share capital actually participating in the meeting (Art.193, paragraph (2) Law no.31/1990). This time, in order to facilitate the decision-making process and avoid a possible blockage of the company's activity, the legislator waives the quorum requirements and applies the simple majority principle, giving weight to the decision of the majority of those present (I.L. Georgescu, p.399; X. Delpech, p.313).

As the wording of the legal text is deficient, the question arises whether in all cases, irrespective of the agenda; the second convocation of the general meeting takes decisions on the basis of the vote of the majority of the members present, regardless of the number of shares held by them.

A negative answer leads to the conclusion that the extraordinary general meeting may decide only on the basis of the principle of unanimity or of an absolute majority, as laid down by law or by the articles of association. This view is based on the need for a much stricter legal regime applicable to extraordinary general meetings whose decisions are of greater importance for the life of the company, which may have repercussions for the members and entail amendment of the memorandum of association (I.L. Georgescu, p.399) than those of ordinary general meetings, which concern only the day-to-day business of the company (M. Şcheaua, p.170).

An affirmative answer starts from the principle that if the law does not distinguish, no differentiation should be made in its application, and from the need to remove any obstacles to decision-making by the general meeting. The Supreme Court has also ruled in this regard, stating that 'the legislature has expressly stated that the newly convened meeting may decide on the agenda, regardless of the number of shareholders and the share of the capital represented by the shareholders present', without distinguishing on the nature of the general meeting. In this situation, "the absence of the member from the general meeting is sanctioned by the decision being taken in his absence" (.C.C.J., com. section, dec.412 of 7.02.2008; Î.C.C.J., com. section, dec.289 of 19.01.2007).As both points of view are justified, we believe that it is necessary to regulate this aspect with greater precision, as provided for in the case of the joint-stock company.

As stated in the doctrine, as an exception to the double majority rule, the law provides for the adoption of resolutions of (extraordinary) general meetings by applying other rules when the articles of association are amended and the vote of all shareholders is required; or when shares are transferred to third parties, in which case the vote of shareholders representing at least three quarters of the share capital is required (C. Lefter, p.101) In this case too, votes cast by correspondence are included in determining whether the quorum requirements are met, if the articles of association provide for this method of voting in the general meeting of members.

In all cases, irrespective of the powers of the general meeting, the associations may, by their articles of association, derogate from the rules laid down by law and establish other quorum requirements. With regard to the conditions for adopting decisions in the absence of the law, the doctrine has argued that the majority quorum must be strengthened in order to ensure greater protection for the members and the company as a whole (I.L. Georgescu, p.384; X. Delpech, p.314). By establishing a default rule applicable to the rules governing general meetings of limited liability companies and allowing the members to lay down in the memorandum of association the rules governing the organisation of such meetings, the legislator sought to make the operation of this type of company more flexible, taking account of its *intuitu personae* nature. Consequently, more relaxed conditions for the adoption of decisions, adapted to each individual company, can be laid down by agreement in the absence of an express prohibition by law.

Legislative and doctrinal aspects

French law is much more rigorous in regulating the quorum requirements for the adoption of decisions by general meetings of members of a limited liability company. Ordinary meetings of members, those which deal with matters which do not lead to amendments to the articles of association, similar to Romanian law, decide at the first convocation with the vote of one or more members holding more than half of the shares (which forms an absolute majority); and at the second convocation with the majority of the votes cast, regardless of the number of members present (simple majority) (Art.L.223-29, para.1, French Commercial Code). According to the law, the benefit of a second convocation of the general meeting can be waived by the articles of association, which is not provided for by Romanian law. In this case, if an absolute majority is not reached, the decision cannot be adopted, which results in the issues being placed on the

agenda of a future meeting in the hope that the members will be able to adopt a decision, which unduly complicates the decision-making process (X. Delpech, p. 313). The members of a French limited liability company may establish in the articles of association a majority other than that provided for by law, but they must set a higher threshold for both the first and second convocation. By way of exception, the decision on the removal of the director must be taken in accordance with the majority laid down by law.

