

## CORONAVIRUS: STATE OF EMERGENCY AND LISTED COMPANIES (I): ASPECTS RELATING TO THE COMPANY BODIES

As part of the measures included in Royal Decree-Law 8/2020, of 17 March, on extraordinary urgent measures to address the economic and social impact of COVID-19 ("**RDL 8/2020**"), some provisions have been included that are directed specifically at listed companies (Article 41), which are supplemented by other measures generally applicable to "private law legal persons" and, among others, corporations (Article 40). Essentially, RDL 8/2020 has established -in the terms of its preamble- a series of extraordinary measures applicable to the functioning of the governing bodies" of listed companies, that basically translate as a suspension or extension of the terms applicable to compliance with certain legal obligations and relaxing the rules on the operation of both the board of directors and the general meeting.

These corporate rules are a response to the consequences that the declaration of the state of emergency by RD 463/2020, of 14 March (amended by RD 465/2020, of 17 March) (the "**Emergency RD**") is having on essential aspects of the operation of corporations.

### WHAT IS UNDERSTOOD BY LISTED COMPANIES FOR THE PURPOSES OF RDL 8/2020?

In contrast to the Spanish Companies Act ("**LSC**"), which takes listed companies to mean those whose shares are traded "on an official secondary securities market" (Article 495.1), RDL 8/2020 states that it is applicable to companies with securities listed "on a **regulated market** in the European Union" (Article 41.1).

The notion of an "official secondary market", that is traditionally used by our legal system (see Article 43.2 of the restated text of the Securities Market Act –"**LMV**"–), is thus replaced by the "regulated market", which corresponds to the terminology used in EU law. Moreover, even though RDL 8/2020 states that it applies to companies with "securities" listed for trading on a regulated

#### Key aspects

- Simplification of forms of board and committee meetings during the state of emergency
- Special rules for calling and holding general meetings in 2020
- Differences between the regime for meetings already called and that for new ones

market in the European Union, these "securities" will necessarily have to be shares. In this way, RDL 8/2020 is applicable to listed companies of Spanish nationality, even if their capital is traded on a regulated European market other than in Spain.

## **HAVE RULES ON THE OPERATION OF THE BOARD OF DIRECTORS AND ITS COMMITTEES BEEN ESTABLISHED?**

Article 41.2 of RDL 8/2020 "exceptionally" allows the board of directors and the audit committee of listed companies to adopt resolutions by **videoconference** or by **conference call**, even if this possibility is not envisaged in the by-laws, provided the secretary can recognise the identity of the directors. But this possibility is only recognised "for the purposes of the provisions of the foregoing section", which only addresses the deadlines for publication of periodic financial information (and this is why -it would seem- only the audit committee is mentioned and no others) and the calling of general meetings.

In any event:

- The possibility that "the governing and management bodies" of any corporation, including the delegate committee and other mandatory or voluntary committees, can hold their meetings via **videoconference** (although not via telephone) during the emergency is recognised in general terms in article 40.1 of RDL 8/2020, "even if the by-laws do not envisage it". There is no doubt that the by-laws of any company (or the board regulations, in the case of listed ones) can envisage the possibility of participating in board meetings via videoconference and other online means. But RDL 8/2020 grants the same power to those companies that lack any such provision in the by-laws (or regulations) in this regard, with a view to avoiding face-to-face meetings of boards and committees while the measures for containment and restricting movement associated with the state of emergency are in place;
- RDL 8/2020 has also established the possibility for all corporations (and other entities) to have their management bodies and committees adopt resolutions "by **voting in writing only, without holding a meeting**, provided it is so decided by the chairperson and (...) when requested by at least two members of the body" while the emergency lasts. In public limited companies, voting in writing only and without holding a meeting does not require a provision in the by-laws, being permitted provided no directors oppose the procedure (Article 248.2 LSC and, likewise, Article 100 of the Commercial Registry Regulations). This is why RDL 8/2020 has relaxed the conditions for the application of the procedure, by allowing it to be used when decided by the chairperson of the board and when requested by at least two members, thus removing the need for the consent of all directors.

We can infer from this group of provisions that RDL 8/2020 has merely facilitated the use of these procedures, but without actually prohibiting face-to-face meetings of the board and its committees. In these cases, it can be understood that the directors would be able to travel to the venue of the meeting as it would be "travel to the workplace in order to perform labour, professional or business activities" [Article 7.1.c) Emergency RD].

