

Fakty Komentarze Analiza

Alert prawny

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Facts

The Act on Special Solutions Related to the Prevention of, Counteracting and Combating of COVID-19, other Infectious Diseases and Crisis Situations Caused by Them of March 31st 2020 ("Act on COVID-19") provides for significant changes in the functioning of commercial law companies, in particular as regards options for adopting resolutions and holding meetings remotely by the bodies of a limited liability company, joint-stock company and limited joint-stock partnership.

In a nutshell, the changes boil down to the approval of a practice already existing in many companies – previously raising doubts as to its validity – involving the use of new technologies for the purpose of handling corporate matters. Until recently, such practice was permissible only if companies explicitly provided for such a solution in their respective articles of association (however, even then it was subject of controversies). As of March 31st 2020, the possibility of using new technologies in the day-to-day corporate operations of companies has become the default rule with a reservation that companies may exclude such a solution in their articles. Given that the majority of the companies did not provide in their articles for any provisions in this regard, a significant part of them will be able to benefit from the recent changes right away.

Resolutions and meetings of the management board

As regards the manner of holding meetings of management boards of companies, the following solutions have been introduced under the Act on COVID-19:

- the possibility of participation in a meeting of the management board using means of direct communication over distance (in the case of a joint-stock company it is required to draw up regulations setting out detailed rules for participation in the meeting);

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- the possibility of adopting resolutions by the management board in writing or by using means of direct communication over distance;
- the opportunity for the members of the board to take part in adopting management board resolutions by casting their votes in writing through another management board member.

Resolutions and meetings of the supervisory board

Similar solutions have been implemented for supervisory board meetings:

- the possibility of participation in a meeting of the supervisory board using means of direct communication over distance (in the case of a joint-stock company and a limited joint-stock partnership the supervisory board should adopt regulations regarding the rules of participation in the online meeting);
- the possibility of adopting resolutions by the supervisory board in writing or by using means of direct communication over distance with the reservation that such resolution will be valid only if all members of the board have been notified of the content of the draft resolution and at least half of the board members took part in its adoption. The company's articles of association may provide for more strict requirements regarding the adoption of resolutions;
- the opportunity for the members of the supervisory board to participate in adopting resolutions of the supervisory board by casting their vote through another member of the supervisory board, with a restriction that in such a case the casting of a vote in writing cannot concern matters put on the agenda during the meeting of the supervisory board;
- revocation of the previous regulation, according to which resolutions adopted over distance could not have concerned the election of the chairman and deputy chairman of the supervisory board, appointment of a management board member and recalling and suspending such persons.

Resolutions of the meeting of shareholders and general meeting

After the amendment it is also possible to participate by means of electronic communication in the meeting of shareholders of a limited liability company and the general meeting of a joint-stock company as well as general meeting of a limited joint-stock partnership. Decision on holding a shareholders' meeting or general meeting with the use of new technologies should be taken by the person convening that meeting.

Choosing the online form of the meeting implies that the supervisory board – or shareholders in its absence – should specify the rules on participation in the meeting. Such rules cannot specify requirements and constraints other than those necessary for the identification of shareholders and to ensure the security of electronic communication. If it is shareholders who adopt the regulations, this may be done by adopting a resolution of the shareholders without having a meeting, provided that the absolute majority of the shareholders agree in writing on the content of such regulations.

Upon the decision on convening an online meeting of shareholders of a limited liability company, notice on the meeting should include information on how to participate in the meeting, speak in the course of it, exercise voting rights and raise objections to resolution(s).

Separate regulation has been provided for the purposes of exercising voting rights remotely as part of the general meeting of a joint-stock company (or limited joint-stock partnership) – immediately after exercising the voting right the company should send to the shareholder an electronic confirmation of receiving the vote (however, the provision regarding this specific solution will not enter into force until September 3rd 2020).

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Comments

The envisaged solutions regarding the possibility of holding meetings of management and supervisory bodies with the use of new technologies provide legal grounds for the implementation of the online operation of companies (in the form of teleconferencing or videoconferencing), within the limits set by the amended provisions of the Code of Commercial Companies ("CCC"). In other words, Act on COVID-19 dispels doubts hitherto expressed in doctrine and case law regarding the admissibility of holding meetings online.

The possibility of adopting resolutions by management and supervisory bodies in writing or by means of direct communication over distance constitutes – in the case of supervisory boards – a favorable reversal of the previous legal rule, under which such a solution was acceptable as long as it was provided for explicitly in the company's articles of association – i.e. online mode of holding a meeting involving new technologies has now become an opt-out option instead of an opt-in one as it used to be before. In the case of management boards, there were previously no similar solutions, which was the source of numerous controversies.

The introduction of the possibility of holding the meeting of shareholders and the general meeting online also constitutes a reversal of the existing code principles – holding meetings using electronic means of communication was possible if allowed in the articles of association since September 2019 in the case of limited liability companies, and since August 2009 in the case of joint-stock companies as well as limited joint-stock partnerships. As of March 31st 2020 it is possible by default, provided that the articles of association do not preclude such an option (i.e. in the absence of an opt-out).

It should be noted that the introduced solutions do not exclude the obligation to

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draw up a report by a notary public if required by the provisions of the CCC. Changes have been proposed in order to allow notaries to prepare electronic notarial deeds, however it is not yet possible. Also, there are no exceptions to the rule according to which in the instances specified in the provisions of the CCC, namely when the vote concerns personal matters or if the participant of the meeting participant requests it, it is necessary to conduct the secret ballot voting. In practice, enabling secret ballot voting with the use of new technologies may involve additional costs of IT systems capable of ensuring full anonymity of voters. Ultimately, this will limit the number of entities being able to take advantage of the improvements introduced by the legislator.

The amendment is also not free from ambiguities. In particular, the provision on the obligation to draw up regulations (art. 406(5) § 3 CCC) upon holding meetings of the management board and supervisory board of a joint-stock company (or a limited joint-stock partnership) with the use of new technologies raises doubts as to its proper application. The intention of the legislator – under the reasoning accompanying the draft Act on COVID-19 in the version of March 19th, 2020 – was to eliminate existing doubts as to the possibility of holding meetings by means of direct communication over distance, and this purpose was to be fulfilled by the reference to the provision of art. 406(5) § 3 CCC. However, during the legislative works on the Act on COVID-19, this provision was amended. As a result, instead of confirming that remote communication can be used without concerns, additional obligations implying the need to adopt appropriate regulations were imposed on the bodies intending to hold a meeting online. This unfortunate last-minute change unnecessarily complicates and postpones the possibility of holding meetings by means of direct communication over distance.

Analysis

Overall, introduced solutions are positive and welcome changes.

The amendment to the CCC constitutes – in line with the intention of the legislator – a response to the market needs, which have been reported for many years now. New options envisaged to support online functioning of selected commercial companies, particularly desirable at present, should contribute to the improvement of companies' day-to-day operations – not only in extraordinary times shaped by the epidemic of a novel virus, but also in those that will come afterwards.

If you would like to receive additional information or answers to questions arising after reading, please contact us and establish cooperation:

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