With regard to the conditions required for the adoption of resolutions at extraordinary meetings, French law outlines three sets of rules depending on the issues on the agenda. In general, decisions concerning the amendment of the articles of association or the co-opting of a new shareholder are taken by a majority of at least three quarters of the shares if the company was incorporated before August 2005 or by a majority of two thirds of the shares of the shareholders present or represented, who in total must hold a quarter of the share capital (at the first convocation) and a fifth (at the second convocation) if the company is incorporated under the new legal provisions (Article 35 of Law 2005-882).

Decisions relating to the change of nationality of the company, the transformation of the limited liability company into another corporate form (SNC, SCS, SA, or SAS), the absorption of the company by a joint-stock company with a single shareholder, the obligation of a shareholder to increase its commitments to the company (not only financial obligations but also other obligations such as non-competition obligations, etc.) must be adopted by unanimous vote (Article L. 223-30, paragraphs 1, 3, 4 and 5 of the French Commercial Code). A simple majority is required for decisions concerning: increasing the share capital by incorporation of reserves or reinvestment of net profits, converting the company into a public limited company if it has a share capital of more than 750,000 euros, removal of directors, ratification of the decision taken by the director concerning the lease of shares by one of the shareholders.

In the context of the increased computerisation of society and the widespread use of remote means of communication, including video communication, it is essential to regulate the possibility of organising and holding general meetings of members of a limited liability company remotely by means of videoconferencing.

As a matter of principle, it is provided that decisions of general meetings which contravene mandatory provisions of the law or the provisions of the articles of association may be challenged in court by any member who either did not take part in the general meeting or was present but opposed the majority decision and requested that this be recorded in the

minutes of the meeting (Article 132), The fact that a "shareholder voted against does not mean that the decision adopted by the general meeting is illegal"; as such, that decision is binding on that shareholder even if he opposed its adoption, as it is also binding on shareholders who were absent from the general meeting, the High Court has stated (SCJ, Com. section, dec. 5130 of 2.10.2001).

In regulating the right to challenge the decisions of the general meeting of the limited liability company, the legislator expressly refers to the rules on the joint-stock company, with an amendment concerning the time limit within which the action for annulment may be brought, of 15 days, which runs from the date on which the member concerned became aware of the decision that is being challenged, (Art. 196 Law no.31/1990) and not from the date of publication of the decision challenged in the Official Gazette, given that the decision of the meeting of the limited liability company does not have to be published (C. Lefter, p. 102). In order to make a correct reading of the text to which reference is made, namely Article 132 of the Companies Act on the procedure to be followed in this case, we must resort to the general principles governing the nullity of the legal act, (Art. 1246 et seq. Civil Code) bearing in mind that "the rules of reference have a limitative character and strict interpretation," according to the Supreme Court (I.C.C.J., Com. section, dec. 2292 of 14.06.2011).

As explained above, the resolution of the general meeting is a legal act of a particular nature, having a collective nature, based on a majority expressly established by law or convention, formed "within a framework of legal guarantees", which ensures the "sincere manifestation" of individual wills that merge into the will of the company (I.L. Georgescu, p. 441). As a result, a series of formal (convocation, agenda, etc.) (I.L. Georgescu, p. 441) and substantive (quorum required to decide on a particular agenda, etc.) (C. Lefter, p. 101) conditions are laid down for the organisation and conduct of the general meeting, failure to comply with which constitutes grounds for the nullity or annulment of the resolution in question.

We have to distinguish between the causes that lead to the nullity of the decision and those that lead to its annulment, applying the rules of common law in conjunction with the special rules provided for by the company law and by Law no. 26/1990, (I.C.C.J., com. section, dec. 282 of 25.01.2011) as well as by the constitutive act.