## WHAT IS THE TERM FOR HOLDING AN ORDINARY GENERAL MEETING?

Article 41.1.b) of RDL 8/2020 has envisaged that, during 2020, the ordinary general meeting of listed companies "can be held within the **first ten months** of the financial year" (instead of the six months generally applicable -Article 164.1 LSC-).

In the case of **non-listed companies**, RDL 8/2020 has opted for a different system:

- Instead of establishing a general maximum term for holding ordinary meetings, it has envisaged the suspension and extension of the term for drawing up the accounts (for the duration of the state of emergency, plus three months) and, if the accounts have already been drawn up, of the audit term (two months as of the end of the state of emergency); and the ordinary general meeting will necessarily have to be held within three months following the end of the period for drawing up the accounts (the extended period pursuant to Article 40.3, we understand, because otherwise the term could be impossible to comply with -in the event, for example, of extension of the term for auditing the accounts- and would not be any different to the ordinary regime -three months to draw up and six to hold the meeting-);
- Therefore, in non-listed companies, the extension of the term will depend on the stage at which the annual accounts were at when the state of emergency was declared (14 March 2020). There may be no extension at all if the accounts had already been drawn up and audited, or just drawn up when an audit is not mandatory. But in the specific case of companies that had not drawn up accounts when the state of emergency was decreed, the sum of the new terms means that the ordinary meeting would have to end up being held within a term that more or less matches the 10 months envisaged for listed companies.

Although the justification for this difference in treatment of listed and non-listed companies is not clear, the legislator would seem to have sought to relax the regime applicable to the former so that they can defer holding their ordinary general meetings in any event, regardless of the stage they are at in the process of drawing up their annual accounts, in view of the increased risk and practical difficulties they are facing in the current circumstances in terms of organising and holding their meetings.

## HOW DOES THE STATE OF EMERGENCY AFFECT THE RULES ON CALLING GENERAL MEETINGS?

RDL 8/2020 has also relaxed the **rules on calling and holding general meetings** for listed companies. The new system will apply throughout 2020 (Article 40.1), not just for the duration of the state of emergency (unlike other extraordinary measures such as the general power to hold board meetings by videoconference or solely in writing), and applies to all general meetings, not only to ordinary general meetings.

The new rules on calling general meetings as from the entry into force of RDL 8/2020 (18 March 2020) are as follows:

- On calling the meeting, the board may establish that it will be held **online** and with **remote voting** pursuant to Articles 182, 189 and 521 LSC, even if

this is not provided for in the company's by-laws. For the same reasons, the board should be considered empowered to establish online attendance and remote voting means above and beyond those set out in the by-laws or regulations on general meetings, in order to simplify such means and make them available to all (if they are dependent on onerous requirements, for example, such as e-signatures).

- Even if RDL 8/2020 seems to be limited to general meetings that have already been called and cannot be held at the established venue due to the measures imposed by the public authorities (Article 41.1.d), boards that provide online attendance and remote voting means should also be considered empowered to call an **exclusively online general meeting**, at least while the current state of emergency persists. In such cases, it may be impossible to predict whether restrictions preventing or limiting physical attendance of the meeting will still be in place, which certainly justifies the use of this option.
- Although RDL 8/2020 makes reference to "online attendance and remote voting", the board should generally be understood to have the option to permit **only one of these procedures**, as the wording of Article 41.1.c seems to suggest (in calls already made "any of these options may be established..."). However, this is not the case with exclusively online meetings; in such cases, Article 41.1.d RDL 8/2020 establishes the requirement to offer "the option to attend the meeting by each and every one" of the means expressly established (online attendance and proxy or remote voting).
- In the case both of "mixed" and exclusively online meetings, there also should not be any impediments to companies requiring that "online" or remote votes be issued a certain amount of time in advance of the meeting date, given the practical difficulties of verifying and controlling votes at the meeting itself in such cases.
- The board may also establish that the meeting will be held in any **location** in Spain, not necessarily in the municipality indicated in the by-laws or, in its absence, the municipality where the company has its registered office (Article 175 LSC). This change must, of course, be based on justified grounds, such as to allow a fully online meeting to be held (which is considered to be held at the company's registered office under Article 41.1.d RDL 8/2020) or, potentially, to allow the meeting to be held at a location where there are no restrictions or limitations preventing physical attendance.

