

NEW POSSIBILITIES OF OPERATION FOR COMMERCIAL PARTNERSHIPS AND COMPANIES IN INTERNAL RELATIONS, PROVIDED FOR AS PART OF REGULATION OF THE SO-CALLED ANTI-CRISIS SHIELD

Dr. habil. Grzegorz Kozieł, University Professor

Maria Curie-Skłodowska University in Lublin, Poland
e-mail: korespondencja1000@gmail.com, <https://orcid.org/0000-0002-7226-908X>

Abstract. The article synthetically summarizes in a comparative form the new main possibilities for the operation of commercial partnerships and companies in their internal corporate relations (in the area of internal decision-making, including in particular the adoption of resolutions), mainly in the area of introducing or extending the possibilities for using means of distance communication, including electronic means of communication, which were provided for by the legislature directly in the regulations consisting of the so-called anti-crisis shield setting out specific support instruments due to the spread of the SARS-CoV-2 virus causing the COVID-19 pandemic, i.e. in the Act of 31 March 2020 (Journal of Laws item 568), as well as in the Act of 16 April 2020 (Journal of Laws item 695) as well as those resulting from references (to the solutions introduced) set out in applicable legal provisions. Subsequently, certain selected, general and specific doubts as to the manner and scope of regulation of these legal solutions have been pointed out, as well as proposals to modify them, presented in the form of specific proposals *de lege ferenda* (for the law as it should stand), consisting of a general proposal for a broader, comprehensive and more symmetrical regulation of this matter, primarily in relation to commercial partnerships and companies) according to the comprehensive, optimal theoretical model of its regulation.

Keywords: commercial partnerships; commercial companies; COVID-19; anti-crisis shield; means of direct distance communication; means of electronic communication

1. INTRODUCTION

1.1. Aim and scope of the study

The aim of the article is to present synthetically, in the form of a comparative study, the new possibilities for commercial partnerships and companies¹ to act in internal relations (i.e. in the area of running corporate

¹ The basis for regulation of commercial partnerships and companies in Polish law is the Act

affairs, including, above all, adopting resolutions), which were provided for by the legislature directly in one of the first regulations that make up the so-called anti-crisis shield,² i.e. in Article 27 of the Act of 31 March 2020 on amendments to the Act on special solutions related to preventing, countering and combating COVID-19, other infectious diseases and crisis situations caused by them and some other acts,³ and in Article 29 of the Act of 16 April 2020 on special support instruments related to the spread of the SARS-CoV-2,⁴ as well as those that result from the references (to the changes introduced) existing in the legislation. Moreover, the article is to indicate certain selected, general and detailed doubts related to the manner and scope of regulation of these new possibilities of action, as well as to put forward proposals for their modification in the form of detailed postulates *de lege ferenda* (proposals of the law as it should stand), constituting a general proposal for a broader, comprehensive and symmetrical (even) regulation of this matter with regard to commercial partnerships/companies according to the proposed comprehensive, optimal theoretical model of its regulation. It is not the author's intention to comment in detail on each of the regulations that introduced particular improvements, or to analyse and assess in detail the legislative technique applied in introducing particular new possibilities of action, as these could constitute the subject of at least several separate studies on this subject.

The article concerns commercial companies that have legal personality, including primarily limited liability company (*spółka z ograniczoną odpowiedzialnością*) and joint-stock company (*spółka akcyjna*), as well as commercial partnerships that are organizational units without legal personality, on which the legislation confers legal capacity, including in particular professional partnership and limited joint-stock partnership. Companies, as legal persons, act (i.e. perform factual acts concerning the organisation and management of internal corporate relations, as well as adopt resolutions and

of 15 September 2000, the Code of Commercial Partnerships and Companies, Journal of Laws of 2020, item 1526 as amended [hereinafter: CCPC].

² The term "anti-crisis shield" has been used for special solutions and a comprehensive catalogue of actions aimed at countering the negative economic and social effects of the COVID-19 pandemic caused by SARS-CoV-2, as well as for the package of legislation proposed by the Polish Government, adopted by the Polish Parliament and signed by the President of the Republic of Poland in March 2020, enabling the implementation of these actions; see: Explanatory note to the draft Act of 16 April 2020 on special support instruments in relation to the spread of SARS-CoV-2 (Sejm Papers no. 330) [hereinafter: explanatory note no. 2-330], p. 1. I use herein the term "anti-crisis shield" to refer to this legislation package with respect to commercial partnerships/companies.

³ Journal of Laws of 2020, item 568 [hereinafter referred to as the Act of 31 March 2020 on the SARS-CoV-2 Act amendment].

⁴ Journal of Laws of 2020, item 695 [hereinafter: Act of 16 April 2020 on special support instruments in relation to SARS-CoV-2].

perform acts in law, including the submission or acceptance of statements submitted to them within their scope of signatory powers) through their governing bodies [Pazdan 1969, 203], while commercial partnerships as organizational units without legal personality, on which the legislation confers legal capacity – act through their statutory representatives (i.e. as a rule by their partners, e.g. partners in a general partnership) or so-called quasi-authorities⁵ (including e.g. by the management board – in a professional partnership or by the supervisory board – in a limited joint-stock partnership. This statement refers to the activity of these commercial companies in the sphere of their internal corporate relations, and thus in the area of running internal affairs, including in particular the adoption of resolutions by governing bodies of companies and the adoption of resolutions by representatives and *quasi*-bodies of partnerships.

