

DIGITALISATION OF THE FUNCTIONING OF BODIES OF CORPORATE AND NON-CORPORATE ENTITIES IN THE LIGHT OF COVID-19 REGULATIONS

Dr. Konrad Garnowski

Faculty of Law and Administration, University of Szczecin, Poland
e-mail: konrad.garnowski@usz.edu.pl; <https://orcid.org/0000-0002-7976-1333>

Abstract. The purpose of the article is to compare the regulations governing remote participation in the meetings of bodies of corporate and non-corporate entities, which were introduced to the Polish legal system during the COVID-19 pandemic. On this basis, the optimal solution is chosen. Comparison of regulations of the Code of Commercial Companies, Cooperative Law, Law of Associations, Law of Foundations and Apartment Ownership Act leads to a conclusion that the solutions contained in the Code of Commercial Companies should be assessed as the best. This act to the greatest extent takes into account the need of ensuring remote participation in the meetings of the bodies and at the same time meets the principle of technological neutrality and provides an appropriate level of security. Due to the need to introduce permanent regulations ensuring remote participation in the meetings of the bodies of corporate and non-corporate entities, the regulations of the Code of Commercial Companies can be used as a starting point for creating similar regulations that are adapted to the specific characteristics of particular entities. Therefore, the article presents possible directions of development of the national law in relation to the discussed issue.

Keywords: electronic means of communication, companies, associations, cooperatives, foundations, housing communities

INTRODUCTION

The outbreak of the COVID-19 pandemic resulted in significant impediments to the day-to-day functioning of many kinds of legal entities. At the same time, the pandemic provided an impetus for the introduction of changes aimed at improving the functioning of these entities in new and more difficult conditions. The need to introduce some of these changes has been apparent for a long time, and the state of the pandemic only accelerated their implementation. These certainly include the new regulations on the possibility for bodies of corporate and non-corporate entities to operate using means of distance communication.

Some regulations related to this issue have been already present in the Polish legal system, but the state of pandemic has shown the need for new solutions, with a wider range of applications. There is no doubt that the possibility to operate by means of distance communication is fully justified, because it significantly facilitates and speeds up the functioning of entities and at the same time, with today's technological achievements, it is possible to ensure an adequate level of security and reliability of such methods of operation. However, the measures introduced are not uniform and different regulations have been introduced in relation to specific categories of entities.

The aim of the article is to compare those regulations, to evaluate them and to choose the best solution. The choice will be made on the assumption that optimal regulations should meet two basic requirements. First, they should be flexible and implement the postulate of technological neutrality of law, according to which the law should not impose too specific technological solutions on legal entities and should treat all available technologies equally.¹ Secondly, this solution should also maintain an adequate level of security and minimize the risk of abuse.

1. CHANGES IN THE FUNCTIONING OF COMPANIES UNDER THE COMMERCIAL COMPANIES CODE

One of the most important changes concerning the subject matter are the amendments introduced to the Act of 15 September 2000, the Code of Commercial Companies². These changes allow internal corporate decisions to be made by means of electronic communication. Although the provisions of the Code of Commercial Companies already allowed for such a possibility, it applied only to some company bodies and this possibility had to be regulated in the company's articles of association. As part of the so-called anti-crisis shield, two bills were introduced that reversed the previous rules. These were: the Act of 30 March 2020 on amending the Act on special solutions related to preventing, counteracting and combating Covid-19, other infectious diseases and crisis situations caused by them, as well as some other acts³ and Act of 16 April 2020 on specific support instruments in relation to the spread of SARS-COV-2.⁴ Currently, the default solution under CCC is that decisions can be made by means of remote communication, and the articles of association may exclude such possibility. This rule applies to all of the bodies of both types of

¹ See more: Greenberg 2016; Maxwell, Lovells, and Bourreau 2014; Reed 2007.

² Journal of Laws of 2000, No. 94, item 1037 [hereinafter: Code of Commercial Companies or CCC].

³ Journal of Laws item 568.

