

PROCESS FOR CREATING BYLAWS FOR AN ORDINARY ASSOCIATION

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Introduction/Background: One of man's freedoms is the freedom of association. In the modern world, we can exercise this freedom in a great variety of organisational and legal forms. One such form is the association. However, we have different associations. One type of association is the "ordinary association". The basic internal law of this association is the bylaws. Therefore, the correct definition of its content is essential for the subsequent correct and efficient functioning of this association.

Purpose of the paper: The purpose of the paper is to define a model for the process of creating bylaws for the operation of an ordinary association. This will be achieved by identifying the essential elements of these bylaws and showing the interdependence of these elements and their impact on the subsequent functioning of the association.

Materials and methods: The primary research method used is the legal analysis, supplemented by an analysis of court case law and an analysis of the scientific literature on the problem under study.

Results and conclusions/ Practical implications: The model of the process of creating bylaws of an ordinary association can be used in practice by those who intend to create such an association. An undoubted problem for those intending to create an ordinary association is to define the internal legal norms in such a way that the association can effectively carry out its activities in the future. This paper identifies the most difficult element necessary for the creation of an ordinary association - the bylaws.

Social implications: an ordinary association is one of the basic organisational forms in which one can actively influence social life, especially the local community. With this legal form, one can be creative and realise one's own needs and the needs of others. The entity must have bylaws for its activities.

Keywords: ordinary association, bylaws, formation of ordinary association.

1. Introduction

Modern man, in most European countries, but not only European countries, is able to enjoy many freedoms, including freedom of life, personal freedom, freedom of communication, movement within the territory of a country (European Union), choice of place of residence,

freedom of conscience and religion, expression of one's views, freedom of association in trade unions, political parties, freedom to choose an occupation and a place of work, freedom of artistic creativity, scientific research and publishing its results, freedom of teaching, use of cultural goods, freedom of economic activity. The source of all these freedoms is the inherent and inalienable dignity of man (Article 30 of the Constitution of the Republic of Poland). Guaranteeing each of these freedoms is a fundamental goal of the legal systems of individual states and international organisations such as the European Union (Witkowski, 2011). Each type of freedom is important, complex and multi-faceted. In this paper, I address one aspect of freedom of association in Poland.

Freedom of association in Poland can be exercised in very different organisational and legal forms (Pisarczyk, 2016). One such form is an association. It is a voluntary, self-governing, permanent association with non-profit purposes. An association, irrespective of its type, independently defines its objectives, programmes of activities, structures, adopts internal acts concerning its activities. This is guaranteed by the legal norms set out in Article 2 of the Act of 7 April 1989 Law on Associations (hereinafter: AsLaw). However, we have different types of associations. The basic type of associations is, according to the wording of the referred to Act, an "association", which, after registration by the registration court in the National Court Register, acquires the status of a legal entity.

One type of association is an 'ordinary association'. Unlike an "association", an "ordinary association" has no legal personality, only legal capacity (Hadrowicz, 2020). However, an analysis of this problem is beyond the scope of this paper. These two types of associations are also distinguished by the type of internal law act. The basic act of internal law of an association is its statute, whereas in an ordinary association the act is the bylaws - Article 40 of AsLaw (Barański, 2019). The proper determination of the content of this act is essential for the subsequent proper and efficient functioning of the association.

The Law on Associations does not provide for the institution of an entity managing the process of creating an association, including an ordinary association, but this does not mean that such a person is not desirable from the point of view of the efficiency, effectiveness and substantive correctness of the process of creating this association. In any decision-making process both formal and material decision-makers are needed (Knosala, 2005). The creation of bylaws is not only a part of the process of establishing an ordinary association, but also, from the point of view of management, it is an act that defines the system of goals, values, and shapes the intra-organisational bond (Kozuch, 2004, 2020). Persons who intend to establish an ordinary association (at least three persons) should hold a founding meeting, where they adopt a resolution to establish an ordinary association, adopt bylaws, elect a board or a representative representing the ordinary association, which will apply in writing to the administrative body supervising ordinary associations for entry in the register of ordinary associations. This authority in counties is the starost (Wilk, 2019) and in cities with poviat rights the president of the city.

