



Impact of the COVID-19 pandemic on day-to-day operation of commercial companies

Practical tips taking into account the solutions presented in the Act on specific solutions related to the prevention, prevention and eradication of COVID-19, other infectious diseases and crisis situations caused by them (Anti-Crisis Shield), which entered into force on March 31, 2020, the Act on specific support instruments regarding the spread of the SARS-CoV-2 virus, which entered into force on April 18, 2020 and the Act on amendments to certain laws concerning protection measures in connection with the spread of SARS-CoV-2 virus, which entered into force on May 16, 2020.

Scheduling meetings of company bodies, including shareholders' meetings/general meetings, in the immediate future, and the possibility of remote participation and written voting

Restrictions related to the prohibition of assemblies

Currently, prohibition on the organisation of assemblies, as well as meetings and gatherings, regardless of their type, introduced by the Regulation of the Council of Ministers of 19 April 2020 on establishing certain restrictions, orders and prohibitions in connection with the occurrence of a state of epidemic, is in effect in Poland, until further notice.

This prohibition do not apply to, among others, meetings and gatherings related to the performance of professional activities or tasks nor non-agricultural business activities, as well as to undertaking agricultural activities. If one considers that holding shareholders' meetings, general meetings and meetings of bodies of companies conducting business activities, is excluded from the abovementioned prohibitions, then their organisation creates a real risk for the transmission of the virus. It is therefore worth examining alternative solutions.

The Act of 31 March 2020 amending the law on special arrangements for the prevention, counteracting and combating of COVID-19, other infectious diseases and crisis situations caused by them and certain other laws (further, the "Anti-Crisis Shield") is in force as of 31 March 2020 and introduces significant measures facilitating the day-to-day operation of commercial companies, and it has been further supplemented by the Act of 16 April 2020 on specific support instruments regarding the spread of the SARS-CoV-2 virus, that came into force on 18 April 2020 and by the Act of 14 May 2020 on amendments to certain laws concerning protection measures in connection with the spread of SARS-CoV-2 virus, that came into force on 16 May 2020.

Possibility of remotely participating in shareholders' meetings and general meetings which have already been convened

If a shareholders' meeting or a general meeting was convened before 31 March 2020, shareholders may participate remotely, even if it was convened in the "traditional" manner. It is necessary for the convener to give notice of the possibility to participate by electronic means of communication, in accordance with the procedure laid down for the meeting's convention, but, no later than 4 days before the date of the meeting.

»» Possibility of cancelling meetings which have already been convened

The cancellation of meetings which have already been convened may also be considered. This would require confirming the formal requirements applicable in a given company, as well as the procedure under which a meeting was convened.

In the case of shareholders' meetings and general meetings, the possibility of their cancellation may be limited. If the articles of association do not provide for special regulations in the event of extraordinary circumstances or force majeure, then generally applicable regulations shall apply. As a rule, the right to cancel a shareholders' meeting and a general meeting is vested in the convener, but in certain cases it may be limited, such as, when such a meeting was convened at the request of authorised entities, which in principle may then have the exclusive right to cancel it.

The cancellation should be carried out in accordance with the same requirements as apply to the convening of the meeting. The above restriction may give rise to practical difficulties during the current pandemic, especially if there is little time left before the date of the meeting and it was convened in a formal manner (by registered mail or an announcement in the Court and Commercial Gazette (*MSiG*)).

»» Possibility of remote participation in meetings

The Anti-Crisis Shield introduces the possibility of remotely participating in shareholders' meetings or general meetings, as well as in meetings of the management board and the supervisory board, as a general rule. Many companies' current articles of association may impose restrictions in this regard, especially since they were adopted in the previous legal environment and reflected existing statutory restrictions. Therefore, before calling an e-meeting one should confirm whether a particular category of issue has been excluded from being resolved on remotely.

It is important to note that supervisory boards can also adopt resolutions using means of direct remote communication on matters for which a secret ballot is required by the articles of association, unless any of its members objects.

With regard to shareholders in limited liability companies and joint stock companies, the possibility of remotely participating in a shareholders' meeting or a general meeting will be decided upon by the person convening the meeting. In the case of limited liability companies, additional information must be included in the invitation (including, but not limited to, the manner of participation, speaking, exercising voting rights and raising objections during the meeting).

Detailed rules for participation in an e-meeting should be adopted in the company's internal regulations by the supervisory board (or by the shareholders, where there is no supervisory board).

»» Written voting

The Anti-Crisis Shield facilitates the adoption of resolutions of commercial company bodies in a so-called written procedure. Resolutions of both the supervisory board and the management board resolutions may be adopted under this procedure.

