THE SHAREHOLDERS VOTING RIGHTS IN COMPARATIVE LAW

Roxana-Mihaela CATEA*

Abstract

The most important consequence of owning shares in a company is the possibility to exercise your voting right as a shareholder and decide the future of the company and of your own capital increases. Nowadays, companies are becoming increasing interested in knowing the identity and the financial reputation of their shareholders in order to ensure a healthy and stable economic flow. Although Romanian legislation provides minimum quorum and majority guidelines for approving shareholders' decisions, the procedural manner in which shareholders exercise their voting rights may benefit to some extent from the solutions identified by other legal systems, which have a clearer regulation of minority and majority shareholders rights. Also, the discrepancies due to the absence of a more standardized legal framework for the exercise of voting rights have been overcome as a result of the interpretation provided through case law, which has revealed a series of criteria for determining whether the stockholder's vote has been duly cast. Considering the current Romanian legal background, this article aims to analyze the Romanian legal system with respect to the shareholders' voting rights in comparison with the guidelines set out by other legal systems and to emphasize the welcoming recent EU legislation for the harmonization and protection of shareholders' rights.

Keywords: *right to vote, minority shareholder, majority shareholder, exercising voting rights, joint stock company, limited liability company, corporate policy, proxy voting*

1. Introduction

1.1. Introduction

The purpose of a company is to organize its activity in order to produce profit. This is the lucrative purpose which generates interest in owning a part of that company by individuals or other legal entitites.

Law no. 31/1990 regarding companies ("**Law no. 31/1990**") provides that votes are cast in the general meeting of shareholders and their result represents the will of the company itself. Renowned scholars have said that the general meeting of shareholders represents the deliberation body of the company because it expresses the company's social will[1]. Although in doctrine, the legal nature of the resolution of the general meeting of shareholders pendulated between an unilateral legal act and a contract between shareholders, the true nature of such an act was established as being a sui generis act, since it cannot be included in any other category of legal deeds[2].

As opposed to voting in limited liability companies, voting in joint stock companies may lead to several issues due to the specific nature of the procedures and types of vote set out by Law no. 31/1990.

For example, as opposed to the open voting procedure established by Law no. 31/1990 for shareholders in limited liability companies, art. 130 par. 1) of the same law provides that open votes are the general rule in joint stock companies, while secret votes are established for specific operations.

While the Romanian legal system is in line with most of European legal systems establishing a subjective system, where commercial and corporate norms are applicable to legal professionals, in USA the common-law rules apply both to individuals and to legal professionals performing a commercial or corporate deed. However, federal regulations have been adopted in USA in order to uniformize commercial rules by issuing a common Commercial Code[3] applicable for all states.

Apart from the differences within the Romanian legal system connected to the type of company analized, there are significant differences between the manner in which the shareholder's voting rights are cast in other legal systems, both in relation to substantial aspects regarding the shareholder's voting competence and to procedural aspects regarding how the vote is actually cast.

While most of Europe's legal system is a continental one, in USA

2. Overview of the shareholder voting rights in Romania

2.1. Voting as a limited liability company shareholder

For a shareholder in a limited liability company, each share grants the right to one vote. Votes are cast in the general meeting of shareholders. Law no. 31/1990 established a restriction referring to shareholders who cannot exercise their right to vote in the general

*Assistant professor, PhD student, Faculty of Law, "Nicolae Titulescu" University (e-mail: roxana.catea@yahoo.com);

[1] V. Nemes, *Commercial Law*, 3rd Edition, Hamangiu Publishing House, 2018, p. 142.

[2] St. D. Carpenaru, S.David, C. Predoiu, Gh. Piperea, *Commented Companies Law*, 4th Edition, C.H. Beck, Bucharest, 2009, p. 485.

[3] St. D. Carpenaru, *Romanian Commercial Law Treaty*, VIth Edition, C.H. Bech, Bucharest, 2019, p. 15.

meeting if the matter on the agenda refers to their own share capital contributions or the legal acts concluded between the shareholder and the company. Needless to say that if a shareholder loses the ownership of its shares, even within a forced execution procedure[4], it shall lose the capacity required by law to act as shareholder and exercise votin rights.