2. Model for the process of drafting bylaws for an ordinary association and their content

2.1. General comments

An ordinary association usually operating in a local environment should be an entity helping to resolve social conflicts and interacting with local decision-makers in the fields of culture, education, order, peace and public safety (Olejniczak-Szałowska, 2016). When embarking on the process of drafting the bylaws of an ordinary association, persons who wish to establish such an association must be aware that an ordinary association has no legal personality but only legal capacity and, consequently, every member of the association is liable for the obligations of the ordinary association. This liability is an unlimited liability with all its assets jointly and severally with the other members of the association and with the association. This is different from the case of an "association", which, after registration in the National Court Register, acquires legal personality and its members are not liable for its obligations with their assets. In ordinary associations, however, it is different.

The bylaws of an ordinary association should specify the following:

- type of association (ordinary association),
- name of the association,
- objective(s),
- area of operation,
- means of operation,
- seat,
- representative representing the association or the board,
- rules for amending the bylaws,
- method of acquiring membership,
- method of loss of membership,
- method of dissolution of the ordinary association.

The mentioned issues are obligatory, they are specified in Art. 40, par. 2 of the Law on Associations. Other issues should also be defined in the bylaws, although the Act does not explicitly require them, e.g. definition of the rights and obligations of the members, conditions for the validity of the resolutions of the association's authorities, ways of obtaining financial resources and including the establishment of membership fees. Some decisions taken at the beginning of the management process of a given project are crucial (Bednarski, 1998) and will have consequences throughout the whole period of activity of an ordinary association. Such a project is the bylaws.

2.2. Type of association, name, objectives and means of operation

The designation of the type of association as "ordinary association" should be included in any resolution adopted by the persons forming the association. First of all, this designation should include: the resolution establishing the ordinary association and the resolution adopting the bylaws. In practice, the adoption of the bylaws may be an element - an appendix to the resolution on the establishment of the association. In that case, the assembled persons vote on the resolution containing the bylaws.

Among the general provisions, the bylaws of the association should specify its name. The provisions of the second chapter of AsLaw, determining the rules for the formation of associations registered in the National Court Register, do not apply to ordinary associations. However, this does not mean that the norms contained in this chapter may be interpreted a contrario when establishing an ordinary association. An example is the norm prescribing that the name of an association must be distinguishable from other associations, organisations and institutions. The name of an ordinary association must not be misleading as to the identity of that entity. In this respect, the judgment of the Supreme Court - Chamber of Labour, Social Insurance and Public Affairs of 5 December 2013, ref. III SK 10/13, OSNP 2015/1/17; (Hadrowicz, 2020) should be considered as also referring to ordinary associations. The identification of the name allows to individualise the entity. Besides, a name is a personal good and is subject to legal protection. From a practical point of view, specifying the name of the association to distinguish it from other entities will allow to avoid future confusion as to the identity of the entity, for example as mundane as when delivering correspondence, engaging in cooperation with other entities or undertaking supervisory activities.

An ordinary association, unlike an "association", cannot carry out economic activities, set up field organisational units, carry out paid public benefit activities, nor can it associate legal persons. On general principles, it bases its activities on the voluntary work of its members. Having legal capacity, however, it may employ staff, including its members.

The association's objectives must correspond to the nature of the association, which is to represent the collective interests of its members vis-a-vis public authorities. An ordinary association, like any association, is a permanent non-profit association. The funds from the association's activities cannot be paid out, distributed to the members, and must be used to achieve the association's objectives. An ordinary association, as opposed to an "association", cannot carry out economic activity and even cannot carry out paid public benefit activity (art. 42 AsLaw). The purpose(s) of an ordinary association must be defined in its bylaws. In practice, they usually refer to the affairs, activities and life of the local community. Although it is not a legal requirement, but the aims of the association should correspond to its name, in fact the name should correspond to the aims the association will pursue. Examples of names of associations from the City of Gliwice include: Stowarzyszenie Kupców Na Lipowej, Slava Pomoc Ukrainie, Stowarzyszenie Gier Planszowych Gambit, Uczniowie Drogi Mesjasza.

