

Power of attorney to participate in the general meeting of a cooperative according to Polish law

Pełnomocnictwo do uczestnictwa w walnym zgromadzeniu spółdzielni
według prawa polskiego

Доверенность на участие в общем собрании кооператива в соответствии
с польским законодательством

Довіреність на участь у загальних зборах кооперативу за польським
законодавством

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Summary: The present paper discusses the issue of the power of attorney to participate in the general meeting of a cooperative. The power of attorney in question does not constitute the power of attorney within the meaning of the Civil Code but is a separate type of substantive civil power of attorney. Within the scope not regulated by the provisions of the cooperative law, Articles 98–109 of the Civil Code apply to this type of power of attorney, however by analogy. The article uses the logical-linguistic method.

Key words: power of attorney, general meeting, cooperative

Streszczenie: W artykule została przedstawiona problematyka pełnomocnictwa do uczestnictwa w walnym zgromadzeniu spółdzielni. Pełnomocnictwo do uczestnictwa w walnym zgromadzeniu spółdzielni nie jest pełnomocnictwem w rozumieniu Kodeksu cywilnego, lecz stanowi odrębny typ pełnomocnictwa cywilnego materialnego. W zakresie nieuregulowanym w przepisach prawa spółdzielczego zastosowanie do niego znajdują art. 98–109 Kodeksu cywilnego, ale w drodze analogii. W artykule posłużono się metodą logiczno-językową.

Słowa kluczowe: pełnomocnictwo, walne zgromadzenie, spółdzielnia

Резюме: В данной статье представлен вопрос о доверенности на участие в общем собрании кооператива. Доверенность на участие в общем собрании кооператива не является доверенностью в понимании положений Гражданского кодекса, а представляет собой отдельный вид материальной гражданской доверенности. В части, не урегулированной кооперативным законодательством, к нему применяются статьи 98–109 Гражданского кодекса, однако по аналогии. В статье используется логико-лингвистический метод.

Ключевые слова: доверенность, общее собрание, кооператив

Резюме: У статті розглянуто питання довіреності на участь у загальних зборах кооперативу. Довіреність на участь у загальних зборах кооперативу не є довіреністю в розумінні Цивільного Кодексу, але є окремим видом цивільної матеріальної довіреності. В обсязі, не врегульованому кооперативним законодавством, стосується ст. 98–109 ЦК, але за аналогією. У статті використано логіко-лінгвістичний метод.

Ключові слова: довіреність, загальні збори, кооператив

Introduction

The power of attorney to participate in the general meeting of a cooperative has a long-lasting legal tradition in Polish cooperative law, dating back to the time when Poland regained its independence. It was regulated in the Act on Cooperatives of 29 October 1920.¹ Pursuant to Article 45 § 2 of that Act, a member may take part in a general meeting only in person. Any persons who cannot join a cooperative in person, participate through their statutory representatives, while legal persons take part in such a meeting through the intermediary of a proxy appointed solely and exclusively for this purpose. Thus, it constituted the principle of cooperative member's personal participation in a general meeting, and the exception to that principle was the possibility for a member to be substituted by a representative, including a proxy. A similar regulation was included in Article 32 § 2 of the Act of 17 February 1961 on Cooperatives and their Unions.² What is more, Article 36 § 2, sentence 1 of the currently applicable Act of 16 September 1982 – Cooperative Law,³ in its original wording, established the principle of personal participation of a cooperative member in a general meeting,⁴ which was the subject of criticism in the doctrine.⁵ An exception to this rule applied to legal persons who could participate in a general meeting solely and exclusively through a representative appointed for this purpose (Article 36 § 2, sentence 2 of Cooperative Law), as well as with respect to persons with limited or no legal capacity that acted through their statutory representatives (Article 15 § 3 of Cooperative Law).⁶ Hence, the power of attorney to participate in the general meeting of a cooperative was of little practical importance due to its narrow scope of application. The present shape of the power of attorney to participate in the general meeting of a cooperative was primarily influenced by the amendment to Article 36 of Cooperative Law implemented by way of the Act on the Reduction of Administrative Barriers for Citizens and Entrepreneurs dated

¹ Journal of Laws [Dziennik Ustaw] 1920 no. 111, item 733 as amended.

² Journal of Laws of 1961 no. 12, item 61 as amended.

³ Journal of Laws of 1982 no. 30, item 210.

⁴ L. Stecki, *Prawo spółdzielcze*, Warszawa 1987, p. 71; also: M. Gersdorf, in: M. Gersdorf, J. Ignatowicz, *Prawo spółdzielcze. Komentarz*, Warszawa 1985, p. 94; Z. Kuniewicz, *Pełnomocnictwo do udziału w zgromadzeniu spółki kapitałowej*, Rejent 2001, no. 12, p. 81; K. Kwapisz, *Prawo spółdzielcze. Komentarz*, Warszawa 2012, p. 100.

⁵ M. Józefczyk, *Pełnomocnictwo do udziału w walnym zgromadzeniu spółdzielni*, Rejent 2005, no. 12, pp. 81 ff.

⁶ M. Gersdorf, in: *Prawo spółdzielcze...*, p. 94; K. Krzekotowska, *Prawo spółdzielcze z komentarzem*, Bielsko-Biała 2003, p. 30; K. Pietrzykowski, *Spółdzielnie mieszkaniowe. Komentarz*, 2018 [Legalis database], Commentary on Article 36, thesis 3; A. Stefaniak, *Prawo spółdzielcze oraz ustawa o spółdzielniach mieszkaniowych. Komentarz. Orzecznictwo*, Warszawa 2009, p. 52.