From a procedural point of view, art. 192 of Law no. 31/1990 establishes that the general meeting passes a ruling considering the votes representing the "absolute majority" of the shareholders and their shares, provided that the articles of association do not establish othervise. In order for the general meeting to amend the articles of incorporation, Law no. 31/1990 provides that shareholders' unanimity in this respect is required.

2.2. Voting as a joint stock company shareholder

Voting rights and procedures in a joint stock company are more detailed by the Romanian legislator, most likely due to the more complex configuration of this type of company.

Generally and similar to limited liability companies, in a joint stock company a subscrised and paid up share grants the shareholder the right to one vote, provided that the company's articles of association do not establish otherwise.

When discussing the voting rights of a shareholder within a joint stock company, it is neccesary to determine if the shareholders have established certain limitations attached to their shares through the articles of association. For example, the shareholders may include in the articles of association certain vote limitations for shareholders owning more than a share.

A limitation has been set through Law no. 31/1990 regarding certain resolutions in which the shareholders who are also members of the board of directors, of the directorate or of the supervision board cannot vote with respect to their discharge from their mandate or with respect to an issue in which their person or management would be subject to discussion. Similarly, a shareholder who, either personally or in his capacity as a proxy of another person, has an interest contrary to the company's interest needs to refrain from voting in connection to that certain operation.

Another relevant aspect regarding the exercise of a vote in joint stock companies is linked to the type of shares owned by the shareholder. For example, in case of priority shares without voting rights attached hereto, the shareholder owning such type of shares is prohibited from voting.

If the shareholders did not pay their contributions, their voting rights are suspended.

The right to vote cannot be transferred and any convention which states that the shareholder undertake to exercise its voting right in accordance with the company's or the company's representatives' instructions or proposals is null and void. In practice[5], courts have clarified this matter in the sense that only if the company or its representatives instruct or propose that the vote be cast in a certain manner, the procedure is null. However, if the shareholder mandates a third party to exercise its voting right as the third party deems proper, the shareholder's instruction shall not be deemed null.

From a procedural point of view, voting in general meetings of shareholders is performed through an open vote. Art. 130 par. 2) of Law no. 31/1990 provides that a secret vote is mandatory for the appoinment or revokation of members of the board of directors or of supervision council, for the appoinment, revokation or dismissal of censors or financial auditors and for passing decisions in connection to the liability of the members of administration, management and control bodies of the company.

The provisions of Law no. 31/1990 also entail that shareholders in joint stock companies must exercise their rights in good faith, while observing the rights and legitimate interests of the company and of other shareholders.

3. Voting rights in other legal systems

If in general, one share generates the right to one vote in a Romanian company, a difference in this respect can be observed in foreing law systems, such is the French one. For example, pursuant to articles L225 - 122 and L225 - 123 of the French Commercial Code, a voting right equivalent to twice that attributed to other shares could have been attributed to fully paid shares which can be proved to have been registered in the name of the same shareholder for at least two years, depending on the proportion of the share capital they represent, by the memorandum and articles of association or a special shareholders'meeting. Recently, thorugh the adoption of the so-called Florange law this principle was reversed for listed companies, so that the attribution of double voting rights is automatic by operation of law except if the articles expressly provide otherwise.This system enables companies to recognize, subject to the satisfaction of certain requirements, double voting rights to their shares.

Shareholders' extensive rights under French law allows them remove any director at any shareholders' meeting by a simple majority vote of the shareholders, upon proposal of any single shareholder, even if the subject is not on the agenda for the relevant

[4] Brasov Appeal Court, Decision no. 433/R/2016 - Losing the quality of shareholder after being under forced execution for the shares. Absolute nullity of the general meeting of shareholder resolution passed after the transmission of the shares to a third party.

[5] Gorj Tribunal, Resolution no. 1/2010 - Claim for the annulment of the resolution of the general meeting of shareholders.

shareholders' meeting and regardless of the term of office for which the director was originally appointed[6].