1.2. The semantic scope of the category of “new possibilities of operation”

I consider as the new possibilities of internal operation for commercial partnerships and companies presented and analysed herein the introduction or extension by the legislature of the possibilities of: (1) the participation in meetings of governing bodies and the adoption of resolutions by such bodies via direct distance communication (e.g. teleconferencing and video-conferencing), including electronic means of communication (in particular software for on-line meetings or audio and video transmission [Ostrowski 2020, 34; Osajda 2020, 20-21], such as e.g. *ZOOM*, *Webex*, *Microsoft Teams*, *Google Meet*, or even chat service – e.g. via *Signal*, *Whatsapp* or *WeChat*), (2) casting a written vote through another member of the body (at meetings held traditionally and by means of direct distance communication), and (3) the adoption of resolutions by written vote. In view of the contemporary dynamic development and growing practical application of various types of modern communication technologies, including in particular electronic communication means,⁶ this article will address mostly the new possibilities

⁵ A *quasi*-body is not a strictly (full-fledged) governing body of a commercial partnership as the partnership does not have legal personality, whereas its members are merely representatives of the other partners of that partnership as defined for the management board of professional partnership by e.g. Górska 2001, 36-37; Jacyszyn 2001, 171; Krześniak 2002, 243ff; Ciecierska 2005, 62ff; Kozieł 2006, 29]. There is also a different view presented in the literature that *quasi*-bodies, including specifically the management board of professional partnership, have the nature of a governing body as proposed by e.g. Asłanowicz 1999, 14-21; Sołtysiński, Szajkowski, Szumański, et al. 2001, 481; Szajkowski 2005, 544ff.

⁶ In particular, electronic means of communication that enable holding meetings and adopting resolutions (or casting votes) by individual management boards of companies or representatives of partnerships, which is also recognised in foreign literature [Kosmin and

of operation related to the use of means of direct distance communication, especially electronic communication means.

The legal solutions currently adopted for companies regarding the new possibilities of action analysed herein, as well as the broadest proposed model for the regulation of these improvements, defined by me as optimal, do not provide for temporary limitation of their application only to the period of introduction of the state of epidemiological threat or state of epidemic, referred to in the Act of 5 December 2008 on the prevention and control of infections and infectious diseases in humans,⁷ which takes into account the current state of development of modern technologies, diverse means of communication, including electronic means of communication, as well as resulting possibilities and needs, regardless of the existence and scope of communication restrictions caused by SARS-CoV-2.

1.3. The research methodology used

Due to the purpose and scope of the study, the prevailing method used is the formal-dogmatic method.

2. NEW POSSIBILITIES OF OPERATION BY COMPANIES

2.1. General remarks

New operation possibilities provided for in the provisions introducing the so-called anti-crisis shield in a group of commercial partnerships and companies concern directly limited liability company and joint-stock company (including the actions of the management board, the supervisory board or the audit committee and the shareholders' meeting in a limited liability company, as well as the action of the management board, the supervisory

Roberts 2020, VII-IX] as measures that meet the contemporary needs of corporate action. It is pointed out in this respect to the obligation to comply with the rules of cybersecurity generally applied in the area of corporate governance [Kosseff 2020, 155].

⁷ Journal of Laws of 2020, item 1845 as amended. [hereinafter: APCI]. Unlike the improvements introduced in cooperatives, associations or foundations, which, apart from the debatable question of their substantive scope which differs significantly from the rules set out in this respect for companies (especially limited liability company and joint-stock company), they can only be applied for the period of a state of epidemiological threat or epidemic situation – see Article 36(9-13) of the Act of 16 September 1982, the Law on Cooperatives, Journal of Laws of 2020, item 275 as amended [hereinafter: the Law on Cooperatives], Article 10(1e) of the Act of 7 April 1989, the Law on Associations, Journal of Laws of 2020, item 2261 as amended [hereinafter: the Law on Associations], or Article 5(1b) of the Act of 6 April 1984, the Law on foundations, Journal of Laws of 2020, item 2167 [hereinafter: Law on Foundations] – which must now be regarded as insufficient, if not doubtful or incorrect.

board and the general meeting in a joint-stock company). They refer to the legal solutions previously provided for in the regulations on a simple joint-stock company (Articles 300¹ to 300¹³⁴ CCPC) with regard to the possibility to act in internal relations, contained in Article 300⁵⁸(1-5) CCPC and Article 300⁵⁹ CCPC (with regard to the management board and supervisory board – in the dualistic system of management, or – board of directors – in the monistic system of management), as well as in Article 300⁸⁰ CCPC and Article 300⁹² CCPC (with regard to the general meeting), which entered into force one year and four months after the introduction of the first of the acts comprising the anti-crisis shield, namely on 1 July 2021 [Kozieł 2020, XIX-XXXVII].

The new possibilities of operation of governing bodies of limited liability companies and joint-stock companies have primarily been provided for in the similarly formulated provisions on: 1) the governing board (Article 208(5¹–5³) CCPC and Article 371(3¹–3³) CCPC); 2) the supervisory board (Article 222(1¹, 2, 3 and 4¹) CCPC and Article 388(1¹, 2, 3 and 3¹) CCPC, which in the limited liability company, under Article 222(7) CCPC, is related also to the audit committee established therein), as well as 3) the shareholders' meeting in a limited liability company (Article 234¹ CCPC) and the general meeting of shareholders in a joint-stock company (Article 406⁵ CCPC).