25 March 2011.⁷ It introduced a relatively wide possibility for a cooperative member to participate in a general meeting by proxy. In the current legal status, these two exceptions have been maintained (Article 36 § 3, sentence 2; Article 15 § 3 of Cooperative Law), with the right of each member of a cooperative to participate in the general meeting of a cooperative through a representative appointed, as a general rule, pursuant to Article 36 § 3, sentence 1 of Cooperative Law. The said right is not absolute. It may be limited or even, as it seems, completely excluded,⁸ not only by virtue of an act (e.g. Article 36 § 5 and 6 of Cooperative Law) but also by statutory provisions (Article 36 § 3, sentence 1 *in fine* of Cooperative Law).⁹ Amendment to Article 8³ of the Act of 15 December 2000 on Housing Cooperatives,¹⁰ introduced by virtue of the Act of 20 July 2017 on the Amendment to the Act on Housing Cooperatives, the Act – Code of Civil Procedure and the Act – Cooperative Law,¹¹ was also of utmost importance as it added Section 1¹ which regulates the power of attorney to participate in the general meeting of a housing cooperative. Prior to the entry into force of this amendment on 9 September 2017, a member of a housing cooperative could participate in a general meeting by proxy as stipulated in the general rules provided for in Article 36 § 3 of Cooperative Law. Currently, as far as housing cooperatives are concerned, Article 8³, Section 1¹ of Housing Cooperatives constitutes *lex specialis*, hence the general provisions on the power of attorney contained in Article 36 § 3 of Cooperative Law, but also in Articles 98–109 of the Act of 23 April 1964 – Civil Code,¹² apply to the power of attorney to participate in the general meeting of a housing cooperative only to the extent not regulated by Article 8³, Section 1¹ of Housing Cooperatives.¹³ This provision confirms the validity of the right of a cooperative member to participate in the meeting of a decision-making body by proxy. In accordance with Article 8³, Section 1¹, sentence 1 of Housing Cooperatives, a member of a cooperative may take part in a general meeting in person or by proxy. However, in the case of housing cooperatives, this rule is absolute since Article 8³, Section 1¹, sentence 5 of Housing Cooperatives states that

⁷ Journal of Laws of 2011 no. 106, item 622 as amended.

⁸ *Implicite*: K. Kwapisz, *Prawo spółdzielcze...*, p. 100; A. Zbiegień-Turzańska, in: *Prawo spółdzielcze. Komentarz*, eds. K. Osajda, B. Lackoroński, 2021 [Legalis database], Commentary on Article 36, thesis 22.

⁹ K. Pietrzykowski, *Spółdzielnie mieszkaniowe...*, Commentary on Article 36, thesis 4.

¹⁰ Consolidated text: Journal of Laws 2021 item 1208.

¹¹ Journal of Laws 2017 item 1596.

¹² Consolidated text: Journal of Laws 2020 item 1740 as amended.

¹³ K. Królikowska, in: *Ustawa o spółdzielniach mieszkaniowych. Komentarz*, eds. K. Osajda, B. Lackoroński, 2021 [Legalis database], Commentary on Article 8³, thesis 38; A. Stefaniak, *Prawo spółdzielcze. Ustawa o spółdzielniach mieszkaniowych. Komentarz*, Warszawa 2018, p. 421.

the statute of a housing cooperative may not limit a member's right to participate in a general meeting by proxy.¹⁴

The aforementioned amendments to the provisions of the cooperative law, introducing significant changes in the power of attorney to participate in general meetings of cooperatives, create the need to address this research problem. The purpose of this article is a legal analysis of the power of attorney to participate in the general meeting of a cooperative, discussing the issues of the legal nature, objective and subjective scope, as well as the form and expiry of this type of power of attorney. From the point of view of the issue in question, it is particularly important to define the legal nature of the power of attorney to participate in a general meeting. The author defends the thesis that it does not constitute the power of attorney within the meaning of Article 98 et seq. of Civil Code, but a separate type of power of attorney.

1. Legal nature of the power of attorney

The issue of the legal nature of the power of attorney to participate in the meeting of a decision-making body (also known as corporate power of attorney) was not analysed in depth with respect to cooperative law. On the other hand, it was considered in terms of the law of commercial companies in which it functions as a power of attorney to participate in, and exercise voting rights at, the shareholders' meeting of a limited liability company (Articles 243–244 of the Act of 15 September 2000 – Code of Commercial Companies),¹⁵ power of attorney to participate in, and exercise voting rights at, the general meeting of a simple joint-stock company (Articles 300⁹⁵–300⁹⁶ of Code of Commercial Companies) and a joint-stock company (Articles 412–413 of Code of Commercial Companies). In the literature on the law of commercial companies, this power of attorney is not perceived uniformly and two concepts can be distinguished in this regard. According to the first concept, it is the power of attorney within the meaning of Article 98 et seq. of Civil Code.¹⁶

¹⁴ A. Zbiegień-Turzańska, in: *System Prawa Prywatnego*, vol. 21. *Prawo spółdzielcze*, ed. K. Pietrzykowski, Warszawa 2020, p. 235; also: E. Bończak-Kucharczyk, *Spółdzielnie mieszkaniowe. Komentarz*, Warszawa 2018, p. 339.

¹⁵ Consolidated text: Journal of Laws 2020 item 1526 as amended.