Existing restrictions for supervisory boards have been relaxed in this regard. Now it will be possible to elect the chairman and vice-chairman of the supervisory board, appoint or dismiss a member of the management board or suspend them from their duties by means of a written vote.

Many companies' current articles of association and regulations may impose restrictions on written resolutions, especially since they were adopted in the previous legal environment and reflected existing statutory restrictions. Before deciding on the voting procedure, one should therefore confirm whether a given category of issue has been excluded from being resolved on by way of a written vote.

Nevertheless, supervisory boards can currently adopt resolutions by way of the written procedure on matters for which a secret ballot is required by the articles of association, unless any of its members objects.

»» **Appointing a proxy or casting a vote through another member of a company body**

The Anti-Crisis Shield facilitates written voting through another member of a company body. Now members of the management board will also be able to make use of this procedure. This form of voting will now be allowed in both supervisory boards and management boards even if such a solution is not expressly provided for in the articles of association. Many companies' current articles of association and regulations may impose restrictions in this regard, especially as they were adopted in the previous legal environment and reflected existing statutory restrictions. Similarly to previously applicable law, only shareholder may appoint a proxy. As a rule, a power of attorney to participate in a meeting must be granted in written form under pain of nullity, however, a power of attorney may also be sent by e-mail if it bears a qualified electronic signature.

»» **The need to adapt the articles of association of commercial companies**

Although the Anti-Crisis Shield introduces a number of provisions aimed at facilitating the operations of companies in light of the current epidemic, existing articles of association may impose restrictions that preclude them from being used. Therefore, the recommended solution is to verify and appropriately amend the wording of the company's articles of association so that the solutions introduced by the provisions of the Anti-Crisis Shield can be used by companies to the greatest possible extent.

Be aware of the deadlines for obtaining corporate approvals

»» The Anti-Crisis Shield does not suspend the time limits for obtaining corporate approvals during the state of epidemic. If the consent of a given body was a statutory requirement for the performance of certain actions and the company is forced to perform them during the state of epidemic (e.g. selling real estate), the two-month period during which the competent body may confirm said actions commences. After this period expired, it will no longer be possible to confirm the action.

No changes regarding the requirement for the management board to convene a meeting of the shareholders.

»» The Anti-Crisis Shield does not release members of the management board from their duty to convene a shareholders' meeting and a general meeting in the cases provided for by law or in the company's corporate documents. In particular, a company's management board is obliged to convene a meeting of its shareholders in the event that the company's balance sheet shows a loss exceeding the sum of its supplementary and reserve capitals and half of its share capital (one third, in the case of joint stock companies) in order to adopt a resolution concerning the company's further existence. The shareholders may then also decide to contribute funds to the company using existing mechanisms, such as through additional contributions (only in the case of limited liability companies), a share capital increase, a loan, or a bond issue (including the issue of convertible bonds - only in the case of joint stock companies). If the company's financial liquidity is disrupted or the so called balance sheet conditions are met, an application for bankruptcy or restructuring proceedings will have to be filed.

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The Anti-Crisis Shield has not introduced any changes to the provisions of the Commercial Companies Code, according to which, the management boards of commercial companies are obliged to convene an annual shareholders' meeting or annual general meeting within 6 months of the end of each financial year in order to approve the financial statements for the previous financial year, despite the obligation to approve such financial statements itself being postponed by 3 months according to a Regulation of the Minister of Finance. Therefore, are doubts as to whether management boards are nevertheless obliged to convene such meetings on their original dates.

Postponement of deadlines for the preparing and approval of financial statements for 2019

» The Anti-Crisis Shield and the Regulation of the Minister of Finance of 31 March 2020 extend the deadlines for the preparing and approving of financial statements and reports on companies' activities by 3 months (in case of companies subject to supervision of the Polish Financial Supervision Authority – by 2 months). This extension only applies to companies whose financial year ended between 29 September 2019 and 30 April 2020, provided that the deadline for the performance of duties related to the drafting and approval of said statements did not expire before 31 March 2020.

For companies whose financial year overlaps with the calendar year, the deadline for the drafting of financial statements for 2019 will expire on 30 June 2020, and the deadline for their approval by shareholders is 30 September 2020.

Before the date of the meeting, a company's supervisory board should adopt reports on the audit of the financial statements and present their recommendations to the shareholders, and prior to that, the company's auditors should complete their audit of its financial statements. In light of the pandemic and market uncertainty, auditors are introducing additional requirements for companies, confirming the validity of the entity's management adopting the going concern principle when preparing the financial statements.