2.2. New opportunities for companies to operate by management, supervisory and audit bodies

New possibilities of operation in the case of management boards and supervisory boards of companies (also audit committees in limited liability companies) include – unless the articles of association provides for otherwise (i.e. on the basis of the so-called *opt-out* model), the possibility of: 1) participation in a meeting of the body using means of direct (and not necessarily simultaneous [Osajda 2020, 21]) distance communication (Article 208(51) CCPC, Article 222(11) CCPC, Article 371(31) CCPC, Article 388(11) CCPC); 2) adopting resolutions in writing or using means of direct distance communication (Article 208(52) CCPC, Article 222(4) CCPC, Article 371(32) CCPC, Article 388(3) CCPC); 3) members of these bodies taking part in adopting resolutions by casting their vote in writing through another member of the body (Article 208(53) CCPC, Article 222(3) CCPC, Article 371(33) CCPC, Article 388(2) CCPC).

Re: 1. Regarding the participation in the meeting of the body in this manner, the legislature imposed on the supervisory board, only for a joint-stock company, and unfortunately not for a limited liability company (or also to the management board, supervisory board or board of directors of a simple

joint-stock company), in connection with the application *mutatis mutandis* of Article 406⁵(3) of the Code of Commercial Partnerships and Companies the obligation to define in the form of by-laws the detailed rules of participation in the meetings of these bodies with the use of electronic means of communication, with the exception of requirements and restrictions that are not necessary to identify shareholders and ensure the security of electronic communication. However, it seems that one may also draw from the application *mutatis mutandis* of the mentioned provision of 406⁵(3) CCPC a less legitimate conclusion that the obligation to establish these by-laws with regard to the management board rests with the management board, and not with the supervisory board, which may raise additional doubts. The above should be treated as an expression of a kind of inconsistency and lack of a comprehensive, complete and optimal legislature's approach to the legal solutions introduced.

Re: 2. With regard to the adoption of resolutions in such procedures, however, a certain legislative insufficiency is connected with the fact that only in the case of the supervisory boards of a limited liability company and a joint-stock company, also audit committees (as well as in the case of a supervisory board or a board of directors – Article 300⁵⁸(1-2) CCPC), but not in relation to the management boards of these companies (including the management board in a simple joint-stock company), the legislature introduced a regulation under which a resolution is valid when all members of the board have been notified of the content of the draft resolution and at least half of the members of the board took part in the adoption of the resolution, and the articles of association of the company may provide for stricter requirements for adopting resolutions in such a manner. This should be assessed as an expression of a certain inconsistency and lack of a holistic, comprehensive and optimal approach to the legal solutions being implemented.

Re: 3. As regards adopting resolutions adopted in such a procedure, it is regrettable that its only the case of supervisory boards, and not also in the case of management boards of these companies (or also in the case of management boards, supervisory boards and boards of directors in a simple joint-stock company), for which the legislature adopted a principle that written vote casting may not concern matters put on the agenda at a meeting of the body), which should be perceived, similarly as above, as an expression of a certain inconsistency and lack of a comprehensive, holistic and optimal approach to the legal solutions being implemented.

At the same time, the legislature has rightly repealed Article 222(5) CPCC and Article 388(4) CPCC related to supervisory boards (and, also to audit committees in limited liability companies), which excluded the above possibilities of adopting resolutions and casting votes (particularly in

writing or using means of direct distance communication) with regard to electing the president and vice-president of the supervisory board, appointing a management board member, as well as dismissing and suspending these persons. Similarly, the legislature rightly added to these rules the provisions of § 3¹ (with wording analogous to Article 222 CCPC) and § 4¹ (with wording analogous to Article 388 CCPC), in which he granted supervisory boards (and also audit committees in a limited liability company) the right to adopt resolutions in writing or by means of direct distance communication also in matters for which, respectively, the articles of association (of a limited liability company or a joint stock company) provide for a secret ballot, provided that none of the supervisory board members raises an objection. It is a pity, however, that no regulations analogous to those provided for in Article 222(3¹) CCPC and Article 388(4¹) CCPC were introduced by the legislature with regard to management boards and shareholder meetings of companies (including bodies of a simple joint-stock company). This may be assessed as above as an expression of a certain inconsistency and lack of a comprehensive, holistic and optimal approach to the improvements being implemented.