⁴ Journal of Laws item 695.

capital companies described in CCC, i.e. a limited liability and a joint-stock company.⁵

First of all, the above-mentioned rules apply to the functioning of the most important bodies of a limited liability company (meeting of shareholders) and a joint-stock company (general assembly). According to Article 234¹(1) CCC, a shareholder of a limited liability company may participate in the meeting of shareholders by means of electronic communication, unless the articles of association provide otherwise. Participation in the meeting in the manner referred to in the first sentence shall be decided by the convener of such a meeting, which in most of the cases is the management board. This may suggest unrestricted discretion in determining such a possibility, but the literature rightly points out that hindering or preventing participation in a shareholders' meeting remotely may constitute grounds for challenging resolutions [Pabis 2020b]. Moreover, Article 234¹(2) CCC stipulates that participation in the meeting of shareholders in a described manner should cover two-way real-time communication of all persons attending the shareholders' meeting, whereby they may speak in the course of the shareholders' meeting from a place other than the venue of the shareholders' meeting. It should also allow the exercise of voting rights before or during the shareholders' meeting. Detailed rules for participation in the shareholders' meeting shall be set forth in the bylaws adopted by the supervisory board or by the shareholders, but the bylaws may not set forth requirements and limitations which are not necessary for identifying shareholders and ensuring security of electronic communication (Article 234¹(3) CCC). Analogous solutions with regard to joint stock companies are contained in the regulations of Article 406⁵(2) and (3) CCC.

The regulations that were in force before the discussed amendments provided for the requirement that the shareholders' meeting of a limited liability company and the general assembly of a joint-stock company must be broadcast in real time.⁶ Currently this requirement is retained only for a joint-stock company. However, this does not change the fact that for both types of companies the traditional concept of a shareholders' meeting and a general assembly has not been abandoned. In particular, the shareholders' meeting and the general assembly have not become virtual meetings [Pabis 2020b].⁷ This is due to the fact that meetings can still only be held on the territory of the Republic of Poland at places stipulated in Article 234 CCC and Article 403 CCC [Pabis 2020b; Krysik 2020; Leśniak 2020]. The place where the meeting is held is,

⁵ This article does not cover the issue of a simple joint stock company, because currently the regulations on this type of company are not in force yet.

⁶ Article 234¹(2) CCC as amended on 3 September 2019 by the Act of 19 July 2019, Journal of Laws item 1453, Article 406⁵(4) CCC.

⁷ See also: Herbet 2013; Horwath 2007; Krysik 2020.

therefore, the place where the chairman and the recording clerk are located, although some or even all of the other participants may participate remotely.

In the case of the management board of a limited liability company and a joint-stock company, the possibility of participating in the meeting and of adopting resolutions by means of direct remote communication arises from Articles 208(5¹) – (5²) and Articles 371(3¹) – (3³) CCC, which allow for this possibility, unless the articles of association provide otherwise. The current regulations directly confirm the admissibility of the solution which has long been postulated by legal scholars and commentators, despite the lack of a relevant statutory provision. It has been stressed that in view of the possibility to freely shape the internal organization of the management board and the lack of a clear prohibition of what follows, it was permissible to introduce a procedure for adopting resolutions remotely [Pabis 2020a; Bieniak 2020; Opalski 2016; Szumański 2013].

Similar principles apply to the supervisory board of a limited liability company and a joint-stock company, whose meetings may also be attended by means of direct remote communication, unless the articles of association provide otherwise (Article 222(1¹), Article 388(1¹) CCC). Resolutions may be adopted in the same manner (Article 222(4), Article 388(3) CCC). However, there is a specific limitation that, in matters requiring a secret ballot, remote voting is only possible if no member objects (Article 222(4¹), Article 388(3) CCC).

The changes introduced in the CCC deserve credit due to the far-reaching and undoubtedly much-needed liberalization. It can be seen primarily in the fact that currently the main principle is that it is possible to participate in meetings of the company's bodies remotely. At the same time, this right may be limited, e.g. if the shareholders agree in the articles of association to allow only personal participation in all or certain matters or if they limit the permitted means of electronic communication. Admittedly, in both cases the traditional concept of a shareholders' meeting/general assembly has not been abandoned in favour of a virtual assembly, but this can be justified by the argument that, despite the widespread digitisation of communication, there is still a need to ensure the possibility to attend meetings of the most important bodies in person. However, regardless of this, the right to remote participation in the meetings of all of the bodies should be a rule and in this context the solutions adopted in CCC are correct. It is also important to note that the changes introduced in CCC are permanent and none of the provisions provide for any time limit of validity of this amendment of the CCC.