The objectives of the Stowarzyszenie Kupców Na Lipowej are e.g. to strive for modernisation of the market, promotion of the market, improvement of the quality of the surface, marking and numbering of stands, striving for fair conditions of use of the market. The aim of the Association Slava Pomoc Ukrainie is, among others, to provide assistance and support to people in need in Poland, to help people in difficult life situations, to provide organisational, legal, financial, material, psychological, transport and accommodation assistance.

Examples of associations from the district of Będzin are: Czyste Przeczyce i Mierzęcice, Towarzystwo Przyjaciół Akademii Młodego Muzyka w Siewierzu, Stowarzyszenie Rogo Senior, Stowarzyszenie "Księstwo Siewierskie". The objectives of the Association of Czyste Przeczyce i Mierzęcice include: promoting ecological development of infrastructure and development of green areas, popularisation of landscape values, improvement of the inhabitants' safety, support and cultivation of local traditions, popularisation of active leisure, promotion and organisation of volunteer work, caring for the development of local entrepreneurship, and development of general and specialist knowledge and professional qualifications, support for employment, conducting tourist and sightseeing activities, support for agriculture, action to counteract unemployment. The objectives of the Towarzystwo Przyjaciół Akademii Młodego Muzyka w Siewierzu are: to develop the project "Akademia Młodego Muzyka w Siewierzu", to popularise playing musical instruments, to make children and young people musical, to make music together, to popularise musical culture and traditions.

The area of operation of an ordinary association is not restricted by law. On the examples of associations registered in the records of several poviats (and a city with poviat rights), two tendencies can be observed. Some associations have specified the territory of Poland as their area of operation, while others have specified the territory of a town, a municipality or several neighbouring municipalities. It seems to be preferable to define an area with a larger administrative district. Even if the wider area of operation is not often used, there will potentially be such a possibility should the need arise.

Means of operation. The means of operation should give the association the opportunity to achieve its objectives and should therefore depend on the objectives. The previously mentioned Stowarzyszenie Kupców Na Lipowej, among other things, identified the following means of operation: organisation of meetings, cooperation with other organisations, entrepreneurs and local government, submission of motions, opinions and initiatives to institutions, local government administration, social and professional organisations, as well as institutions of the judiciary. Association Slava Pomoc Ukrainie among the means of operation indicated: organising public collections, charity actions, providing support and assistance to people in difficult life situations, social and charitable assistance, organisation of events and meetings, promotion of empathetic attitudes, cooperation with public administration bodies and other institutions and entities.

The means of operation of the association from the Będzin district - Czyste Przeczyce i Mierzęcice include: organising meetings, concerts, exhibitions, cooperation with the external environment, submitting motions and opinions to the relevant administrative authorities, conducting educational and informational activities, entering into agreements and cooperation contracts with other entities, election committees or socio-economic organisations. The means of operation of the Towarzystwo Przyjaciół Akademii Młodego Muzyka w Siewierzu include organising and assisting in the organisation of instrumental classes, systematic testing of the acquired skills during music rehearsals, raising funds for the Society's activities, assisting in the purchase of instruments, costumes, sheet music resources and other necessary equipment, organising and helping to organise concerts, musical events, performances with the participation of the "Akademia Młodego Muzyka w Siewierzu " and cooperating orchestras, choirs, soloists and various types of musical ensembles, organising or co-organising workshops, trainings, courses and other forms of improving musical skills.

The selected examples of ordinary associations, their objectives and means of operation allow the conclusion that these elements are closely linked. In particular, the objectives determine the means of operation and the name of the association is relevant to the objectives to be pursued by the association.

Registered office of the association. By the term registered office, the law generally means the locality. However, the Law on Associations in Article 40b requires that the address of the registered office be indicated. Specifying the address of the registered office is not only of formal but also of practical importance. Official correspondence to the association, in particular regarding registration and other correspondence from the supervisory authority or the court, will be addressed to this address.