2.3. New possibilities for operation by stockholder bodies in companies

On the other hand, in the case of shareholders' meetings, new possibilities of operation involve assuming the possibility of taking part in a shareholders' meeting (in a limited liability company) or a general meeting (in a joint-stock company), unless the articles of association (of a limited liability company or a joint-stock company) provide for otherwise (and therefore, as in the case of management boards and supervisory boards or audit committees on the basis of the so-called opt-out model). Unfortunately, these possibilities, unlike in the case of management boards and supervisory boards (or also the board of directors in a simple joint-stock company – Article 300⁵⁸ CCPC), do not include the use of all means of direct distance communication in general, but only a specific, narrower yet the most commonly used group of these means today, namely electronic means of communication⁸ (Article 234¹(1) CCPC and Article 406⁵(1) CCPC). This participation,

⁸ Ostrowski presents a different opinion, boiling down this difference in the regulations concerning the management and supervisory boards (and also audit committees in the limited liability company) and shareholders' meetings of companies only to the problem of different terminology to be unified [Ostrowski 2020, 36]. On the other hand, Osajda rightfully derives the possibility of holding meetings on a permanent basis by the management board or the supervisory board (or the audit committee in the limited liability company) using means of direct distance communication from the difference between the term “means of direct distance communication” used in the provisions on management

in accordance with, respectively, Article 234¹(2) CCPC and 406⁵(2) CCPC includes, in particular, for example: 1) two-way real-time communication between all persons participating in the meeting, in which they may speak in the course of discussion while staying elsewhere, and 2) exercise of voting rights in person or by proxy before or during the meeting.⁹

Participation in the shareholders' meeting (or the general meeting) using electronic means of communication is decided by the entity who convenes the meeting, i.e. primarily the management board (see in the case of a limited liability company – Articles 235 to 237 CCPC, while in the case of a joint-stock company – Articles 399 to 401 of CCPC). Regardless of this, a public company has been required to ensure the transmission of the general meeting in real time (Article 406⁵(4) CCPC, first sentence).

In accordance with the provisions of Articles 234¹(3) CCPC and 406⁵(3) CCPC, the supervisory board (or shareholders in a limited liability company where the supervisory board is not established) are required to lay down, in the form of rules of procedure, detailed rules for participation in the shareholders' meeting (or general meeting) using electronic means of communication, which may not contain requirements and limitations that are not necessary to identify the shareholders and ensure the safety of electronic communication. In the limited liability company, the adoption of these rules of procedure may take place by a resolution of the shareholders without holding a meeting if the shareholders representing an absolute majority of the votes agree in writing to its content (Article 234¹(3) CCPC, third sentence).

Only with regard to the shareholders' meeting in a limited liability company, and not in relation to the general meeting in a joint-stock company, other bodies of these companies (management boards and supervisory boards, or audit committees), or any of the bodies of a simple joint-stock company, which can be treated as an expression of a specific inconsistency and lack of a holistic, comprehensive and optimal approach to the introduced improvements, the legislature rightly adopted in Article 238(3) CCPC a principle stating that if participation in the shareholders' meeting takes place using electronic means of communication, the notification (about this

boards and supervisory boards and the term “means of electronic communication” used in the rules on shareholders' meetings and at the same time notes that this is not possible in the case of general meetings held by electronic means of communication (in a limited liability company or joint-stock company) [Osajda 2020, 21ff].

⁹ The literature also rightly points to the possibility of participating in the company's general meeting of using electronic means of communication in the mode of real-time transmission of the shareholders' meeting – mentioned by the legislature explicitly only in relation to the general meeting of a public company in Article 406⁵(4) (first sentence) CCPC (i.e. the so-called tele-meeting) [Żaba 2020, 14].

meeting) should additionally include information on how to participate in this meeting, take floor during it, exercise voting rights and submit objections to the resolution or resolutions adopted.

In a similarly non-comprehensive way, this time on the contrary: only in relation to the general meeting in a public limited liability company, and not also in relation to the meeting of shareholders in the limited liability company and the other bodies of these companies (management boards and supervisory boards, or – in the limited liability company – the audit committee or any of the bodies of a simple public limited liability company), the legislature in Article 506⁵(5) and (6) CCPC imposed on the (joint-stock) company the following obligation in the event of exercise of the voting right using means of electronic communication: 1) to promptly send to the shareholder an electronic notice of receipt of the vote (Article 506⁵(5) CCPC), as well as, 2) to send to the shareholder, at the request of the shareholder submitted no later than three months after the date of the general meeting, a confirmation that his or her vote has been properly registered and counted (unless such confirmation has been given to the shareholder or his/her representative in advance (Article 506⁵(6) CCPC).

The above can be assessed in two ways. On the one hand, this can generally be perceived as an expression of a certain inconsistency and of the lack of a comprehensive and optimal approach to the improvements made, and, on the other hand, in the area of the general protective importance of this element of the regulation, as an essentially appropriate legal solution.

2.4. The *opt-out* model forms the basis for new possibilities for the operation of companies through their governing bodies

Both in the case of the management board and the supervisory board (or the audit committee in a limited liability company), as well as in the case of the shareholders' meeting (in a limited liability company) and the general meeting (in a joint-stock company), completely differently than in the regulations in force before the introduction of the analysed amendment relating to supervisory boards (Article 222 and Article 388 CCPC), as well as the general meeting in a joint-stock company (Article 406⁵ CCPC), and also differently than in the currently binding Article 300⁹²(1) CCPC concerning the general meeting of a simple joint-stock company, the improvements presented above are binding by operation of law, unless articles of association of a limited liability company or a joint-stock company provide otherwise, respectively [Szumański 2020, 4].¹⁰ This reflects the adoption of

¹⁰ Szumański rightly considers this element of the improvements as fundamental one [Szumański 2020, 4].

the so-called opt-out model in this respect. Thus, in the case of supervisory boards and the general meeting, one could make a statement similar to the one that “the roles (functions) of rules and exceptions have reversed.”¹¹ Under the currently applicable provisions, the rule is that these improvements may be used, contrary to the previous rules, which, in the case of supervisory boards and general meetings, required an explicit legal grounds for their use in the company’s articles of association. Under the previous provisions, these improvements did not apply to management boards and the general meeting of shareholders. Currently, in order for them not to be used in the area of activity of a limited liability company or joint-stock company by the management board or supervisory board (also by the audit committee in a limited liability company) or shareholders’ meeting or general meeting, the articles of association of the limited liability company or the joint-stock company should be amended to exclude such possibility. However, it does not seem justified in view of the related formal and legal requirements, certain costs as well as the lack of purposefulness of the action (including the purposefulness of restricting the possibility of more efficient operation).