2. CHANGES IN THE FUNCTIONING OF COOPERATIVES

The already mentioned Act of 30 March 2020 has also influenced regulations of the Act of 16 September 1982 Cooperative Law,⁸ that govern the functioning of cooperatives as voluntary associations of an unlimited number of persons, of variable membership and variable share fund, which conduct joint economic activity in the interest of their members (Article 1(1) CL). Currently a member of the supervisory board or management board may demand that a meeting of the supervisory board or the management board be convened, providing the proposed agenda, or that a specific resolution be passed in writing or by means of direct remote communication (Article 35(4¹) CL). If a meeting is not convened within one week from the day of receiving the request, the requesting party may convene the meeting on their own, providing its date and place, or order voting in writing or by means of direct remote communication (Article 35(4²) CL). The detailed procedure for convening meetings of the bodies, as well as the manner and procedures for the adoption of resolutions by these bodies, shall be defined in the statute or in the rules of procedure of these bodies provided for in the statute (Article 35(5) CL).

Although the wording of the CL regulations is different than the wording of the relevant regulations of CCC, the results are similar. Under both acts members of the management board and supervisory board are entitled to participate in the meetings by means of electronic communication. However, under CCC it is possible to exclude this right, which is a more flexible solution. It seems that according to CL it would only be possible to provide for some particular requirements for adopting resolutions in this manner (Article 35(5) CL), but it would not be possible to exclude the right to participate in the meeting by means of electronic communication.

Moreover, the Act of 16 April 2020 introduced another amendment to the Cooperative Law. According to the current wording of Article 36(9) – (12) CL, it is possible for the management board or supervisory board to order that a specific resolution of the general meeting be passed by means of direct remote communication (Article 36(9) CL). The possibility of disabling this procedure is directly excluded, since Article 36(12) CL provides that the voting in this manner may be held irrespective of the provisions of the cooperative's statute. Moreover, these regulations are temporary and according to Article 36(13) CL they apply only during the introduction of the epidemic emergency or the state of epidemic referred to in the Act of 5 December 2008 on the prevention of and combating human infections and infectious diseases.⁹

⁸ Journal of Laws No. 30, item 210 [hereinafter: Cooperative Law or CL].

⁹ Journal of Laws of 2019, items 1239 and 1495; Journal of Laws of 2020, items 284, 322, 374 and 567.

In comparison to the CCC, the cited Cooperative Law regulations have some disadvantages. First, the decision to adopt a resolution of a general meeting by means of remote communication is left entirely to the management board or the supervisory board. This raises the risk of violating the rule of equal rights and obligations of cooperative members (Article 18(1) CL), some of whom may be unwilling or unable to use means of remote communication [Zbiegień–Turzańska 2020]. This problem does not arise under the CCC, regulations of which, at least in relation to the governing bodies, always provide for the possibility of personal participation in the shareholders' meeting/general assembly. Second, the regulations allowing remote voting during the general meeting will not apply once the state of pandemic ceases. Such a solution is not justified, because, as in the case of the governing bodies of companies, also in this situation there is a clear need to ensure a permanent possibility of participation in the general meeting by means of electronic communication. Admittedly, the objectives and principles of the operation of cooperatives and companies are not the same, but from this perspective there are no reasons for differentiating their situation and making it impossible for a cooperative's governing body to adopt resolutions using means of direct remote communication.

3. ASSOCIATIONS AND FOUNDATIONS

Some changes related to the digitalization of the functioning of the authorities have also been introduced in the Act of 7 April 1989 Law of Associations.¹⁰ The aforementioned Act of 16 April 2020 amended Article 10 of the Law of Associations in such a way that the possibility of voting outside the meetings of the authorities of the association by means of electronic means of communication was introduced, if the members of the authority of the association agree to it in a document form (Article 10(1a) of the Law of Associations).¹¹ Furthermore, the possibility of such participation in the meeting should be indicated in the notice of the meeting, containing a detailed description of the manner of participation and the method of the exercise of voting rights (Article 10(1b) of the Law of Associations). In addition, if such a procedure is used, it is necessary to provide for a real-time transmission of the meeting, real-time two-way communication whereby a member of the association's governing body may speak during the meeting, and the exercise of voting rights in

¹⁰ Journal of Laws No. 20, item 104 [hereinafter: Law of Associations].