A resolution of a general meeting may be declared null and void if it was passed in disregard of the rules for convening it, such as: it was convened by persons other than the directors of the company; it was held at a place other than the specified place, which was not the company's

registered office; or earlier than the specified date; not all persons entitled to attend the general meeting were convened; or in breach of the rules on deliberation: the quorum required by law or by the articles of association was not met, or voting was attended by members expressly prohibited by law from exercising this right, or by persons without voting rights (e.g. the minutes of the meeting have not been drawn up; as well as any violation of the law, public order and morality. As has been stated in case law, the improper exercise by one of the shareholders of his voting rights does not constitute a ground for the nullity of the AGM resolution, "but the breach of the obligation not to infringe the legal rights and interests of the company and of the other shareholders entails the financial liability of the shareholder at fault". (I.C.C.J., com. section, dec. 2625 of 13.09.2011; I.C.C.J., com. section, dec. 4043 of 23.11.2010).

Whenever one of the public policy grounds mentioned above is invoked, the application for a declaration of absolute nullity of the decision may be brought at any time by any interested person, against the company, represented by its administrator, (I.C.C.J., Com. section, dec. 3402 of 20.10.2010) stipulated the High Court, which also stated that, since a ground of absolute nullity is invoked, the active procedural right is imprescriptible. (Art. 132, para.(3) Law no. 31/1990; Î.C.C.J., com. section, dec. 1109 of 13.03.2007). By exception, administrators may not challenge in court the decision which concerns their removal from office, (Art.132, para.(4) Law no.31/1990; Î.C.C.J., com. section, dec.1109 of 13.03.2007). /1990) since "the appointment and removal of the administrator, a function governed by the rules of the mandate, is an exclusive attribute of the general assembly of the associates" (I.C.C.J., com. section, dec. 952 of 7.03.2008).

A resolution of the general meeting is annulled if it is adopted with the participation and vote of the incapable shareholders or those whose consent has been vitiated (Art. 1251 Civil Code) in violation of the provisions of the constituent act (rules of a conventional nature) or in disregard of the general interest of the company.

The corporate interest is a complex element of the company's will expressed in the resolution of the meeting, which cannot be reduced to the sum of the interests of the members, but represents the interest of the whole organisation (of the company) which includes the interests of the members, but also the interests of the administrators, auditors, employees, business partners, customers, etc. (X. Delpech, p. 329). In this regard, the Supreme Court states that "the general interest of the company is represented by the common intention of the members to associate and to carry out jointly a commercial activity in order to obtain a profit, the sole aim and main

direction of which is the prosperity of the company". (I.C.C.J., com. section, dec. 4199 of 2.12.2010) That is why the social interest is an important criterion for assessing the exercise of voting rights, which has a major social function (I.C.C.J., com. section, dec. 1973 of 5.06.2008).Disregarding it is the defining element of the abuse of rights that arises in the context of the adoption of collective decisions, in particular the abuse of majority, which marks an illegitimate application of the majority principle. Thus, the decision of the general meeting contrary to the interests of the company, which seeks to favour the majority shareholder or group of majority shareholders, to the detriment of the company itself or the minority of shareholders, must be annulled, the High Court has ruled (I.C.C.J., Com. section, dec. 570 of 11.02.2010).

In principle, the action for annulment of the decision of the general meeting may be brought by a person or persons protected by law, such as an incapacitated member or a member whose consent is vitiated, or minority members whose interests have been infringed by application of the majority principle. However, in order to have legal standing, the shareholder directly injured by the decision he is challenging must also meet one of the conditions laid down alternatively and imperatively by the special law, namely to have been absent from the general meeting or, if present, to have voted against the majority and to have asked for this to be inserted in the minutes of the meeting, as the courts have pointed out (Î.C.C.J., The regulation of the right of shareholders to challenge a decision of the general meeting is very restrictive, it is justified by the legislator's concern to obstruct any attempt by shareholders to destabilise the life of the limited liability company by improperly promoting such actions in court (Art. 132, para. (2) Law no. 31/1990). Moreover, the extrapolation of the rules specific to joint-stock companies to limited liability companies is only possible in situations for which the legislator has expressly stipulated this, as is the case of the provisions on the appeal against the decisions of the general meeting, (I.C.C.J., com. section, dec. 3471 of 20.11.2008) has been underlined in judicial practice.