¹⁶ P. Brzeziński, *Problem zaskarżalności uchwały walnego zgromadzenia w razie bezzasadnego niedopuszczenia pełnomocnika akcjonariusza do udziału w walnym zgromadzeniu*, *Monitor Prawniczy* 2008, no. 14, p. 782; K. Kopaczyńska-Pieczniak, in: *Kodeks spółek handlowych*, vol. 2. *Komentarz do art. 151–300*,

However, according to the second concept, it cannot be classified in this manner, hence it is a separate power of attorney.¹⁷ A similar problem arises under cooperative law. The practical consequence of this dispute is the problem of applying Articles 98–109 of Civil Code to the corporate power of attorney. Three standpoints can be distinguished in this respect. According to the first, Articles 98–109 of Civil Code apply to the corporate power of attorney directly.¹⁸ This viewpoint is related to the concept according to which the corporate power of attorney in companies is a substantive power of attorney referred to in Article 98 et seq. of Civil Code. The

ed. A. Kidyba, Warszawa 2018, p. 614; J. Krukowska-Korombel, *Pełnomocnictwo do udziału w walnym zgromadzeniu oraz do wykonywania prawa głosu*, Przegląd Prawa Handlowego 2012, no. 3, pp. 26 ff.; A. Nowacki, *Spółka z ograniczoną odpowiedzialnością*, vol. 2. *Komentarz. Art. 227–300 KSH*, 2021 [Legalis database], Commentary on Article 243, thesis 3; J. Okolski, D. Wajda, *Pełnomocnictwo do udziału w walnym zgromadzeniu*, Przegląd Prawa Handlowego 2006, no. 5, pp. 15–16; R. Pabis, in: *Kodeks spółek handlowych*, vol. 2B. *Spółka z ograniczoną odpowiedzialnością. Komentarz. Art. 227–300*, ed. A. Opalski, 2018 [Legalis database], Commentary on Article 243, thesis 6; W. Popiołek, in: *Kodeks spółek handlowych. Komentarz*, ed. J.A. Strzępka, Warszawa 2013, p. 951; M. Rodzynkiewicz, *Kodeks spółek handlowych. Komentarz*, Warszawa 2018, p. 551; S. Sołtysiński, P. Moskwa, in: *System Prawa Prywatnego*, vol. 17B. *Prawo spółek kapitałowych*, ed. S. Sołtysiński, Warszawa 2016, p. 660; J. Stadnik-Jędruch, *Pełnomocnik na walnym zgromadzeniu akcjonariuszy – analiza nowelizacji przepisów K.S.H.*, *Monitor Prawniczy* 2009, no. 21, p. 1149; J. Szwaja, A. Herbet, in: S. Sołtysiński et al., *Kodeks spółek handlowych*, vol. 3. *Spółka akcyjna. Komentarz do artykułów 301–490*, Warszawa 2013, pp. 1159–1160; M. Tajer, *Pełnomocnictwo do udziału w walnym zgromadzeniu*, *Prawo Spółek* 2009, no. 10, p. 25; D. Wajda, *Ochrona akcjonariuszy mniejszościowych w kodeksie spółek handlowych*, Warszawa 2007, pp. 141–142.

¹⁷ J. Jastrzębski, *Pełnomocnictwo do udziału i głosowania na walnym zgromadzeniu spółki publicznej po nowelizacji kodeksu spółek handlowych (zagadnienia ogólne z wyłączeniem konfliktu interesów)*, Przegląd Prawa Handlowego 2009, no. 9, pp. 9–10; A. Kidyba, *Kodeks spółek handlowych*, vol. 2. *Komentarz do art. 301–633*, Warszawa 2017, pp. 695–696; M. Korniluk, R.L. Kwaśnicki, *Praktyczne aspekty prawne pełnomocnictw do udziału w zgromadzeniach spółek kapitałowych po nowelizacji z 3.08.2009 r.*, Przegląd Prawa Handlowego 2009, no. 9, pp. 16–17; G. Kozieł, *Prosta spółka akcyjna. Komentarz do art. 300¹–300³⁴ KSH*, 2020 [Legalis database], Commentary on Article 300⁹⁵, thesis 3; A. Opalski, *Reforma walnego zgromadzenia spółki akcyjnej – implementacja do prawa polskiego dyrektywy 2007/36/WE*, Przegląd Prawa Handlowego 2009, no. 5, p. 15; K. Oplustil, *Pełnomocnictwo do występowania na walnym zgromadzeniu akcjonariuszy spółki publicznej po nowelizacji kodeksu spółek handlowych ustawą z 5.12.2008 r.*, Przegląd Prawa Handlowego 2009, no. 11, pp. 4–5; M. Michalski, in: *Kodeks spółek handlowych*, vol. 3. *Komentarz do art. 300–490*, ed. A. Kidyba, Warszawa 2020, p. 653; *implicite*: J.P. Naworski, in: *Kodeks spółek handlowych. Komentarz*, vol. 3, eds. T. Siemiątkowski, R. Potrzeszcz, Warszawa 2012, p. 853; M. Romanowski, A. Opalski, *Nowelizacja kodeksu spółek handlowych w sprawie wykonywania niektórych praw akcjonariuszy spółek notowanych na rynku regulowanym*, *Monitor Prawniczy* 2009, supplement 7, p. 13; J.A. Strzępka, E. Zielińska, in: *Kodeks spółek handlowych. Komentarz*, ed. J.A. Strzępka, Warszawa 2013, p. 544; A.W. Wiśniewski, *Prawo o spółkach. Podręcznik praktyczny*, vol. 2. *Uzupełnienie do tomu 1, spółka z ograniczoną odpowiedzialnością*, Warszawa 1995, p. 145.