¹¹ According to Article 77² of Act of 23 April 1965, the Civil Code (Journal of Laws of 2020, item 1740), in order to observe the document form of an act in law it shall be sufficient to make a declaration of intent in the form of a document, in the manner enabling to determine who made such declaration. Because of this, the document form does not require a written signature.

person or by proxy before or during the meeting (Article 10(1c) of the Law of Associations). The use of electronic means of communication in voting at and outside the meetings of the association's authorities may be subject to different regulations, including restrictions stipulated in the articles of association. The articles of association may also explicitly exclude the application of the above regulations (Article 10(1d) of the Law of Associations). Moreover, according to Article 10(1e) of the Law of Associations, these regulations are applied only in the event of the introduction of the state of epidemic threat or the state of epidemic referred to in the Act of 5 December 2008 on preventing and combating infections and infectious diseases in humans.¹² Pursuant to Article 16 of the Act of 16 April 2020, all of the above-mentioned rules relating to associations apply accordingly to foundations, regulated by the Act of 6 April 1984 Law of Foundations.¹³

The regulations of the Law of Associations and the Law of Foundations are significantly different from the other two acts. Although, like the CCC, the Law of Associations and the Law of Foundations allow for the possibility of limiting or excluding remote participation in the meetings of the authorities in the articles of association, at the same time, in order for the remote participation to be admissible, the prior consent of the members of the authorities is necessary. Importantly, the provision does not determine whether such consent should relate to a specific meeting or whether it should be a general consent for all future meetings. In the absence of an unambiguous regulation, both solutions should be allowed. It is also unclear whether the consent should be unanimous or whether a majority vote is sufficient, but the wording of the regulation rather suggests that unanimity is necessary. Such a solution, however, may be difficult to apply in practice, because even if none of the members of the body object to remote voting, in some situations obtaining the consent of each of these persons may prove impossible (e.g. due to absence and/or lack of contact with one of the members of the body). This may lead to a situation where the lack of consent of an absent person makes it impossible to conduct the meeting by means of remote communication. In this context, the solution provided for in the CCC and CL, which introduces the general principle of permissibility of remote meetings, is more justified. In addition to this defect of the Law of Associations and the Law of Foundations, these acts have other, minor imperfections. First of all, they provide for an unnecessarily strict requirement of real-time transmission of the proceedings. This requirement had been also present in the CCC, but was eventually rightly abandoned in relation to a limited liability company. In case of associations and foundations, it is also unnecessary and it would be enough to leave this issue to the discretion of the authorities of the particular association or foundation, depending on

¹² Journal of Laws of 2020, item 1845.

¹³ Journal of laws No. 21, item 97.

the scale and character of its activities. The Law of Associations and the Law of Foundations also unnecessarily introduce a time limit for the authorities to meet remotely. As in the case of companies and cooperatives, also in this situation, due to technological progress and the need to make the functioning of various organizational units more efficient, it is reasonable to provide for a permanent possibility of remote meetings.

4. HOUSING COMMUNITIES

The next act that requires discussion is the Apartment Ownership Act of 24 June 1994,¹⁴ which regulates, inter alia, the issue of management of common parts of real estate in multi-apartment buildings. All owners of premises located in such buildings form a housing community (Article 6 of the Apartment Ownership Act), which is considered to be a legal entity¹⁵. These persons make the most important decisions connected with the functioning of a housing community in the form of resolutions (Article 23(1) of the Apartment Ownership Act). Despite this, the amendments introduced in connection with the COVID-19 pandemic did not provide for the possibility to adopt resolutions of the owners of premises by means of distance communication. The reason for the lack of such an amendment is not clear, since such right was expressly provided for in the case of the meeting of shareholders of a limited liability company, the general meeting of a joint-stock company, the general meeting of a cooperative and of the authorities of associations and foundations. Certainly neither the importance of the decisions to be made, nor the large number of persons entitled to vote can be regarded as such a reason, because under corporate, cooperative, associations and foundations laws the number of persons entitled to vote may be equally large and the importance of the matters to be discussed at least equally high. Nor can the reason be the question of security, because under Apartment Ownership Act there already is a possibility of voting in writing (without personal presence at the meeting), which guarantees a similar level of security. Moreover, as can be seen from the example of the CCC regulations, ensuring an adequate level of security is also possible with remote voting.

