



Taylor Wessing legal alert

How to hold a meeting of a company's bodies during the coronavirus (COVID-19) and quarantine times?

Due to the unexpected emergence of an untypical situation for the day-to-day business of declaring an epidemic emergency both in Poland and in most EU countries, companies and their bodies must face a new reality in their daily work and take up the challenge of acting as close to normal as possible. Especially given the fact that even an emergency situation does not release from a number of obligations provided for in the provisions of law.

One such obligation, usually performed in the second quarter of the calendar year, is to approve the financial year. The vast majority of Polish businesses consider the calendar year as their financial year. The beginning of the "season" of ordinary shareholders' meetings or ordinary general meetings overlapped this year with the announcement of an epidemic hazard. This makes it impossible to carry out such meetings the regular manner and in accordance to sanitary recommendations.

Approval of financial statements is not the only activity for which the general meeting or shareholders' meeting needs to be active. Given the risk of recession, it is very likely that many shareholders of companies for whom the present situation may give an impulse to liquidity needs as a way to support their companies financially, which, in turn, may require the adoption of resolutions by shareholders' meetings or general meetings; often in the presence of a notary public.

The presence of a larger number of shareholders at a general meeting or a shareholders' meeting may simply be irreconcilable with the need to maintain the requirements of epidemic safety.

Shareholders meeting in the limited liability company

According to the currently binding provisions of the Commercial Companies Code ("CCC"), the Articles of Association may permit participation in a shareholders' meeting using electronic means of communication, which includes in particular: (i) real-time transmission of a shareholders' meeting; (ii) real-time bilateral communication where shareholders may take the floor during a shareholders' meeting from a place other than the venue of the meeting; (iii) exercising the right to vote in person or by a proxy before or during a shareholders' meeting. Where the Articles of Association permit participation in the shareholders' meeting using electronic means of communication, participation in the shareholders' meeting may only be subject to such requirements and restrictions as are necessary to identify the shareholders and ensure the security of electronic communication. It is therefore possible to use both



video-conferencing and teleconferencing as well as acting through a proxy. Use of such remote solutions requires the Articles of Association to contain provisions that allow so.

If the Articles of Association have not been adapted to remote solutions, in limited liabilities companies (sp.z.o.o) where it is possible to reach a consensus on adopting resolutions without holding a "traditional" shareholders' meeting, the procedures provided for in Article 227 § 2 of CCC may be used, i.e. adoption of unanimous resolutions in writing (shareholders agree in writing to the provision to be adopted) or voting in writing. It is worth mentioning that as of 1 March 2019 the possibility to vote in writing also applies to annual resolutions, i.e. resolutions which have so far been adopted at ordinary shareholders' meetings, which have traditionally had to be held before. Therefore, in a situation of an epidemic threat, a practical solution is for the management boards of the companies to obtain, sufficiently in advance, the written consent of all shareholders to vote in writing and, with that, to carry out the approval of the financial year 2019, to grant vote of approval and, if necessary, to appoint members of the company's bodies for subsequent/new terms.

General meeting in a public limited company

The use of electronic means of communication in a public limited company (S.A.) has already been introduced at the stage of organisation of a general meeting. However, it must result from the provisions of Statute. Proposed amendments to the provisions of CCC should extend this possibility (of holding a general meeting with shareholders and members of the governing bodies participating remotely) for all companies where the Statute do not prohibit such a method.

Please note that the announcement of convening a general meeting should contain information about: (i) the manner of exercising the voting right by proxy, including in particular the forms used to vote by proxy, and the manner of notifying the company by electronic means of communication of the appointment of a proxy, (ii) the possibility and manner of participating in the general meeting by electronic means of communication, (iii) the manner of expressing opinions during the general meeting by electronic means of communication, (iv) the manner of exercising the voting right by mail or by electronic means of communication.

As in the case of a limited liability company, also in a public limited company, the possibility of holding a general meeting using electronic means of communication must be provided for in the Statutes and the details should be regulated in the rules of the general meeting. If this condition is met and the Statutes make it possible, then it is possible to use both video-conference and tele-conference technology. For shareholders to participate in the general meeting may only be subject to requirements and restrictions which are necessary to identify shareholders and ensure the security of electronic communication.

Shareholders also have the possibility to contact the company via a distant manner in connection with the convened general meeting. A shareholder or shareholders of a public company who represent at least one twentieth of the share capital may, prior to the date of the general meeting, submit, in writing or using electronic means of communication, draft resolutions to the company which concern the matters on the agenda of the general meeting or matters to be included in the agenda. The Company shall immediately announce the draft resolutions on its website.



In addition the Company's Statute may authorize the shareholders to represent less than one-twentieth of the share capital to request that certain matters be put on the agenda of the next general meeting of shareholders and to submit to the Company in writing or using electronic means of communication draft resolutions concerning matters put on the agenda of the general meeting of shareholders or matters which are to be put on the agenda.