The action for annulment or nullity of the decisions of general meetings is qualified by doctrine as a social action (ut singuli), being exercised in the interest of the company and not for the individual interest of the plaintiff member (X. Delpech, p. 326; I.L. Georgescu, vol.II., p. 443). In this case, acting as an "internal control body" (I.L. Georgescu, p. 444), and not on its own behalf, the associate brings the action for annulment against the company, represented by the administrator, and against the associates who could oppose a direct damage by the court decision (I.C.C.J.,

com. section, dec. 3249 of 8.12.2009) which will be adopted in the council chamber (Art. 132, paragraphs (5) and (9) Law no. 31/1990) in order to ensure maximum speed in the resolution. For the sake of consistency of reasoning and in order to avoid conflicting judgments in the resolution of several actions concerning the same decision of the general meeting, the possibility of their being joined is expressly provided for, based solely on the identity of the subject matter, the person of the plaintiff being different from one case to another (Art. 132, para. (8) Law no. 31 /Being a social action, the effects of which have repercussions on all the internal relations of the company, it has been specified in case law that the judgment delivered in the case is enforceable against both the defendant company and the other associates, as well as against third parties in bad faith, whose rights acquired by the effect of the annulment of the judgment are lost, (I.C.C.J., com. section, dec. 1115 of 19.03.2008) by derogation from the principle of the relativity of judgments. To this end, the final annulment judgment must be mentioned in the commercial register and published in the Official Gazette, becoming enforceable against the shareholders from the time of publication and not from the time of registration in the commercial register, by way of derogation from the ordinary law (C. Lefter, p. 103).

Final conclusions

From the moment when the resolution of the general meeting is annulled or declared null and void, being devoid of legal effects, a new general meeting must be organised to deliberate on the issues on the agenda of the meeting whose resolution has been annulled, to which is added the question of the implementation of the legal consequences of the annulment on the acts concluded on the basis of the annulled resolution of the general meeting (I.L. Georgescu, p. 444).

In order to prevent the occurrence of legal effects, which may be binding on the company in its relations with third parties, the plaintiff is given the possibility to request the court to suspend the execution of the contested decision once the action for annulment has been filed (Art. 133, para. (1) Law no. 31/1990). The President has the right to oblige the applicant to pay a security if he grants the request for suspension. In deciding this application for suspension, the court must assess "the significant harm to the applicant's legitimate interests by the enforcement of the judgment and the irremediable nature of the harm, on the basis of the evidence in the case without prejudice to the merits," (I.C.J., Com. section, dec. 1335 of 24.02.2005) the Supreme Court states. An appeal may be

lodged against the suspension decision within 5 days of its pronouncement (Article 133, paragraphs (2) and (3) of Law no. 31/1990).

Another mechanism for eliminating the abusive application of the majority principle, considered "a necessary evil", (X. Delpech, p. 328) consists in the right of shareholders who do not agree with the amendments to the articles of association to withdraw from the company, provided that this possibility is provided for in the articles of association (Art.194, (2) of Law No 31/1990).The premise for the application of this provision is that the articles of association stipulate the application of the majority principle in the adoption of resolutions by extraordinary general meetings convened to amend the articles of association, by way of derogation from the unanimity rule enshrined in company law. In this hypothesis, the decision of the extraordinary general meeting, validly adopted with the majority established by agreement, is to have effect on all the members, including those who opposed the amendments to the articles of association by voting against them at the meeting and requesting that this be recorded in the minutes of the meeting (C. Lefter, p. 104). Withdrawal from the company in these circumstances is a procedural means established both for the benefit of the partners, who could suffer certain damage caused by the imposition of the majority will, and for the company as a whole, since it ensures that relations between partners are relaxed. In order to prevent the abusive exercise of the right of withdrawal by a member whose personal interests do not coincide with the general interest of the company, as reflected in the resolution of the general meeting, a member who withdraws for this reason is held liable to the company and to third parties in the same way as a member who is excluded from the company, and the provisions of Articles 224 and 225 of the Companies Act are applicable, laying down onerous conditions for the member which have a punitive effect. In this context, a singular opinion, to which we do not subscribe, considers that by combining the provisions on the withdrawal of members with those on the legal effects of their exclusion, a flagrant inequality is created, which is explained by an error of legislative technique (I. Schiau, T. Prescure, p. 584). The specialist authors have questioned whether in this case, which combines the provisions on withdrawal with those on exclusion of the partner ordered by the court, it is necessary for the withdrawal to operate on the basis of a court decision, given the absence of an express provision to this effect, which would clarify the situation (C. Lefter, p. 104 As the right of withdrawal of a member who does not agree with the amendments to the articles of association decided by the general meeting must be expressly provided for in the articles of association, the members will also have to lay down the