2.5. Doubts and comments regarding the legal regulation of new possibilities for the operation of capital companies by management, supervisory and audit bodies

Solutions adopted with respect to the management board in a limited liability company and a joint-stock company are to a large extent modelled on the previously applicable and currently modified regulations concerning supervisory boards in these companies (i.e. Article 222 CCPC and Article 388 CCPC, respectively). One can see in their structure a reference to the provisions relating to the management board, supervisory board and board of directors in a simple joint-stock company (i.e. primarily Article 300⁵⁸ CCPC). Similarly to the regulations relating to supervisory boards and shareholders’ meetings, they may be a source of certain doubts, the more so as the legislature failed to provide any explanation in this respect in the explanatory notes to the draft acts introducing the so-called anti-crisis shield.¹²

It seems that in this case it is pointless to differentiate the regulations regarding management boards and supervisory boards by not including in

¹¹ In the German law, a similar relationship is noted in the literature in relation to the previous (original) and current regulation of § 131 (in conjunction with § 138) of the *Handelsgesetzbuch* of 10 May 1897 [Schmidt 2002, 1455ff].

¹² See: Explanatory note to the draft Act of 31 March 2020 amending the SARS-CoV-2 Act, Sejm papers no. 299 [hereinafter: Explanatory note 1] and the Explanatory note to the draft of 16 April 2020 on special support instruments in relation to the spread of SARS-CoV-2, Sejm papers no. 324 and 330 [hereinafter: Explanatory note no. 2].

the regulations on management boards of the limited liability company and the joint-stock company the provisions concerning the notification of the content of the draft resolution and the regulation, related only to the case of a collegial board, of the issue of the quorum required to adopt resolutions in writing or using means of direct distance communication provided for in the provisions on supervisory boards, i.e. in Article 222(4) (sentences 2 and 3 CCPC and Article 388(3) (sentences 2 and 3) CCPC (likewise the provisions of Article 300⁵⁸(2) CCPC relating to the supervisory board and the board of directors in a simple joint-stock company).

It is also interesting why the provisions on the supervisory board in a limited liability company that introduce improvements (Article 222 CCPC) there is no reference to the Article 234¹(3) CCPC (applied *mutatis mutandis*) analogous to the reference provided for in Article 388(1¹) CCPC (applied *mutatis mutandis*), Article 406⁵(3) CCPC, which imposes on the supervisory board the obligation to lay down in the form of by-laws the rules of participation in its meetings using electronic means of communication, and also specifies what requirements and limitations may be included therein. A question arises here why analogous references to Article 234¹(3) CCPC (applied *mutatis mutandis*), as well as Article 406⁵(3) CCPC (applied *mutatis mutandis*) were not introduced in the provisions on management boards of respectively limited liability companies and joint-stock companies. A similar question regarding the justification for the lack of such regulation can be asked in relation to the management board, supervisory board and board of directors of a simple joint-stock company.

2.6. Doubts and comments regarding the legal regulation of new possibilities for the operation of capital companies by stockholder bodies

As regards new possibilities of operation by stockholder bodies, fundamental doubts arise as to why the legislature did not adopt regulations analogous to those aptly set out in the provisions of 406⁵(5) and (6) CCPC, imposing on the company an obligation to immediately send to the shareholder an electronic confirmation of receipt of the vote cast via electronic means of communication (Article 406⁵(5) CCPC) and confirmation of the correct counting and registration of the vote cast in this form (Article 406⁵(6) CCPC), also for the shareholders' meeting in a limited liability company in the form of, for example, Articles 234¹(4) and (5) CCPC, the general meeting in a simple joint-stock company, nor did it introduce the rules resulting from Article 406⁵ CCPC with regard to management boards and supervisory boards in limited liability companies and joint-stock companies.

It is also puzzling what prevented a regulation similar to that governing the shareholders' meeting in a limited liability company in Article 238(3) CPCC, which specifies the specific requirements for notification of the shareholders' participation in the general meeting, which are the basis for the knowledge of the rules of participation in this meeting by shareholders where that participation in the shareholders' meeting is to take place using electronic means of communication, to be introduced in relation to the general meeting of a joint-stock company, e.g. in Article 402(4) CPCC and the general meeting in a simple joint-stock company, as well as in relation to management boards and supervisory boards in limited liability and joint-stock companies, or the management board, supervisory board and board of directors in the simple joint-stock company.

It seems that there is no justification for limiting the possibility of using only electronic means of communication for participation in meetings of companies (unless the articles of association provide otherwise) (Art. 234¹(1) CCC, Article 406⁵(1) CPCC, Article 300⁹² CPCC), and not – as in the case of management boards and supervisory boards of these companies (or of the management board, supervisory board and board of directors in a simple joint-stock company) – more broadly, i.e. including generally all means of direct distance communication.