2.3. Representative representing the association or the board

Another element of the bylaws of an ordinary association is alternative in nature. It can either have a representative representing the association or a board (Suski, 2018). The person creating the bylaws must ask itself how to make the governing entity function effectively (Stoner, Freeman, Gilbert, 2001; Austen-Tynda, 2009). If the bylaws will provide for the function of a representative to represent the association, this representative should be elected during the formation process of the association at the founding meeting. The founders of an ordinary association, after the adoption of the bylaws, should adopt a resolution to elect a representative. Subsequently, the representative should take steps to submit an application for entry in the register of ordinary associations (art. 40, par. 5 of AsLaw), kept by starosts and city presidents in cities with powiat rights. The law does not provide for an official form for such an application. In practice, many county and city offices have posted a template for such an application on their websites in the Public Information Bulletins. The educational practice of the offices improved after 2016, after the amendment of the Law on Associations, which introduced changes in the requirements to be met by ordinary associations (Glinka, Chyla, 2017). The application for registration of an ordinary association should include:

- identification of the authority to which the application is made,
- definition of the request ("I request that an ordinary association be entered in the register of ordinary associations"),
- determination of name of an ordinary association,
- name, residential address, ID number of the representative representing the association (if the association is represented by a board, then it is necessary to specify these details of all the members of the board; if, in addition, the association has an internal control body, then the details of the members of this body must also be specified),
- address of the registered office of the ordinary association,
- signature of the representative (if the application is submitted by the association's board, then it should be signed by all the members of the board).

The application for registration must be accompanied by the bylaws, a list of the founders of the ordinary association containing their names, surnames, date of birth, place of birth, place of residence, and, next to the person concerned, his/her own handwritten signature. An additional document is the minutes of the founding meeting containing the identification of the persons present, voting at the meeting, identification of the course of the meeting and the resolutions and results of voting on the resolutions. Particularly important resolutions are the resolution on the formation of the association, the resolution on the adoption of the bylaws and the resolution on the election of a representative or the election of the management board. If the bylaws provide for an internal control body, a resolution on the election of the members of this body should also be adopted. All the mentioned documents are so called registration files, to which persons with a legal interest (e.g. a creditor of the association) can have access.

Representative of the association. The representative of an ordinary association should be elected by a person who enjoys the confidence of all the founding members. Such person is the one who represents the association both internally and externally (Suski, 2018). He/she will undertake independently all the acts of ordinary management and, with the prior consent of all the members of the ordinary association and upon their granting of a power of attorney to perform the acts, he/she will also undertake acts exceeding the scope of ordinary management. The Law on Associations, in Article 41a, paragraph 3, lists an exemplary catalogue of actions exceeding ordinary management. These include: acquisition and disposal of real property or the right of perpetual usufruct, establishment of a limited right in rem, conclusion of a credit or loan agreement, assumption of debt, acknowledgement of debt, discharge of debt, accession to debt, conclusion of a surety agreement or conclusion of another similar agreement, assumption of other obligations exceeding the value of 10,000 PLN.

Irrespective of the nature of the act giving rise to the liabilities of the ordinary association, each member is liable to the creditors of the association jointly and severally with the association and the other members with all its assets. It is true that the liability arises as soon as the execution from the assets of the ordinary association is ineffective, however, the action

against a member of the ordinary association may be brought before the execution from the assets of the association proves to be ineffective. For these reasons, the choice of the right person - a representative representing the ordinary association, a person of trust - is particularly important.

An ordinary association may be represented by a "representative", whose status I have already presented, or there may be a board instead of a representative. The Law on Associations regulates very little about the board. If an association decides to have such a body as a board, Article 40(2) of AsLaw only provides for the necessity to determine in the bylaws such issues as the procedure for electing the board, supplementing its composition, its competence, the conditions for the validity of its resolutions, the manner of representation and, in particular, contracting property obligations. The Law does not impose detailed solutions on these issues. It is up to the association, as a self-governing association, to create the norms of internal law in this respect on its own.

The first issue to be determined is the number of persons comprising the board. Although the law does not *expressis verbis* exclude a one-person board, it is generally accepted that the board should be a collegial body. For practical reasons, it should be an odd number - 3 or 5 persons. This is related to the conditions for the validity of its resolutions. With an even number of board members, there may be more difficulties in terms of the board's ability to pass resolutions. If the composition is 3 or 5, it is easy to determine whether a resolution has been passed by a majority or not. On the other hand, also with a board with an even number of members, the conditions for the validity of resolutions can be determined in such a way that there is no ineffectiveness in action. It is common practice that resolutions of collegiate bodies are adopted by a majority of votes (simple or qualified) in the presence of, for example, at least half of the members of the body. It may be stipulated that, in the event of a tie, the chairman of the board has the casting vote. It is also desirable to provide for such a legal solution in the event that the number of board members is an odd number. The board will then be able to validly adopt resolutions with an incomplete membership in the presence of, for example, two board members, one of whom votes in favour and the other against.

