

## **Corporate decisions in times of global pandemic**

The coronavirus pandemic has affected the decision-making processes of a large number of companies. While the commercial sector urged companies to take immediate steps to shore up their finances to ensure they remain going concerns, it often lacked – for various reasons – the flexibility to adopt decisions at times when travel restrictions and other limitations on meeting face to face were in force.

Yet, under certain circumstances Czech law allows corporate decision-making to take place remotely even from various locations around the world. By using modern technologies, companies can maintain their internal processes even when confronted with difficult situations.

### **Use of modern technologies**

Generally, the Czech legal framework allows the articles of association (AoA) to enable decision-making by corporate bodies by technical means. Such modern technical means may, in principle, involve the use of any technology that allows members of the corporate bodies to attend meetings, speak or comment on meetings and participate in voting.

The possibility of using such modern technologies spans a wide range of technical means, such as video conferencing, e-mail, chat applications, or even special program interfaces directly constructed for such a purpose. At the same time, the members of bodies may cast their votes before the meeting (correspondence voting), whereas they will attend the meeting just to discuss the subject of the meeting (whether in person or remotely) and to formally adopt a decision.

It is, of course, appropriate to specify the rules for the meetings in the AoA in detail in order to avoid any ambiguities that the use of technical means may entail, even more so as the law expressly anticipates such special provisions to be adopted. Such rules should cover the convening of and attendance at meetings by using electronic means, voting (with possibly higher quorum and majority requirements), decision-making, the taking (and distribution) of minutes, all with regard to the specific technology used.

Although the use of technologies to organise meetings of company bodies does not in general require any formal legal procedure, there is one exception for the general meetings of capital companies (limited liability companies and joint stock companies). Despite the higher requirements, the use of modern technologies may still facilitate more flexible decision-making at general meetings.

### **Higher requirements for general meetings**

The use of modern technologies for general meetings entails higher requirements in two areas – verification of the identity of the person authorised to vote and identification of the shares to which voting rights are attached. Such requirements are mandatory and cannot be derogated from by different AoA provisions, since the purpose of the legislation is to prevent abuse by third parties impersonating actual shareholders. Unfortunately, statutory law does not clarify the way in which such mandatory requirements for verification of the identity and specification of shares to which voting rights are attached may be met; therefore, the assessment of these aspects is largely a matter of doctrine.

With respect to the first requirement for general meetings, we believe that to meet the spirit and

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purpose of the rule it is sufficient to establish and stipulate in the AoA a reliable method of verifying the identity based on personal knowledge of the shareholder (e.g. video call) or on specific security features ensuring that only the shareholder will be authorised to use the technical means. Verification security features may include a wide range of technical means, including access data, signature templates, or other public law verification features such as advanced electronic signature and access to a data box. Such security features may also be combined with each other, but, in any event, they should ensure that only the shareholder has access to the selected method of authentication.

The second requirement in connection with determining the shares to which voting rights are attached may be easily met by simply inspecting the actual list of shareholders that the company keeps (or the excerpt from the issuance of shares in the case of book-entry shares).

A general meeting may be held by using technical means even when the law requires decisions to be certified in the form of a notarial deed (this typically applies to decisions that have a significant impact on the company). The Notarial Code does not require a notary to verify the identity of all of the participants, and this role remains with the chairman of the general meeting who will verify the identity pursuant to the rules specified in the AoA. The personal attendance of the chairman and members of the statutory body may be required, as the notary may request the chairman of the general meeting (and/or up to two other persons) to sign the copy of the notarial deed.

It may also be advisable to include in the wording of the notarial deed a description of the technical means or software used to participate in the general meeting, as well as an explanation of how the

invitations to the general meeting were delivered and how voting took place, all with regard to the specific manner stipulated in the AoA.

## **Decision-making outside of the meeting**

Decision-making may also take place outside of the meeting (per rollam decisions) and in those cases decisions may be adopted without having to convene and hold meetings of a corporate body. Decision-making conducted outside of a meeting may be realised by sending the draft decision (including any supporting documents) to the members of the body who are then required to send their consent or disagreement within a specified period.

Shareholders may agree on the possibility of per rollam decision-making under the AoA (such express agreement is not required in case of limited liability companies). Decision-making outside of the meeting is particularly helpful in the case of general meetings for decisions widely agreed upon among the shareholder but which, due to lack of time or geographical circumstances, cannot be discussed in person or by technical means to ensure real time communication.

Even per rollam decision-making can be combined with further technical means. The law allows a relatively wide scope for determining the rules for per rollam decision-making in the AoA. For instance, a draft decision may be sent to the members of the body via e-mail or by using a secure internet application. The AoA may further stipulate that shareholders may express their consent or disagreement with the draft decision within a specified period by technical means (e.g. advanced electronic signature, data box verification or an authentication via secure internet application).



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Such decision-making may reach its limits in situations in which the law requires the decision of the general meeting to be certified by a notarial deed. In such cases, the consent of a shareholder of a limited liability company is required to bear his officially verified signature; in the case of a joint stock company, such consent must even be granted in the form of a notarial deed. For general meetings of joint stock companies, such decision-making is therefore not viable as it encounters significant formal obstacles.

## **One member corporate bodies**

While the above applies to the corporate bodies consisting of more members, a slightly different rule applies to decision-making of one member bodies. Since such a decision is in fact a declaration of the will of a single person, the rules on legal actions apply to such cases. This does not necessarily mean that higher formal requirements have to be met, although it is advisable that the company also adopts special rules for decisions made using technical means. The sole member of the body may, for instance, be required to sign the decision by advanced electronic signature or to convert it from written into electronic form through an authorised conversion.

However, the situation is different when the legal regulation requires the decision to be adopted in the form of a notarial deed – this is the case for some decisions taken by the sole shareholder. In such a case, the identity of the shareholder must be proved to the notary beyond any reasonable doubt, unlike in the case of the general meetings comprising several members that may rely on the statement of a chairman or statutory body. Even in such a case, the decision may be adopted by proxy, provided an officially verified (and apostilled, as the case may be) power of attorney is

submitted; yet adopting such a decision requires special efforts.

## **The future of corporate decisions**

With regard to the actual dynamic circumstances of limited travel and movement, it is desirable that companies are prepared to use modern communication technologies in their internal decision-making processes. Some of these technologies are already in use in corporate life (such as video conferencing), whereas others have yet to be discovered by the majority of corporations. Such new technologies may entail a vast range of technical means, including special software created specifically for this purpose.

At the same time, it is already possible to find a wide range of applications for electronic signatures, which may become very useful for verifying a person's identity as well as for accelerating the decision-making process. With the growing applicability of the advanced electronic signature, it is also expected that the electronic means of signing will become equal with the officially verified signatures (such legislation is expected to become effective in the first half of 2022). Making electronic signatures equal to officially verified signatures may not only speed up decision-making outside of the general meeting, but it may also allow a proxy to be granted if a decision is to be adopted in the form of a notarial deed.

The global coronavirus crisis has set new challenges for company law. Current legal practice should respond to these challenges and allow the business sector to carry on its activities regardless of any distance that may separate members of corporate bodies. Although no technology can fully replace face-to-face meetings, they can at least allow companies to respond to sudden difficulties under challenging conditions.



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