2.7. Summary of doubts and comments regarding new possibilities of operation of capital companies versus the postulate to introduce a comprehensive, optimal model of regulation of this matter

The general idea of introducing new possibilities of operation for governing bodies of companies, comprising (with respect to limited liability companies and joint stock companies), first of all, the possibility to make decisions using means of remote communication, including electronic means, regardless of the duration of a state of epidemiological threat or state of epidemic, and even more so in view of the current pandemic, which constitutes a significant obstacle to efficient communication, including decision-making by company bodies in a traditional way based on the personal presence of their members at one place, should be assessed positively.

However, the legal solutions adopted by the legislature and analysed above look incoherent and deprived of a certain legislative consistency, symmetry (in the sense of balance, uniformity) within the scope of regulating the same or similar issues (in relation to particular bodies), as well as an overall (comprehensive) and optimal character (outlook, approach), even in their part concerning companies, not to mention the incompleteness of the regulation of this matter with regard to a simple joint-stock company, or no

regard to commercial partnerships (which will be discussed in more detail below in point 3 of the study).

It seems that in this case the optimal solution would be changes to broadly include, with respect of the governing bodies of companies, almost all important elements set out in the provisions concerning particular, different bodies of limited liability company, joint-stock company and simple joint-stock company, merged into one entity aimed at improvement of their operation, taking into account postulates arising from the above doubts and questions pointing to lack of consistency and a comprehensive, holistic and optimal approach to the legal solutions introduced. This optimal character and the resulting scope of legislative changes could be considered as the basis for an optimal model to regulate the matter in question.

A number of arguments speak in favour of the introduction of such a consistent, comprehensive and optimal regulation.

Firstly, it is generally beneficial for companies and partnerships, including their bodies and members, owing to improvements in their operation.

Secondly, it provides a legal basis for the obligation (duty) to meet elementary requirements for the implementation of the new possibilities of operation, including security requirements in the area of the existence of a regulatory basis for the detailed rules for their implementation, the convening of meetings, the identification of members of bodies, participation in meetings and activities undertaken, and the confirmation of actions undertaken.

Thirdly, such optimal regulation meets civilisational progress in the area of the development of new and innovative communication technologies (means of direct distance communication, including in particular electronic communication).

Fourthly, the Explanatory notes to the above-mentioned bills introducing the so-called anti-crisis shields do not give answers to these doubts, including to the questions about the method of regulation adopted, and thus the explanation (or justification) of the legislative concept adopted by the legislature, from which it can be concluded that the legislature itself was not entirely convinced, perhaps as regards specific issues, as to its final correctness and scope of the concept. On the other hand, the legislature wanted to take, perhaps not the first, but another very important step, to open the door more widely to certain new possibilities of operation, especially with the use of means of direct distance communication, including electronic means of communication, primarily in order to limit the negative consequences of the current coronavirus epidemic caused by SARS-CoV-2.

3. NEW POSSIBILITIES OF OPERATION BY PARTNERSHIPS

3.1. General remarks

Due to the principle of applying *mutatis mutandis* certain regulations concerning limited liability company or joint stock company in the provisions applicable yet before the adoption of the provisions that make up the so-called anti-crisis shield in specific cases, the catalogue of commercial partnerships and companies, including areas to which the improvements in operation provided for in this shield apply, is wider than only these companies. It includes: 1) professional partnerships in which, in accordance with Article 97(1) CCPC, the management board was established, i.e. the so-called hybrid management model was adopted in terms of the new operational capabilities of this board (due to the application *mutatis mutandis* to these companies under Article 97(2) CCPC of the provisions of Articles 201-211 CPCC and Articles 293-300 CCPC, including the provisions of Article 208(5¹⁻⁵³) CPCC, which concern the management board in the limited liability company), as well as 2) limited joint-stock partnerships – in the area of new operational possibilities for the supervisory board established in accordance with Article 142(1) CPCC, due to the existing statutory requirement or requirement stated in the articles of association and the general meeting – only in terms of the resolutions of shareholders adopted at its meetings (due to the application *mutatis mutandis* to these companies under Article 126(1)(2) CPCC. the provisions of the Code of Commercial Partnerships and Companies on joint-stock companies – including Article 388(1-3) CPCC and Article 406⁵ CPCC) [Szumański 2020, 5].¹³

3.2. New possibilities of operation by professional partnerships

For the introduction of solutions proposed above in a limited liability company, in the area of making use of new possibilities of action by particular bodies, as part of the broadest, optimal model of regulation with regard to companies, the reference to selected provisions on the management board of a limited liability company, i.e. Articles 201-211 CCPC and 293-300 CCPC, existing (even before the introduction in the regulations referred to as the so-called anti-crisis shield) in the provision of Article 97(2) CCPC in respect of activities of a partnership in which the management board has been established, may remain a good and simple way of introducing these new possibilities of operation (regarding the use of means of direct distance

¹³ Szumański, however, probably due to the area of analysis intentionally narrowed down to meetings, refers this only to the general meeting in the limited joint-stock partnership, not to mention the supervisory board established in this company or the management board established in the professional partnership.

communication, including electronic means) by the management board of a professional partnership. It seems that, in this case, a separate regulation of this matter directly in the provisions on professional partnership is not justified, due to the similar substantive scope of regulation, despite their different legal natures,¹⁴ including functions and powers, and thus also the resulting formal and legal status of the management board in a professional partnership in relation to the management board in a limited liability company.