¹⁸ J. Szwaja, A. Herbet, in: S. Sołtysiński et al., *Kodeks spółek handlowych...*, pp. 1160–1161; M. Tajer, *Pełnomocnictwo do udziału...*, p. 25; D. Wajda, *Ochrona akcjonariuszy mniejszościowych...*, p. 142.

remaining two standpoints pertain to the second concept. Based on the conviction that the corporate power of attorney is a separate type of power of attorney, they assume that Articles 98–109 of Civil Code are applicable by analogy¹⁹ or as appropriate.²⁰ It is worth adding, however, that a large part of the legal domain is limited solely and exclusively to the statement that, in unregulated matters, this type of power of attorney is governed by the provisions of Civil Code.²¹

In the author's opinion, the institution discussed in Article 36 of Cooperative Law is undoubtedly a power of attorney. However, linguistic and systemic considerations do not allow assuming that it is the power of attorney referred to in Article 98 et seq. of Civil Code. This gives rise to recognising it as a separate type of substantive power of attorney. First of all, such a conclusion can be drawn from the objective scope of the power of attorney to participate in the general meeting of a cooperative. The subject of the corporate power of attorney is limited only to factual acts and actions that are legally conventional but of no legal significance, *pro foro interno* of a civil law entity – in this particular case of a cooperative – and this will be discussed in more detail in the subsequent part of this article. The corporate power of attorney cannot, therefore, be regarded as the power of attorney stipulated in Article 98 et seq. of Civil Code. According to Article 95 § 1 of Civil Code, legal actions may be performed by a representative, including a proxy. Thus, the objective scope of the power of attorney within the meaning of Article 98 et seq. of Civil Code embraces only legal actions. This does not mean that the provisions of Civil Code do not apply to the power of attorney to participate in the general meeting

¹⁹ P. Brzeziński, *Problem zaskarżalności uchwały...*, p. 783; J. Jastrzębski, *Pełnomocnictwo do udziału...*, p. 10; A. Kidyba, *Kodeks spółek handlowych...*, p. 693; M. Michalski, in: *Kodeks spółek handlowych...*, pp. 653–654; M. Romanowski, A. Opalski, *Nowelizacja kodeksu spółek handlowych...*, p. 13; A.W. Wiśniewski, *Prawo o spółkach. Podręcznik praktyczny*, vol. 3. *Spółka akcyjna*, Warszawa 1994, p. 215; R. Wrzecionek, *Postępowanie notarialne w kodeksie spółek handlowych*, Warszawa 2013, p. 156.

²⁰ M. Bieniak, in: J. Bieniak et al., *Kodeks spółek handlowych. Komentarz*, 2020 [Legalis database], Commentary on Article 412, thesis 1; J. Kita, in: *Prosta spółka akcyjna. Komentarz*, eds. R. Adamus, P. Malinowski, Warszawa 2021, p. 362; K. Kopaczyńska-Pieczniak, in: *Kodeks spółek handlowych...*, pp. 614–615; J.P. Naworski, in: *Kodeks spółek handlowych...*, p. 853; K. Oplustil, *Pełnomocnictwo do występowania...*, p. 5; S. Sołtysiński, P. Moskwa, in: *System Prawa Prywatnego...*, p. 660; J.A. Strzępka, E. Zielińska, in: *Kodeks spółek handlowych...*, p. 544.

²¹ M. Chomiuk, in: *Kodeks spółek handlowych. Komentarz*, ed. Z. Jara, 2021 [Legalis database], Commentary on Article 243, thesis 1; L. Modzelewska, K. Reszczyk-Król, in: *Kodeks spółek handlowych. Komentarz*, ed. Z. Jara, 2021 [Legalis database], Commentary on Article 300⁹⁵, thesis 4; W. Popiołek, in: *Kodeks spółek handlowych...*, p. 951; M. Rodzyńkiewicz, *Kodeks spółek handlowych...*, p. 552; A. Szajkowski, M. Tarska, A. Szumański, in: S. Sołtysiński et al., *Kodeks spółek handlowych*, vol. 2. *Spółka z ograniczoną odpowiedzialnością. Komentarz do artykułów 151–300*, Warszawa 2014, p. 670; P. Tracz, in: *Prosta spółka akcyjna. Komentarz ze wzorami*, eds. M. Kożuchowski, M. Macieszczyk, B. Woźniak, Warszawa 2021, p. 349.

of a cooperative. The entity discussed here is the same legal institution, hence the provisions of Article 98 et seq. of Civil Code will be binding upon this type of power of attorney, except not directly but by analogy.²² For there is no reference to “appropriate” application, unlike in the case of the corporate power of attorney in companies (Article 2, sentence 2 of Code of Commercial Companies). Thus, the thesis in question can be defended by functional arguments. Recognising the corporate power of attorney in cooperatives as a type of power of attorney also prevents a loophole in the law, by analogous application of the code provisions, it gives flexibility to the institution of the corporate power of attorney that is indispensable for its application in trading. In the event of adopting a view that the corporate power of attorney under the cooperative law constitutes the power of attorney within the meaning of Article 98 et seq. of Civil Code, the provisions of Civil Code would have to be applied directly. This would lead to a number of doubts, in particular with regard to the application of Article 108 of Civil Code, when the corporate power of attorney would be granted to a member of a cooperative.