The trend for enlarging shareholder protection is recognizable in Sweden, as well. For example, the Swedish Companies Act provides for certain protection of minority shareholdersso that some rights under the Swedish Companies Act may be exercised by each shareholder (i.e., regardless of the number of shares owned or the number of votes they represent) whereas some rights may only be exercised by a shareholder whose shareholdings represent 10 per cent or more of the share capital. In order to illustrate such a system, imagine that a shareholder is allowed to introduce matters to the agenda and present proposals for resolutions at general meetings; and take court actions against the company to set aside or amend a resolution on the grounds that it has not been duly passed or that the correct procedure for its adoption was not followed. However, in Sweden, the right of a shareholder to voe via a proxy is somewhat limited, in the sense that to introduce proxy voting, the company initialy must alter its articles of association, by introducing a provision on proxy voting. This would enable the distribution of proxy forms where the shareholders may indicate their votes (as 'yes' or 'no') regarding the relevant proposals, which are then executed without the shareholders being present at the shareholders' meeting.

The preoccupation for the protection of minority shareholders is not trending in all European countries, as one might expect. For example, in Luxembourg, where a law issued in 2016 amended the provision which stated that one vote is attached to one share. The former rule limited the voting rights to the number of the shares, in order to strengthen the exercise of minority shareholders' voting rights in listed companies in order to improve the corporate governance of such companies.

Also, in Luxembourg the management of the company is strictly limited to its board. Should a shareholder be directly involved in the management of the company, he or she may be deemed a de facto director and face civil or criminal liability, or both, and generally be liable under the same circumstances as the appointed directors[7].

Another example of the shareholders' voting rights being limited is included in Switzerland's Code of Obligations and established that a company may limit the voting rights of shareholders to a certain percentage (usually between 2 and 5 per cent), above which the registration with voting rights in the company's share register may be refused, thus making the shareholders' voting rights capped at the relevant percentage limit. Through this feature, a company may also be able to limit coalitions between shareholders[8]. Also, in Switzerland, shareholders of a Swiss company have no right to request direct access to the company's shareholder register, this aspect not making the decision process smooth at all, since shareholders may not be aware of other shareholders with similar interests in the company. However, a most welcomed provision of the the Swiss Ordinance against Excessive Compensation (the Ordinance), which entered into effect on 1 January 2014, states that any institutional representation of shareholders can be done only through an independent proxy elected annually at the shareholders' meeting, and no longer through a company representative[9].

In contrast with the Swiss limiting laws blocking shareholders for having access to the shareholders' registry, in the United Kingdom, under Section 116, Section 809 and Section 811 of the Companies Act[10], shareholders have the right to inspect and copy a company's register of members and any register of beneficial interests. This disclose of the company register allows other shareholders to be identified and subsequently communicated with, or (in circumstances where the directors of a company have failed to comply with a shareholder's requisition) allow the interested shareholder to call the general meeting itself at the company's expense (Section 305).

Also, in the United Kingdom, shareholder's rights in connection to the manner in which a vote is cast are firmly regulated. In this respect, under the Companies Act, a shareholder who holds at least 5 per cent of a company's issued share capital to require the directors of a company to obtain an independent report on any poll taken or to be taken at a general meeting of the company (Section 342).

4. The shareholders' Directive

In 2017, the European Council adopted a revised version of the EU Shareholder Rights Directive, applicable from June 2019[11] (the "**2017 Shareholders Rights Directive**"). Topics include the identification of shareholders, rules that require investors to be transparent about how they invest and how they engage with companies they invest in, voting rights concerning executive compensation (say on pay), and transparency on and shareholder engagement in respect of related party transactions.

The 2017 EU Shareholders Rights Directive is an amending Directive which shall require transposition into each Member State's national law and is expected to be implemented during the second part of 2019.