Another, very important, issue is to consider, from the perspective of the law as it should stand, the introduction of the analysed new possibilities of operation of a professional partnership, in which a traditional model of operation has been adopted (i.e. the management board has not been established) – in relation to running affairs by its partners in matters requiring adopting resolutions by them (and thus, as a rule, in matters exceeding the scope of ordinary activities of the partnership), the more so, because pursuant to Article 97(3) CCPC, also in the hybrid model of partnership management, the management board of such a company should include at least one partner by operation of law.

3.3. New possibilities of operation by limited joint-stock partnership

Where the solutions proposed above are introduced in a joint-stock company in the area of using new possibilities of operation by individual bodies as part of the broadest, optimal model of regulating this matter in relation to capital companies, the reference existing (even before the introduction of the provisions referred to as the so-called anti-crisis shield) in Article 126(1) (2) CCPC to the properly applicable provisions on the supervisory board and the general meeting of a joint-stock company in relation to a limited joint-stock partnership, also with regard to the use of means of distance communication, including electronic means of communication, may remain a good and simple way of introducing new possibilities of operation (and specifically the use of these means) by the supervisory board of this company and the general meeting, as regards resolutions adopted by shareholders. As it may be assumed, a separate regulation of this matter directly in the provisions on a limited joint-stock partnership is not justified in this case, due to a similar, despite having a different legal nature, substantive scope of the regulation, including functions and powers, and therefore also the resulting formal and legal status of the supervisory board and the general meeting in a limited joint-stock partnership in relation to these bodies in a joint-stock company.

¹⁴ See, for example, Górńska 2001, 36-37; Jacyszyn 2001, 171; Krześniak 2002, 243ff; Ciecierska 2005, 62; Kozieł 2006, 29.

Another issue, a very important one, is to consider, from the perspective of law as it should stand, the introduction of these new possibilities of operation of a limited joint-stock partnership with regard to the running of affairs by its general partners in matters requiring the adoption of resolutions by them (i.e., in principle, in matters exceeding the scope of ordinary activities of the partnership), as well as in relation to expressing a consent of the general partners (unanimously by all or by a majority of votes) to shareholders' resolutions adopted at the general meeting, in accordance with Article 146(2-3) CCPC. It should be borne in mind that the provisions on joint-stock companies in the light of Article 126(1)(1-2) CCPC applied *mutatis mutandis* to the general meeting in the limited joint-stock partnership do not refer to consents of the general partners to these resolutions, as required under Article 146 CCPC.

3.4. New possibilities of operation of general partnerships and limited partnerships – a proposal *de lege ferenda*

The proposal to introduce these new operational possibilities remains valid also for partners of other commercial partnerships, i.e. partners of a general partnership, partners of a limited partnership (general partners and the limited partners who, unless the articles of association provide otherwise, have the right to consent to the resolutions of the general partners on the matters of running affairs of the partnership, which exceed the scope of the ordinary activities of the partnership – Article 121(2) CCPC). It seems that there is no justification for the differentiation in this area (new possibilities of operation) of the legal position of the bodies of a limited liability company and joint-stock company (or a simple joint-stock company), and on the other hand the legal status of the members (partners) in commercial partnerships who make decisions collectively, i.e. primarily in the form of resolutions.¹⁵

CONCLUSION

It seems that the new possibilities of operation by commercial companies and partnerships introduced by the legislature in the regulations of the so-called anti-crisis shield are a key step, perhaps a milestone, and at the same time they begin another very important stage in regulating this matter, which should generally be assessed positively. However, as mentioned

¹⁵ On the other hand, Szumański holds that the use of means of direct distance communication generally in all commercial partnerships may contradict the personal nature of commercial partnerships, including the primacy of the person over capital [Szumański 2020, 5].

above, individual detailed and very important legal solutions in this area are selectively and unevenly “scattered” over the provisions relating to individual governing bodies of companies, without any justification, including without taking into account the need for a specific analogy, symmetry and the completeness of regulation in each case, instead of being comprehensively, holistically and symmetrically related to each of them. It can be assumed, as in other analogous cases, that this results from the specific, but easily noticeable (also against the backdrop of similarly incomplete and asymmetrical legal solutions introduced for other entities, e.g. in cooperatives,¹⁶ associations¹⁷ or foundations¹⁸) inconsistency and lack of a holistic, comprehensive and optimal approach to the solutions being introduced. Apart from the above-mentioned specific doubts concerning the regulations for companies (applied *mutatis mutandis* to the management board of a professional partnership, as well as the supervisory board and the general meeting of a limited joint-stock partnership), there are no grounds in this respect, *inter alia*, for the fact that the new possibilities of operation do not apply to entities other than the bodies adopting resolutions in commercial partnerships, i.e. to their members (partners), or – like for the bodies of a limited liability company and joint-stock company – to the bodies of a simple joint-stock company (including, in particular, to its general meeting).