2. Objective scope of the power of attorney

In the case of corporate power of attorney in companies, the wording of the act clearly indicates that the scope of this type of power of attorney includes two main corporate powers of a shareholder of a company, i.e. the right to participate in, and the right to vote on resolutions adopted by, a decision-making body (Articles 243 § 1, 300⁹⁵ § 1, 412 § 1 of Code of Commercial Companies). Despite the doubts that, from the point of view of formal logic, arise from the literal content of Articles 243 § 1, 300⁹⁵ § 1 and 412 § 1 of Code of Commercial Companies, the doctrine does not raise any concerns as regards the provision that the authorisation of a proxy may include both the above-mentioned powers jointly, only one of them as well as each one separately.²³ Even though Article 36 § 3 of Cooperative Law refers solely and exclusively to the participation of a cooperative member in the general meeting of a cooperative by proxy, it seems that this provision should be interpreted relatively broadly, hence it needs to be assumed that this also embraces the exercise of voting rights by proxy, as is the case with the corporate power of attorney in companies. It seems, however, that under the cooperative law there cannot be corporate power of

²² P. Widerski, *Pełnomocnictwo w prawie polskim*, Warszawa 2018, p. 464.

²³ R. Czerniawski, *Walne zgromadzenie spółki akcyjnej*, Warszawa 2009, p. 153.

attorney that is limited only to the exercise of voting rights, without authorisation to participate in the general meeting of a cooperative. Therefore, it should be recognised that in cooperative law, the corporate power of attorney may constitute a power of attorney to participate, in a general meeting including the right to vote, or a power of attorney to participate in a general meeting without the right to vote. This is important in the context of the new regulation contained in Article 36 § 9–13 of Cooperative Law which allows for the adoption of resolutions outside the general meeting, in writing or by means of direct remote communication, during the state of epidemic emergency or state of an epidemic. The corporate power of attorney which envisages the traditional way of adopting resolutions, i.e. at meetings, was not adapted to the new regulation which entered into force on 18 April 2020. It seems, however, that since the power of attorney to participate in a general meeting includes the right to vote, a member of a cooperative may vote by such proxy also while adopting resolutions in writing or by means of direct remote communication. However, in these cases, the corporate power of attorney with excluded right to vote will not apply.

The right to participate in a general meeting is in fact a set of further more detailed entitlements. Apart from participation itself, it entitles, for example, to take part in discussions, including the right to ask questions as well as to exercise the right to vote and stand for election to a committee at a meeting. The objective scope of the power of attorney to participate in the general meeting of a cooperative is therefore reduced to factual acts and actions that are legally conventional but of no legal significance, and do not go beyond internal relations (*forum internum*). The right to participate in a general meeting is related to the membership relationship, i.e. generally speaking, the relationship between a cooperative and its member,²⁴ and falls within the field of internal relations, while, as stated in Article 1 of Civil Code, the Code regulates civil law relations between natural persons and legal persons. Thus, in the case of legal persons, such as cooperatives, it is an external relationship (*forum externum*).

In the case of the power of attorney to participate in the general meeting of a cooperative, the full power of attorney model is implemented.²⁵ For if no other entitlements result from the content of the power of attorney, then a proxy is an alter ego of the member of the cooperative at its general meeting. In principle, a proxy may therefore exercise all the rights of the member of a cooperative vested with him or her at a general meeting. Limitations in this respect must be clearly stipulated in the

²⁴ P. Zakrzewski, *Status prawny członka spółdzielni mieszkaniowej w spółdzielczych stosunkach lokatorskich*, Warszawa 2010, p. 78.

²⁵ A. Stefaniak, *Prawo spółdzielcze. Ustawa...*, p. 97.

power of attorney. The corporate power of attorney may, however, be established as a type of power of attorney that authorises its holder to perform a specific category of activities at the general meeting of a cooperative, as well as a power of attorney to perform a specific act at the general meeting of a cooperative. This power of attorney may authorize its holder to act in substitution of a member of a cooperative at one, several or all meetings of the cooperative's decision-making body. It may be of a tie-in character if the proxy is tied in by the instructions of the cooperative member who acts as the principal, in terms of the manner of participation or exercising voting rights at a general meeting.²⁶ It may also be concluded that the specificity of the power of attorney to participate in the general meeting of a cooperative does not exclude authorising substitution under the principles set out in Article 106 of Civil Code used by analogy.²⁷

3. Subjective scope of the power of attorney

Currently, the cooperative law does not provide for any normative restrictions as to the category of civil law entities that may appoint a proxy to represent them at the general meeting of a cooperative. Therefore, a power of attorney to participate in the general meeting of a cooperative may be granted by a cooperative member who is a natural person, legal person or a statutory person (Article 33¹ of Civil Code). Nevertheless, it should be noted that when it comes to legal persons, pursuant to Article 36 § 3, sentence 2 of Cooperative Law, they may participate in the general meeting of a cooperative only by proxy. This also applies to statutory persons.²⁸ The objections raised by this regulation in the light of the theory of authorities (Article 38 of Civil Code) are justified.²⁹ However, the effects of the linguistic interpretation do not allow *de lege lata* to agree with the view that the requirement to grant a power of attorney does not refer to a situation where the principle of sole representation of a legal person applies, because in such a case the goal of the regulation is fulfilled and the granting of a special (additional) power of attorney is un-

²⁶ In regard to commercial companies, R. Pabis, in: *Kodeks spółek handlowych*, vol. 3B. *Spółka akcyjna. Komentarz. Art. 393–490*, ed. A. Opalski, 2016 [Legalis database], Commentary on Article 412, thesis 12.

²⁷ P. Widerski, *Pełnomocnictwo w prawie...*, p. 465.

²⁸ A. Zbiegień-Turzańska, in: *System Prawa Prywatnego...*, p. 235.

²⁹ Z. Kuniewicz, *Pełnomocnictwo do udziału...*, p. 82; A. Zbiegień-Turzańska, in: *System Prawa Prywatnego...*, p. 235.

necessary.³⁰ On the other hand, as far as natural persons are concerned, Article 15 § 3 of Cooperative Law stipulates that persons without or with limited legal capacity take part in a general meeting through their statutory representatives. Nonetheless, there are no obstacles for a statutory representative of a natural person without full legal capacity to grant a power of attorney to participate in the general meeting of a cooperative.