For the purpose of ensuring better transparency within European companies, the 2017 Shareholder

[6] C. com. Articles L. 225-18; L. 225-105.
[7] Tom Barnes, *The Shareholder Rights and Activism Review*, Third Edition, 2018, London, Law Business Research Ltd., p. 132.
[8] Tom Barnes, *The Shareholder Rights and Activism Review, Third Edition*, 2018, London, Law Business Research Ltd.,p. 129.
[9] Tom Barnes, *The Shareholder Rights and Activism Review, Third Edition*, 2018, London, Law Business Research Ltd.,p. 125.
[10] Section 116, Section 809 and Section 811 of the United Kingdom Companies Act.
[11] 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.

Rights Directive regulates the company's right to identify their shareholders and request such identification in connection to shareholders holding more than a certain percentage of shares or voting rights. Such a percentage shall not exceed 0,5 %. Also, in case an intermediary such as an investment firm, a credit institution, or central security depository, is involved in the chain between the company and its shareholders, the companies are allowed, within the limits set out above, to request that intermediary to provide information regarding the shareholders' identity, without such a circumstance being deemed as a breach of legal provisions. This obligation stems both from a necessity for more transparency within the corporate governance and from the role of the intermediary, who provides services of safekeeping of shares, administration of shares or maintenance of securities accounts on behalf of shareholders or other persons.

Additionaly, the 2017 Shareholders Rights Directive establishes the right of the shareholder to request and obtain information from the intermediary and the intermediaries are required to transmit the following information, without delay, from the company to the shareholder or to a third party nominated by the shareholder:

a) the information which the company is required to provide to the shareholder, to enable the shareholder to exercise rights flowing from its shares, and which is directed to all shareholders in shares of that class; or
b) where the information referred to in point (a) is available to shareholders on the website of the company, a notice indicating where on the website that information can be found.

The role of the intermediary is further increased by the 2017 Shareholders Rights Directive, to the extent that the intermediary becomes a de facto proxy on behalf of the shareholder. Article 3c of the 2017 Shareholders Rights Directive states that intermediaries facilitate the exercise of the rights by the shareholder, including the right to participate and vote in general meetings. The intermediary's attributions in this respect comprise but are not limited to one of the following:

a) the intermediary makes the necessary arrangements for the shareholder or a third party nominated by the shareholder to be able to exercise themselves the rights;
b) the intermediary exercises the rights flowing from the shares upon the explicit authorisation and instruction of the shareholder and for the shareholder's benefit.

Another measure introduced by the 2017 Shareholders Directive for the protection of shareholders and their voting rights refers to the possibility for the shareholder to receive a written confirmation of the receipt of its vote when it is cast electronically. Additionally, the 2017 Shareholders Directive states that after the general meeting, the shareholder or a third party nominated by the shareholder can obtain, at least upon request, confirmation that their votes have been validly recorded and counted by the company, unless that information is already available to them.

The European Commission summaries the challenging requirements investors will face in a Q+A on its website[12], and the conclusions of the survey reveal that investors remain poorly informed and under-prepared for these paradigm shifts with just over half (58%) of participants aware of the Directive.

Irrespective of the conclusions of said survey, it appears that the general professional views[13] with respect to the amendments of the Shareholders Rights Directive are that the Directive represents a historic opportunity to address some of the systemic problems in capital markets and ensure a more sustainable capitalism functioning in a fairer and more transparent way in the interests of all stakeholders.

5. Conclusions

From a regulatory perspective, increased transparency and accountability reflected in European legislation are likely to reinforce the trend of safeguarding and extending shareholders' voting rights and may potentially strengthen minority or activist shareholders. While the traditional strategy among corporate legal systems in Europe focuses mainly on the company, the new emerging generation of legislators tend to shift the interest on the protection and active involvement of shareholders, instead of the central role of the company itself.

In support of this conclusion, the 2017 Shareholders Rights Directive seeks to make it easier for shareholders to exercise their rights, and facilitate cross-border voting, thus alining European legislation with the international activism trends of minority shareholders emerging and developed in the USA.

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[12] http://europa.eu/rapid/press-release_MEMO-17-592_en.htm.
[13] https://corpgov.law.harvard.edu/2019/04/04/the-shareholder-rights-directive-ii/.

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