procedural rules applicable to this situation. To this end, a general meeting of the members will be convened, which will have on its agenda the resolution of the request for withdrawal of the objecting member and which will adopt this request unanimously. Otherwise, a court decision is required ordering the withdrawal of the partner against the limited liability company.

In conclusion, failure to comply with the mandatory provisions on the organisation and conduct of general meetings of members concerning the exercise of voting rights renders the resolution adopted in this way either null and void or null and void, or the administrator liable under Article 275(1)(2) of Law 31/1990.

References

Delpech,X., *Société à responsabilité limitée (SARL). Creation.Gestion. Évolution*, 27 éd., Dalloz, Paris, 2012

Georgescu,I.L., *Drept comercial român*, vol. I, Editura Socec & Co., SAR, Bucureşti, 1947

Georgescu,I.L., *Drept comercial român*, *Societăţile comerciale*, vol.II Editura Socec&Co., SAR, Bucureşti, 1948

Georgescu,I.L., *Societăţile cu răspundere limitată - Studiu de drept comparat în legătură cu unificarea noastră legislativă*, Ed. Institutul de Arte grafice „Îndreptarea" SA, Bucureşti, 1927

Lefter,C., *Societatea cu răspundere limitată în dreptul comparat*, Ed. Didactică şi pedagogică, RA, Bucureşti, 1993

Lefter,C., *Societatea cu răspundere limitată. Soluţii teoretice şi practice pentru întreprinzători*, Ed. Economică, Bucureşti, 1996

Scheaua,M., *Legea societăţilor comerciale nr.31/1990 comentată şi adnotată,* ed.II-a, Ed.Rosetti, Bucureşti, 2002

Scheaua,M., *Răspunderea organelor de conducere a societăţilor comerciale reglementată de Legea nr.64/1995*, *Ad honorem Stanciu D. Cărpenaru*, Ed. C.H.Beck, Bucuresti, 2006

Schiau,I., Prescure,T., *Legea societăţilor comerciale nr.31/1990. Analize şi comentarii pe articole*, ed.a-2-a, Ed.Hamangiu, Bucureşti, 2007

Înalta Curte de Casaţie şi Justiţie, *Buletinul Jurisprudenţei. Culegere de decizii pe anul 2007*, Ed. C.H.Beck, Bucureşti, 2008

Înalta Curte de Casaţie şi Justiţie, *Buletinul Jurisprudenţei. Culegere de decizii pe anul 2008*, Ed. C.H.Beck, Bucureşti, 2009

Înalta Curte de Casaţie şi Justiţie, *Buletinul Jurisprudenţei. Culegere de decizii pe anul 2009*, Ed. C.H.Beck, Bucureşti, 2010

Înalta Curte de Casaţie şi Justiţie, *Buletinul Jurisprudenţei. Culegere de decizii pe anul 2010*, Ed. C.H.Beck, Bucureşti, 2011

Înalta Curte de Casaţie şi Justiţie, *Buletinul Jurisprudenței. Culegere de decizii pe anul 2011*, Ed. C.H.Beck, Bucureşti, 2012

C.S.J., Secţia com., dec.nr.51302/2001, publicată în Revista de drept comercial, nr.12/2003

Legea nr.31/1990 a cunoscut numeroase modificări şi completări, fiind republicată în M.Of. nr.1066/17.11.2004

Legea nr.2005-882 privind încurajarea întreprinderilor mici şi mijlocii, publicată în J.O. din 3 august 2005

Cod comercial francez www.legifrance.gouv.fr