Pursuant to Article 36 § 3, sentence 1 of Cooperative Law, restrictions on participation in the general meeting of a cooperative may result not only from the act but also from the statute.³¹ Therefore, statutory restrictions which may refer to the category of civil law entities that may act through proxy at the general meeting of a cooperative are permissible. However, it seems that the statute cannot exclude the obligation of legal persons to participate in a general meeting by proxy, as provided for in Article 36 § 3, sentence 2 of Cooperative Law.

As regards the eligibility for being a proxy at the general meeting of a cooperative, also in the absence of normative restrictions as to the category of civil law entities, the power of attorney may be granted not only to a natural person but also to a legal and a statutory person. A natural person should possess at least limited legal capacity (Article 100 of Civil Code by analogy).³² For the sake of clarity, it needs to be mentioned that a member of the management board of a cooperative may not be a proxy at the general meeting of a cooperative, and this does not apply to cooperatives with ten or fewer members unless the statute provides otherwise (Article 36 § 5 of Cooperative Law). Moreover, the power of attorney cannot be granted to an employee of a cooperative, unless he or she is also a member of the cooperative employed based on a cooperative employment contract (Article 36 § 6 of Cooperative Law).

It seems that the specificity of the corporate power of attorney under the cooperative law does not exclude the possibility for a cooperative member to grant more than one power of attorney to participate in a general meeting of a cooperative. Moreover, the lack of normative regulation in this respect in Cooperative Law leads to such a conclusion, at the same time enabling analogous application of Article 107 of Civil Code.³³ Bearing in mind Article 107 of Civil Code, an independent pow-

³⁰ M. Gersdorf, in: *Prawo spółdzielcze...*, p. 94; A. Zbiegień-Turzańska, in: *System Prawa Prywatnego...*, p. 235.

³¹ A. Zbiegień-Turzańska, in: *Prawo spółdzielcze...*, Commentary on Article 36, thesis 22.

³² P. Widerski, *Pełnomocnictwo w prawie...*, p. 465. In regard to housing cooperatives differently R. Dzięczek, *Spółdzielnie mieszkaniowe. Komentarz. Wzory pozwów i wniosków sądowych*, Warszawa 2018, p. 278.

³³ P. Widerski, *Pełnomocnictwo w prawie...*, pp. 465–466.

er of attorney needs to be assumed as a rule if corporate proxies have the same scope of authorisation, unless the power of attorney states that it is cumulative. In the absence of statutory limitations, the problem of combining the authorisation of several proxies of a cooperative member should be treated liberally. First and foremost, a member may grant several powers of attorney to the effect that each of the proxies will be authorised to exercise a different power at a meeting of the decision-making body, or even a different part of the same power, e.g. one will have the right to stand for election and the other to vote in committee elections at a meeting. Secondly, it is possible to grant several powers of attorney so that all proxies will be authorised to exercise one, several or all of the shareholder's rights at a meeting. Such a solution is essentially dysfunctional and may contribute to a paralysis of the session of the body, although, in certain situations, several powers of attorney may prove useful, e.g. a member may thus minimise the risk of failure of one of the proxies to appear at the meeting.

Pursuant to Article 18 § 1 of Cooperative Law, all members of a cooperative have equal rights and obligations. A derivative of this rule is proclaimed in Article 36 § 2 of Cooperative Law according to which one member has the right to one vote.³⁴ Each member of a cooperative has one vote at the general meeting, irrespective of the number of shares held, and the statute of a cooperative whose members are only legal persons may define a different principle for determining the number of votes that particular members of the cooperative are entitled to. In this respect, the cooperative law raises the issue of non-uniform voting (i.e. split voting) by proxy. In the law of commercial companies, there is a general prohibition of non-uniform voting by shares held by a shareholder,³⁵ but *de lege lata* this principle is not absolute as split voting is allowed in the case of a joint-stock company, however under a special provision (Articles 411³, 412 § 2 of Code of Commercial Companies). The main argument in favour of the abovementioned prohibition is that the act of

³⁴ K. Pietrzykowski, in: *System Prawa Prywatnego*, vol. 4. *Prawo rzeczowe*, ed. E. Gniewek, Warszawa 2007, p. 534; A. Stefaniak, *Prawo spółdzielcze. Ustawa...*, p. 96; A. Zalcewicz, *Bank spółdzielczy. Aspekty prawne tworzenia i funkcjonowania*, Warszawa 2009, p. 106; A. Zbiegień-Turzańska, in: *System Prawa Prywatnego...*, p. 234.

³⁵ A. Herbet, in: *System Prawa Prywatnego*, vol. 17A. *Prawo spółek kapitałowych*, ed. S. Sołtysiński, Warszawa 2015, p. 454; A. Kidyba, *Kodeks spółek handlowych*, vol. 1. *Komentarz do art. 1–300*, Warszawa 2017, p. 1165; K. Strzelczyk, in: *Kodeks spółek handlowych. Komentarz*, vol. 2, eds. T. Siemiątkowski, R. Potrzebszcz, Warszawa 2011, p. 467. Differently: Z. Jara, R.L. Kwaśnicki, *Dopuszczalność niejednolitego wykonywania prawa głosu z odrębnych udziałów spółki z o.o.*, *Przegląd Prawa Handlowego* 2004, no. 10, p. 27; A. Krysik, in: *Kodeks spółek handlowych. Komentarz*, ed. Z. Jara, 2021 [Legalis database], Commentary on Article 412, thesis 13 et seq.; M. Romanowski, *Dopuszczalność niejednolitego głosowania z posiadanych akcji*, *Przegląd Prawa Handlowego* 2003, no. 6, p. 25.