However, the Apartment Ownership Act currently provides for a possibility to use the means of remote communication for a management board of the housing community. As a result of the introduction of Act of 30 March 2020, the Apartment Ownership Act was amended by adding Article 21(4), which allows for the possibility to adopt resolutions of the management board if

¹⁴ Journal of Laws No. 85, item 388 [hereinafter: Apartment Ownership Act].

¹⁵ Resolution of Seven Judges of the Supreme Court – Civil Chamber – Legal principle of 21 December 2007, ref. no. III CZP 65/07.

all members of the management board have been duly notified of the meeting or of the vote in writing or by means of direct remote communication. With reference to Article 21(4) of the Apartment Ownership Act, legal scholars and commentators emphasize that its addition was unnecessary, because the possibility of holding remote meetings was already allowed earlier, in the absence of such prohibition [Berek 2020]. Moreover, this provision is much less precise than its counterpart in CCC, because it does not explicitly grant the possibility to participate in meetings via electronic means of communication [Doliwa 2021], but only stipulates that sending a notice in one of the described ways is a condition for the possibility of adopting a resolution of the management board. Additionally, reading this regulation literally, one may come to a conclusion that the notice is effective if it is sent to a member of the management board in any of the described ways (in writing or by means of remote communication), regardless of whether such person consented to a given method of communication. The intention is understandable, however, and it should be recognized that the legislator intended to grant the possibility to participate in meetings by means of remote communication, if the members of the body agree to it. This does not change the fact that in this respect the regulations contained in Article 208(5¹) – (5²) CCC and Article 371(3¹) – (3³) CCC are much clearer.

It should be also noted that pursuant to Article 5 of Act of 10 December 2020 amending certain acts supporting the development of housing,¹⁶ the entire Article 21(4) of the Apartment Ownership Act was repealed. The explanatory memorandum to the act indicates that such a change “is aimed at improving the functioning of housing community boards, which will result in better functioning of entire communities and their members. The change is particularly important in the context of the efficient functioning of the management board during and after the state of emergency, so that the residents of the communities are provided with fast and efficient service [...]”¹⁷ One can guess that the legislator intended to liberalize the procedure of adopting resolutions of the management board, resigning from the requirement of carrying out the procedure of notifying about the meeting or voting. Leaving aside the question whether such a solution is justified and applying the rules of historical interpretation one may come to a conclusion that currently resolutions cannot be passed by electronic means since the provision allowing for such a possibility has been repealed. However, it should rather be assumed that the purpose was to simplify the functioning of the management board and to maintain the possibility to operate with the means of remote communication, while abandoning the requirement of prior notification of the meeting or vote

¹⁶ Journal of Laws of 2021, item 11.

¹⁷ Parliamentary print 534 – Government draft act on amending certain acts supporting the development of housing.

of the management board. However, this is another circumstance confirming the lack of precision in the regulations of the Apartment Ownership Act.

SUMMARY AND CONCLUDING COMMENTS

Regulations introduced during the COVID-19 pandemic in relation to remote meetings of bodies of corporate and non-corporate entities are similar at the core, but the detailed solutions adopted in particular cases are different. Their comparison shows that the optimal regulation was adopted in the Code of Commercial Companies. It may be said that these solutions, particularly in relation to a limited liability company, take into account the possibilities offered by modern technology, but at the same time they do not impose overly stringent requirements. Moreover, the rules adopted in relation to a limited liability company guarantee an appropriate level of security and, thanks to the reference to internal regulations, allow the introduction of solutions that take into account the specificity of the functioning of a given entity. The instruments relating to a joint stock company also deserve credit, as in their vast majority they are identical to those concerning a limited liability company. Admittedly, in some cases they provide for stricter requirements, but they might be justified by the higher level of complexity of this type of entity.

The regulations included in the remaining acts are marked by various disadvantages, which include above all the provisional character of the solutions introduced (Cooperative Law, Law of Associations and Law of Foundations), and in some cases even a lack of any regulations allowing for the possibility of holding a meeting remotely (e.g. a resolution of a housing community). There are also other, less significant defects, which together make the regulations of the remaining acts discussed much less elaborated than the regulations of the Code of Commercial Companies. Of course, this does not mean that the solutions adopted in the CCC contain a universal formula that can be applied to all other types of entities. Nevertheless, the regulations included in this act may be a good starting point for developing lasting measures that will allow for remote functioning of the discussed categories of entities in the future.

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