Note that the delayed approval of financial statements for 2019 may have negative consequences for shareholders. Until the financial statements for 2019 are approved, the management board is prohibited from paying dividends for 2019, or advances on the expected dividend for the current year. Under current law, the approval of financial statements for the previous financial year, i.e. 2019, is a prerequisite for the payment of advances on account of the expected dividend for 2020.

A company's payment of dividends does not affect the possibility of their use of the aid mechanisms provided for in the Anti-Crisis Shield – this act does not introduce restrictions in this regard. Therefore, the payment of dividends is only subject to existing restrictions resulting from the Commercial Companies Code.

Changes to the form of subscription order for shares in joint-stock companies

» The amended law introduces a significant facilitation in the rules on subscription orders for shares, required for the subscription of shares in joint-stock companies. Under the current law, subscriptions for shares are made in writing on a form prepared by the company in at least two copies - one copy for the subscriber and the other for the company. The law provides for the introduction - additional to the form mentioned above - of the possibility of electronic subscriptions for shares, by completing a form made available in an ICT system and signing it with a qualified electronic signature, a trusted profile or a personal signature.

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An electronic subscription order should still contain the number and types of subscribed shares, the amount of payment, the subscriber's consent to the wording of the articles of association if he/she is not a shareholder of the company, and the address of the entity authorised to accept subscriptions and payments, however, the signatures of the subscriber and the company will not be mandatory. The so-called "Shield 1.1" also stipulates that the acceptance of a subscription order in electronic form requires its certification by the entity accepting such a subscription, but does not specify the form of such certification.

Obligations related to the shareholders register and the mandatory dematerialisation of shares

- » The Anti-Crisis Shield does not release joint stock companies or partnerships limited by shares from obligations related to their implementation of shareholder registers and the mandatory dematerialisation of shares scheduled for 2020, however, in the light of the current epidemiological situation, the statutory terms have been postponed, allowing the abovementioned obligations to be properly fulfilled. Currently, general meetings must adopt resolutions on the selection of the entity keeping the shareholders register and signing the relevant agreement with such entity by 30 September 2020. This is also the date by which the company must have issued the first call to its shareholders for them to supply it with the share documents they hold. The expiry date of all issued share documents has also been postponed by two months, from 1 January 2021 to 1 March 2021.

Obligations related to the Central Register of Beneficial Owners (CRBR)

- » The Anti-Crisis Shield postpones the deadline for companies registered in the National Court Register (KRS) before 13 October 2019 to first report data on their beneficial owners to the CRBR until 13 July 2020. What is important, the 7 – days period to report any change in the information which has already been submitted to the CRBO was not extended.

Companies registered after 13 October 2019 are still required to register this information with the CRBR within 7 days of their registration in the KRS. We would like to remind you that the obligation to register information with the CRBR applies to general partnerships, limited partnerships, partnerships limited by shares, limited liability companies, simple joint-stock companies (the regulations on simple joint-stock companies will take effect from 1 March 2021) and joint-stock companies (except for public companies). The CRBR holds information on the natural persons exercising direct or indirect control over a given company (its so-called beneficial owners).

Applications to the KRS in the absence of the e-KRS system

- » The Anti-Crisis Shield does not suspend current deadlines to submit applications to the KRS nor does it introduce the possibility to submit applications to the KRS by electronic means (this does not apply to the submission of financial statements and applications made by companies established electronically, provided that all such applications were previously submitted electronically). This will only be possible from 1 March 2021.

Modification of the liability of members of company bodies

As a rule, members of the management board, supervisory board, audit committee and liquidators of companies are liable to the company for damages caused by their wilful misconduct or omission, which is unlawful or violates the provisions of the company's articles of association.

Pursuant to the provisions of the Anti-Crisis Shield, the liability of such persons for damages is excluded if the company is party to a public procurement contract, and said persons have decided that the company, being the contracting party, would not seek contractual penalties or damages from the contractor, or have made appropriate amendments to said contract, due to circumstances caused by COVID-19.

The law additionally excludes the liability of members of the management board, supervisory board and liquidators of joint-stock companies for damages caused to the company where a given person, in the public interest, performs duties and tasks related to combating the effects of COVID-19, which have been imposed on the company by law, or on the basis of the provisions of an agreement concluded between the minister of the economy and the Polish Development Fund specifying the conditions and procedures for the transfer of funds to cover the Fund's costs in connection with the implementation of the government's programme to grant financial support to entrepreneurs.