voting constitutes a declaration of the shareholder since the voting right is vested with the shareholder and not with the shares.³⁶ Such reasoning becomes even more valid in the case of the cooperative law in which the provisions clearly indicate that the vote is related to a member of a cooperative (e.g. Article 36 § 2 of Cooperative Law). Therefore, it should be assumed that the prohibition of non-uniform voting also applies to the cooperative law, and if a member of a cooperative has more than one vote, its proxy cannot vote non-uniformly. In the case of companies, it is possible for several shareholders to grant corporate powers of attorney to one entity (i.e. proxy voting).³⁷ On the other hand, the legislator expressly excluded the possibility of substituting more than one member by proxy (Article 36 § 4, sentence 1 of Cooperative Law), therefore proxy voting is inadmissible when it comes to the power of attorney to participate in the general meeting of a cooperative. Such an exemption was also found in relation to housing cooperatives in Article 8³, Section 1¹, sentence 2 of Housing Cooperatives, according to which a proxy may not substitute more than one member.

It follows from the essence of the power of attorney as an authorisation that the principal is not deprived of its competences within the scope granted to the proxy. A cooperative member and its proxy may both participate in the same general meeting. It seems that if this issue is not resolved by the statute, then in the case of simultaneous exercise of a particular right, e.g. by voting, by a cooperative member and its proxy, the action of the cooperative member is valid as it is the principal. However, in the case of non-simultaneous exercise of a particular power, it is the action of the person who was the first to exercise it that is binding. In such a situation, it is possible for a member of the cooperative, who is the principal, to revoke the proxy's declaration (Articles 61 § 1, 65¹ of Civil Code).

4. Form of granting the power of attorney

As it results from Article 36 § 4, sentence 2 of Cooperative Law, the power of attorney to participate in the general meeting of a cooperative shall be granted in writing, or else shall be deemed null and void. This provision is absolutely mandatory (*ius cogens*).³⁸ This principle was expressly restated with respect to hous-

³⁶ A. Herbet, in: *System Prawa Prywatnego...*, pp. 454–455.

³⁷ A. Szajkowski, M. Tarska, A. Szumański, in: S. Sołtysiński et al., *Kodeks spółek handlowych...*, p. 668.

³⁸ A. Stefaniak, *Prawo spółdzielcze. Ustawa...*, p. 96.

ing cooperatives in Article 8³, Section 1¹, sentence 3 of Housing Cooperatives. The form required for resolutions adopted at a general meeting with the participation of a proxy acting on behalf of a cooperative member is not relevant. In the context under consideration, Article 36 § 4, sentence 2 of Cooperative Law and Article 8³, Section 1¹, sentence 3 of Housing Cooperatives constitute *leges speciales* in relation to the general rule regarding the form of granting a power of attorney under Article 99 § 1 of Civil Code.

A. Stefaniak rightly notes that the requirements going beyond the provisions of Article 36 § 4 of the Cooperative Law, stipulated with respect to the power of attorney in the statute of a cooperative are invalid (Article 58 § 1 of Civil Code).³⁹ Admittedly, bearing in mind the principle of substituting the “weaker” forms with the “stronger” (stricter) ones, which naturally follows from the fact that each “stronger” form contains elements of the “weaker” ones,⁴⁰ nothing prevents a member of a cooperative from granting a power of attorney to participate in the general meeting of the cooperative in a form more solemn than the ordinary written form. Pursuant to Article 78¹ § 2 of Civil Code, a statement of will submitted in electronic form is equivalent to a statement of will submitted in writing. Therefore, it needs to be concluded that the power of attorney to participate in the general meeting of a cooperative may also be granted in electronic form.⁴¹ To meet the requirement of this form of legal transaction, it is sufficient to submit a statement of will in the electronic form and affix it with a qualified electronic signature (Article 78¹ § 1 of Civil Code).

The power of attorney to participate in a general meeting should be attached to the minutes of the general meeting, as set forth in Article 36 § 4, sentence 2 *in fine* of Cooperative Law. This regulation was restated with respect to housing cooperatives in Article 8³, Section 1¹, sentence 3 of Housing Cooperatives. In addition, the list of proxies must be read out after the opening of the general meeting (Article 83, Section 1¹, sentence 4 of Housing Cooperatives). Failure to comply with these formalities shall not invalidate either the general meeting itself or the resolutions adopted at the general meeting.⁴² Similarly, the law of commercial companies provides for the obligation to attach a copy of the power of attorney document to the minutes (Articles 243 § 2, 300⁹⁵ § 2, 421 § 3 of Code of Commercial Companies) and the

³⁹ Ibidem, p. 97.

⁴⁰ P. Sobolewski, in: *Kodeks cywilny. Komentarz*, vol. 1. *Przepisy wprowadzające (art. I-LXV PWKC). Część ogólna. Własność i inne prawa rzeczowe (art. 1-352 KC)*, ed. K. Osajda, Warszawa 2013, p. 729.

⁴¹ P. Widorski, *Pełnomocnictwo w prawie...*, p. 466.