A way to address the imperfections of these regulations, and thus to remedy the insufficiencies caused by them, may be the introduction of legislative changes based on the optimal model of regulation proposed above. Its application should be considered from the perspective of the law as it

¹⁶ New possibilities of operation for the governing bodies of cooperatives (acting under general rules) have been set out mainly in the provisions concerning: 1) the management board and the supervisory board (Article 35(4¹-4⁴) of the Act of 16 September 1982, the Law on Cooperatives, Journal of Laws of 2020, item 275 as amended [hereinafter: Law on Cooperatives]), 2) the general meeting (Article 36(9-13) of the Law on Cooperatives, Article 40(3) of the Law on Cooperatives and Article 46a, third sentence, of the Law on Cooperatives), 3) the meeting of representatives (Article 35(4¹-5) of the Law on Cooperatives in conjunction with Article 37(5) of the Law on Cooperatives) and 4) the meetings of member groups (Article 35(4¹-5) of the Law on Cooperatives in conjunction with Article 59(1), third sentence, of the Law on Cooperatives).

¹⁷ New possibilities of action of the governing bodies of associations have been set out in the provisions of Article 10(1a) to Article 10(1d) of the Act of 7 April 1989, the Law on Associations (Journal of Laws of 2020, item 2261 as amended [hereinafter: Law on Associations]). These generally refer to the authorities (bodies) of the association (general meeting of members, internal auditing body and management board).

¹⁸ New possibilities of operation of foundation's bodies have been set out in provisions of Article 10(1a) to Article 10(1d) of the Law on Associations in conjunction with Article 5(1a) of the Act of 6 April 1984 on foundations (Journal of Laws of 2020, item 2167) and relate in general to all foundation's authorities (bodies) (the management board and bodies established on the basis of the foundation's statutes, such as e.g. the founders' council).

should stand (*de lege ferenda*) not only in the area of commercial companies and partnerships, but also in relation to other entities, including both those which pursue business activities and those which do not, in particular: co-operatives, state-owned enterprises (in relation to the bodies of self-government of the personnel in these enterprises) or associations.

REFERENCES

- Aślanowicz, Marcin. 1999. "Charakter i pozycja zarządu w spółce partnerskiej." *Przeegląd Prawa Handlowego* 8:14-21.
- Ciecierska, Magdalena. 2005. "Charakter prawny zarządu w spółce partnerskiej." *Przeegląd Sądowy* 6:62.
- Górska, Beata. 2001. "Spółka partnerska w prawie niemieckim i w polskim kodeksie spółek handlowych." *Przeegląd Prawa Handlowego* 3:36-37.
- Jacyszyn, Jerzy. 2001. *Spółka partnerska*. Bielsko-Biała: PPU PARK.
- Kosmin, Leslie, and Catherine Roberts. 2020. *Company meetings and resolutions. Law, Practice, and Procedure*. Oxford: Oxford University Press.
- Kosseff, Jeff. 2020. *Cybersecurity law*. New York: Wiley.
- Krześniak, Eligiusz J. 2002. *Spółka partnerska ze szczególnym uwzględnieniem spółek adwokatów i radców prawnych*. Warszawa: Wolters Kluwer Polska, Kantor Wydawniczy Zakamycze.
- Kozieł, Grzegorz. 2006. *Przeniesienie praw i obowiązków w handlowych spółkach osobowych. Uwagi na gruncie regulacji art. 10 k.s.h.*. Warszawa: Wolters Kluwer Polska, Kantor Wydawniczy Zakamycze.
- Kozieł, Grzegorz. 2020. *Prosta spółka akcyjna. Komentarz do art. 300¹-300¹³⁴ k.s.h.*. Warszawa: C.H. Beck.
- Osajda, Konrad. 2020. "Zarząd spółki kapitałowej (nowelizacja Kodeksu spółek handlowych w związku z pandemią)." *Przeegląd Prawa Handlowego* 6:18-29.
- Ostrowski, Łukasz. 2020. "Nowa regulacja posiedzeń zarządów i rad nadzorczych odbywanych przy wykorzystaniu środków komunikacji elektronicznej." *Przeegląd Prawa Handlowego* 5:32-38.
- Pazdan, Maksymilian. 1969. "Niektóre konsekwencje teorii organów." *Zeszyty Naukowe Uniwersytetu Śląskiego. Prace Prawnicze* 1:203.
- Schmidt, Karsten. 2002. *Gesellschaftsrecht*. Köln-Berlin-Bonn-München: Carl Heymanns (Verlag).
- Sołtysiński, Stanisław, Andrzej Szajkowski, Andrzej Szumański, et al. 2001. *Kodeks spółek handlowych*. Vol. 1: *Komentarz do art. 1-150 k.s.h.*. Warszawa: C.H. Beck.
- Szajkowski, Andrzej. 2005. "Status prawny zarządu spółki partnerskiej." In *Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana Profesorowi Stanisławowi Sołtysińskiemu*, edited by Aurelia Nowicka. Poznań: Wydawnictwo Uniwersytetu Adama Mickiewicza.

- Szumański, Andrzej. 2020. "Nowa regulacja udziału w zgromadzeniu spółki kapitałowej przy wykorzystaniu środków komunikacji elektronicznej." *Przegląd Prawa Handlowego* 5:4-14.
- Żaba, Mateusz. 2020. "Uczestnictwo i głosowanie na zgromadzeniu wspólników przy wykorzystaniu środków komunikacji na odległość." *Przegląd Ustawodawstwa Gospodarczego* 3:13-20.