In the current situation, it seems advisable to enable shareholders to participate in the general meeting and exercise their voting rights by proxy. Shareholders and the company may entrust the role of a proxy holder to one professional adviser appointed by the company, exercising the profession of advocate or attorney at law. In such a case, the relationship of the mandate (and duty of care) would link the advocate (attorney at law) with the company and would concern the facility of holding the general meeting by exercising the shareholders' powers of attorney, according to their instructions. The proxy would be present in a notary's office or in the registered office of the company or even in the law office of that proxy, in the presence of a notary (if possible; such proxy may also act as the chairman of the general meeting) and would exercise the voting rights of all shareholders who would grant him a power of attorney. The course of the general meeting may be broadcasted and allow both remote presence of members of the authorities (management board and supervisory board) and the option for shareholders to ask questions. A possible introduction of changes to the content of draft resolutions of the general meeting, as compared to the content of published drafts, for which shareholders have drawn up voting instructions, would require an announcement of a break in the general meeting, in order to enable a possible change in the content of the instructions issued by the shareholders. The current regulations, concerning both written and remote voting, do not seem to fully meet the challenges posed by the current situation to the companies. In particular, since the possibility of voting by mail has been introduced in the act by referring to the "general meeting bylaws (regulamin walnego zgromadzenia)", a previously unknown to CCC corporate document, whose status is at least doubtful (a violation of the bylaws does not result in the right to challenge a resolution).

Therefore, we recommend that if it is necessary to hold a general meeting during a state of epidemic hazard, state of epidemy or even a state of emergency considered by the government, to use the institution of a proxy nominated by the company and the possibility to make the course of a general meeting available by means of video and audio broadcasting from several simultaneous locations where members of the authorities and shareholders would be located. Thus, without waiting for statutory changes, a practical possibility of holding general meetings would arise.

We would like to point out that regardless of the form of holding a meeting, in the case of limited liability companies, the presence of the chairman of the shareholders' meeting and a minutes secretary is required (and if required, a notary public), and in the case of joint-stock companies, the chairman of the general meeting and a notary public.

Urgent amendment of CCC regulations with regard to the form of meetings of supervisory boards and management boards

The current regulations do not allow the collegial management boards of capital companies to adopt resolutions by remote or circular means.



The proposed statutory changes are to change this state of affairs. In a situation where members of the authorities can be subject to either formal or even de facto quarantine and with movement restrictions, it has become necessary to allow the boards of directors to act in an emergency situation.

Supervisory boards may operate remotely, i.e. by means of direct remote or written communication forms, only if the Articles of Association or the Statutes allow for this possibility (except that resolutions concerning the election of the chairman and vice-chairman of the supervisory board, the appointment of a member of the management board and the dismissal and suspension of these persons from their duties are excluded). Furthermore, a resolution adopted in this manner is only valid if all members of the supervisory board have been notified of the content of the draft resolution. This provision is internally inconsistent. It combines written resolutions with distance voting, using means of distance communication. It is hoped that it will change on the occasion of the current, rapid, amendment.

The Ministry of State Assets ("MAP") has accelerated work on the CCC reform, at least in the part concerning the introduction of the possibility to hold remote meetings of supervisory boards and management boards of capital companies. Such a possibility will exist "by default"; its exclusion will require an explicit provision in the Articles of Association or the Statute. According to the statements of MAP's representatives, the intention of the authors of the amendment under preparation is that all decisions, including those concerning the casting of management boards, may be taken by circulation. This means that the possibility of adopting resolutions without holding a "traditional" meeting of the authority (i.e. a direct meeting of its members) will be introduced to the provisions of CCC, which in the vast majority of cases will translate into an automatic possibility to apply this solution in practice.

In situations where the currently applicable internal bylaws of management boards or supervisory boards specifically regulate the conditions for adopting resolutions, they should be analysed in terms of the need to change them, if necessary.

Press releases (*Dziennik Gazeta Prawna*) indicate that an amendment to the regulations could be passed at the next Sejm meeting, which would be advisable due to the prevailing pandemic situation. We postulate introducing these regulations with retroactive effect. This is possible under the Constitution of the Republic of Poland. Appropriate transitional and entry into force provisions must be drafted in an appropriate manner and have a proper axiological rationale.

Conclusion

Until the aforementioned amendment to CCC comes into force, the content of the company's Articles of Association and Statutes shall first be thoroughly analysed in terms of the possibility of adopting resolutions remotely, communicating with the company and participating in a shareholders' meeting or a general meeting. If the Articles of Association or Statute do not provide for the facility to use other forms of body meetings than a face-to-face meeting, it is worth considering implementing such solutions in the company's corporate documents; however, it should be noted that due to the need to carry out the procedure required for amending the Articles of Association (Statutes) and registering the change in the National Court Register, this may prove to be time-consuming and thus difficult. A practical solution is to grant a power of proxy and coordinate this process by the companies, additional transmission of the meeting or, in the case of a limited liability company, consent to a written vote.



It is possible that the law will come into force retroactively. Rather, it should be pointed out that while waiting for such a solution, we suggest paying attention to the communications from MAP. From our part, we will keep you informed. We are also ready to provide you with assistance in preparation and convening of general meetings of joint stock companies without physical presence of shareholders as well as broadcasting of such a meeting to the entitled and registered participants thereof.

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