⁴² *Implicite*: R. Dziczek, *Spółdzielnie mieszkaniowe...*, p. 279.

doctrine stipulates that failure to do so does not invalidate either the meeting of the decision-making body itself or its resolutions.⁴³

The literature correctly points out that Article 8³, Section 1¹, sentence 4 of Housing Cooperatives sets forth an obligation to prepare a list of powers of attorney. The obligation for the list to be read out following the commencement of the general meeting of a housing cooperative results in the requirement that a holder of a written power of attorney to participate in a general meeting granted by a cooperative member shall appear in the meeting room in advance so as to allow sufficient time for him or her to be entered on the list of powers of attorney after prior checking the validity of the power of attorney.⁴⁴ However, the view that a proxy's arrival at the meeting room after reading out the list excludes him or her from participation in the session cannot be agreed with.⁴⁵ While not denying that a proxy's failure to appear on time destabilises the meeting of the decision-making body, it seems that the sanction in the form of exclusion from participation in the session is disproportionate to the infringement, taking into account that it would de facto violate the right of a cooperative member to participate in a general meeting resulting from its membership (Article 18 § 2, point 1 of Cooperative Law). The main argument against this view is the fact that such a sanction for appearing at the meeting after the reading out of the list of powers of attorney was not provided for by the legislator in the wording of the act.⁴⁶ In the event of a proxy's late appearance, the list ought to be supplemented and its supplemented version should be read out.

5. Expiry of the power of attorney

Expiry of the power of attorney to participate in the general meeting of a cooperative is regulated by analogy by the provisions on the power of attorney contained in Civil Code. Therefore, it needs to be concluded that the grounds for the expiry of the power of attorney include the death of the cooperative member who is the principal or the proxy (Article 101 § 2 of Civil Code) as well as the winding up of a legal person in the

⁴³ A. Szajkowski, M. Tarska, A. Szumański, in: S. Sołtyński et al., *Kodeks spółek handlowych...*, p. 670; R. Pabis, in: J. Bieniak et al., *Kodeks spółek handlowych. Komentarz*, 2020 [Legalis database], Commentary on Article 243, thesis 8.

⁴⁴ A. Stefaniak, *Prawo spółdzielcze. Ustawa...*, p. 422.

⁴⁵ Ibidem.

⁴⁶ *Implicite*: R. Dziczek, *Spółdzielnie mieszkaniowe...*, p. 279.

case of legal entities.⁴⁷ The withdrawal of the power of attorney also constitutes the grounds for its expiry (Article 101 § 1 of Civil Code). It seems that the renunciation of withdrawal of the power of attorney for reasons justified by the content of the legal relationship constituting the basis for the power of attorney under Article 101 § 1 *in fine* Civil Code should be considered admissible with great caution. Additionally,⁴⁸ as indicated in the jurisprudence, the reservation that the power of attorney is irrevocable does not preclude the principal from withdrawing the power of attorney for important reasons.⁴⁹ The grounds for the expiry of the power of attorney that are not explicitly mentioned in Civil Code include circumstances indicated in the power of attorney, achievement of the purpose of the power of attorney, as well as the lapse of time or the fulfilment of the terminating condition in the case when the power of attorney was limited by term or condition.⁵⁰ The proxy's renunciation of the power of attorney shall also be deemed to be the reason for the expiry of the power of attorney.⁵¹ Furthermore, the expiry of a corporate power of attorney in a cooperative may additionally result from the principal's declaration of bankruptcy⁵² as well as the expiry of the relationship being the basis for the power of attorney in the event when the authorisation was a side effect of the power of attorney provided for by the Act, in particular, Article 734 § 2 of Civil Code.⁵³

Conclusion

The dynamics of the recent changes in the institution of the power of attorney to participate in the general meeting of a cooperative proves that the legislator has noticed the increasing practical importance of this type of power of attorney. The power of attorney to participate in the general meeting of a cooperative is of civil and substantive nature due to the fact that it results from substantive civil law regulations. At the same time, as shown in the legal analysis, it does not constitute

⁴⁷ Z. Radwański, *Prawo cywilne – część ogólna*, Warszawa 2005, pp. 330–331.

⁴⁸ In regard to commercial companies A. Nowacki, *Spółka z ograniczoną odpowiedzialnością...*, Commentary on Article 243, thesis 29.

⁴⁹ Judgement of the Supreme Court of 24 January 2008, I CSK 362/07, OSNC 2009, no. 3, item. 46.

⁵⁰ M. Pazdan, in: *System Prawa Prywatnego*, vol. 2. *Prawo cywilne – część ogólna*, eds. Z. Radwański, A. Olejniczak, Warszawa 2019, p. 658; P. Sobolewski, in: *Kodeks cywilny...*, p. 804.

⁵¹ M. Pazdan, in: *System Prawa Prywatnego...*, pp. 662–663; Z. Radwański, *Prawo cywilne...*, pp. 330–331; M. Smyk, *Pełnomocnictwo według kodeksu cywilnego*, Warszawa 2010, pp. 374 ff.

⁵² Decision of the Supreme Court of 7 November 2003, I CZ 127/03, OSP 2004, no. 10, item 123.

⁵³ M. Pazdan, in: *System Prawa Prywatnego...*, p. 658.

the power of attorney within the meaning of Article 98 et seq. of Civil Code, but a separate type of power of attorney to which, within the scope not regulated by the provisions of the cooperative law, the provisions of the Code concerning the power of attorney apply by analogy (Articles 98–109 of Civil Code). Moreover, the conducted analysis indicates that a cooperative member has far-reaching freedom in configuring the content of the power of attorney, both within subjective and objective scope, which should be treated as an advantage. As for the form of granting it, *de lege ferenda* relaxation of the rigour of the ordinary written form by replacing it with a documentary form may be proposed (Article 77² of Civil Code) *ad solemnitatem*, as was the case with a simple joint-stock company (Article 300⁹⁵ § 2 of Code of Commercial Companies).

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