The bylaws of the activities must specify the procedure for the election of the board and the completion of its composition. Therefore, it is advisable that the bylaws provide for the existence of such a body as the general meeting of members, which would elect (members of) the board, supplement its composition (or elect a representative representing the association) by resolution. The Law on Associations does not explicitly provide for such a body as a general meeting of members and it seems that an ordinary association does not have to have such a body. However, it should be borne in mind that the board (or a representative), in order to perform actions exceeding the scope of ordinary management, must obtain the consent of all members of the ordinary association and obtain a power of attorney from all members to perform such actions (Article 41a(2) AsLaw). Therefore, it seems advisable to define, by the bylaws, the existence of such a body as the general meeting of members, which will not have

decision-making powers with respect to the implementation of tasks exceeding the scope of ordinary management, but will be a platform for discussing the problems posed, setting directions, indicating the initiatives to be taken by the board, amending the bylaws, granting discharge to the board, considering the reports on the activities of the board or the representative and the internal control body, granting discharge to the board.

The existence of a body such as the general members' meeting will facilitate the obtaining of consents from individual members of the ordinary association to take an action exceeding the scope of ordinary management and powers of attorney to perform such action. However, the general members' meeting cannot adopt such consent or grant a power of attorney by passing a resolution. Both consent and proxy must be given by each member independently. This is due to the fact that each member of an ordinary association is liable for the obligations of the ordinary association without limitation with all its assets (jointly and severally with the association and the other members of the ordinary association).

The competence of the board is a necessary issue, which must be determined by the bylaws. The basic competence of the board is to represent the association externally and to act on behalf of the association, to manage the day-to-day activities, to manage the assets, the financial resources, to report on the activities of the board (to the internal control body or to the general meeting of members - if these bodies are provided for), to cooperate with the supervisory bodies, to keep the data in the register of ordinary associations up to date, to convene the general meeting of members, to obtain permission and powers of attorney from the members to undertake actions exceeding the scope of ordinary management, to adopt resolutions on the admission of new members and resolutions on the exclusion of members.

2.4. Acquisition and loss of membership

The way in which membership is acquired and lost must be set out in the bylaws. Usually the competence to admit new members and to expel them is given to the board. The bylaws may stipulate specific requirements to be met by a candidate for membership of the association and the candidate's application (membership declaration), e.g. an attachment in the form of a written recommendation by two members of the association. It may also specify the procedure for appealing against a resolution to refuse admission to the association or a resolution to exclude from the association. It is particularly important to define the prerequisites for the loss of membership. Loss of membership should occur as a result of written resignation, exclusion, death of a member of the association. The most problematic reason for loss of membership is exclusion of an association member. The bylaws should specify the grounds for exclusion. These may be, for example, non-payment of membership fees for a certain period of time. Failure to comply with the resolutions of the association's authorities, violation of the bylaws. In this respect, an interesting problem of a possible exclusion of a member is exclusion for the reason that he/she did not give consent to the management board and did not give a power of attorney to perform an action exceeding the scope of ordinary management. The mere fact of

lack of consent should not be a reason for exclusion, whereas the duties of an association member should probably include supporting and fulfilling the association's objectives. If the attitude of a member of the association, his/her activity, is of a negative nature, preventing the realisation of the association's goals, these circumstances should be defined as an acceptable reason for the exclusion of a member of the association. Of course, a member of the association should have its rights defined by the bylaws, e.g. passive and active election right to the authorities of the association, the right to submit initiatives, postulates, motions, the right to speak out on the activity of the association, the right to vote at the general meeting of the members.

2.5. Other elements of the bylaws

Another body that an ordinary association may have is an internal control body. However, this is not an obligatory body in an ordinary association. In associations, it is usually called the "audit committee". If the bylaws provide for such a body, they must also provide for the procedure for its election, its replenishment and its competence. With regard to the mode of election and replenishment, the remarks relating to the board remain valid. On the other hand, the competence of the internal control body should be to control the activity of the association, including the control of the activity of the management board (or the representative), to submit the conclusions of the control to the other bodies of the association, to convene a meeting of the other bodies of the association, to propose the discharge of the management board or the representative.

In the course of the activity of an ordinary association, the bylaws of the association, adopted at the founding meeting, may turn out to be imperfect, imperfections may come to light, which hinder the functioning of the association. For this reason, there must be rules for amending the bylaws. As the bylaws are the most important internal law of an ordinary association, this competence should be entrusted to the members of the association - the general assembly of members. This competence should not be entrusted to the board or any other body of the association.

The last necessary element of the bylaws is the determination of the method of dissolution of the ordinary association. An association is a permanent association. Therefore, the rules for the dissolution of the association should be defined in such a way that the permanence of the association is a feature of the association. The permanence cannot be absolute nor can the dissolution of the association be very easy to achieve. The competence for the dissolution of the association should belong to the general assembly of the members, and if the bylaws did not provide for such a body, this competence should remain at the disposal of a certain majority of the members of the association, e.g. 2/3 or 3/5 of the number of members of the association. The initiative to dissolve the association should belong to the board (or the representative) of the ordinary association, as well as to a certain number of the association's members e.g. 1/10 of the number of members. Irrespective of the entity that has the right to take the initiative for

a resolution in this respect and irrespective of the majority that guarantees the validity of the resolution on the dissolution of the association, the bylaws should stipulate the requirement that the resolution on the dissolution of the association must also specify the liquidator.

At the request of the supervisory authority (starost) or the public prosecutor, the court may also dissolve an ordinary association if its activity shows a gross or persistent violation of the law or the provisions of the bylaws and there are no conditions for the restoration of activity in compliance with the law or the bylaws (art. 29 AsLaw).

The court is obliged to issue a decision on the dissolution of an ordinary association when the number of members of an ordinary association is less than 3, as well as when the association does not have the authorities provided for in the law and there are no conditions for their election within more than 12 months (art. 31 AsLaw).

3. Conclusions and recommendations

An ordinary association, as stated in Article 40 of the Law on Associations, is a simplified form of association. This simplified form of association is expressed in the possible smaller number of members, including founding members, in the absence of the need to have a board and an internal control body and in many other matters. However, an ordinary association must have bylaws, which is the supreme internal law of an ordinary association. The law does not regulate very many issues that have to be defined precisely in the bylaws. The simplified form of an association does not mean that it can function without clearly defined rules. These rules must be set out in the bylaws.

Persons in the process of creating an ordinary association have to analyse a great number of issues. The law only lists the necessary elements, what the bylaws of the activity must contain, while the persons designing these bylaws, according to the principle of self-governance, at their own discretion, using their knowledge, must create legal solutions that are not only in accordance with the law, but are also in line with the expectations of the founding members.

In the process of designing the bylaws, every element of the bylaws is important. Depending on what legal solutions are adopted, this is how the association will have to function in the future. It seems that the most relevant problem is to decide whether an ordinary association will have a board or whether it will be managed by a representative representing the association. A recommendation should be made that associations with a foreseeably small number of members should have, as managing entity, a managing representative, whereas associations with a considerable number of members should rather have a board. The more multifaceted the activities of an ordinary association were to be, and the more the association was to have more objectives, especially of a different nature, the more the managing entity should be a board and not a single managing representative.

An ordinary association that will manage considerable financial means should have, besides a board, an internal control body - an audit committee that will control the activity of the association and, in particular, the managing entity - a representative representing the association or the board. The issue of the existence of an internal control body, statutorily optional, is particularly relevant in the perspective of the liability of the members of an ordinary association for the obligations of the association with all their assets.

The process of creating a model of bylaws proposed in this paper will allow the founders of an ordinary association to consciously decide on particular solutions, which solutions are legally possible, which are more and which are less favourable. Depending on the expectations of the founding members, the presented model of bylaws will allow to select the optimal solution in a particular case so that the association can function properly and achieve its goals in the future.

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