These provisions of RDL 8/2020 should be considered in conjunction with the "CNMV's considerations regarding general meetings of listed companies in the context of the health crisis caused by Covid-19", of 10 March 2020, which include a series of guidelines and recommendations that have, in many cases, been superseded by the measures established in RDL 8/2020.

## **WHAT HAPPENS TO MEETINGS CALLED PRIOR TO THE DECLARATION OF THE STATE OF EMERGENCY?**

RDL 8/2020 also covers cases in which general meetings were **called** prior to its entry into force, although it is somewhat confusing and unclear. In this regard:

- The two previous possibilities, of holding meetings online and voting remotely or holding the meeting at a location different from the one established in the by-laws, can be set out in a **supplementary announcement** which must be made at least five calendar days prior to the date on which the general meeting is to be held [Article 41.1.c) RDL 8/2020]. In addition, as is to be expected in these cases that face-to-face meetings cannot be held while the state of emergency is declared, such announcement could state that the meeting will be held "exclusively online", pursuant to the provisions of Article 41.1.d) of RDL 8/2020;
- If the company is unable to make such supplementary announcement sufficiently in advance, or if it is unable to organise an exclusively online meeting for the planned date, the general meeting cannot be held. In that case, RDL 8/2020 states that it may be announced "in a **subsequent meeting announcement** (...) having the same agenda and the same requirements for its announcement as the meeting not held, at least five days prior to the planned meeting date" [Article 41.1.d).ii)]. RDL 8/2020 sets no deadline for this "subsequent meeting announcement" (or expedited meeting announcement), although given the short notice with which it can be called (five days), we can assume that it would have to be an announcement close to the date of the meeting that could not be held (as otherwise it would make no sense, for example, for a meeting initially called for late March or early April to be the subject of this "subsequent meeting announcement" in the month of October, even if the ten-month term for holding the ordinary meeting is abided by).

Unlike what is established for non-listed companies (Article 40.6), RDL 8/2020 has not established the possibility for listed companies to **cancel** meetings. But the power to cancel a meeting is a power always held, as a rule, by the management body, which is the flipside of the power to call meetings and a supplement thereto. Thus, it is undisputed that the board of directors of a listed company that had called a meeting prior to the entry into force of RDL 8/2020 could simply decide to cancel it, instead of choosing one of the alternatives offered under this new Royal Decree (i.e. change the way it will be held by issuing a supplementary announcement or calling it again through a "subsequent meeting announcement"). In fact, since this year listed companies have a term of ten months in which to hold their ordinary meeting, cancelling the meeting could actually be a handy way to delay and postpone calling the meeting indefinitely, only to call the meeting again once the state of emergency has been lifted and the company has a clearer view of the alternatives available to it with regard to holding such meeting.

In short, the board of directors is considered empowered in these cases, to choose between amending the meeting announcement already made or making a "subsequent meeting announcement", in the terms of RDL 8/2020, but also to choose to cancel the meeting altogether, so as to later announce that it will be held on a future date within that ten-month term.

## **CAN GENERAL MEETINGS BE HELD DURING THE STATE OF EMERGENCY?**

Although RDL 8/2020 seems to suggest the mere plausibility of "the impossibility of holding the meeting" as a result of the "measures imposed by the public authorities" [Article 41.1.d).ii)], in the current state of emergency situation it is important to understand that it is not possible to hold meetings with people physically present –and that includes the shareholders, their

representatives and the directors, among others—. Unlike meetings of boards of directors and their committees, travel to take part in a meeting does not seem to be covered by any of the exceptions to the prohibitions against movement contained in the Emergency RD (Article 7), which must be taken to mean that no meetings can be held where members are physically present.

For this reason, and since the declaration of the state of emergency affects all of Spain (Article 2 of the Emergency RD), the case mentioned in Article 41.1.d.i) RDL 8/2020 causes something of a stir: where the meeting was validly constituted at the place and on the date indicated in the meeting announcement but could not be held due to the measures imposed by the public authorities, in which case "the meeting may resolve to continue on the same day in another location and seat within the same province, establishing a reasonable period for all persons attending to travel there". Among the many remarks this rule raises, it is doubtful that a meeting called prior to the state of emergency can be validly constituted at the physical location announced, due to the restrictions on movement deriving from the state of emergency, and even less likely still that the persons attending would be able to travel in that case, on the same day, to another place within the same province to continue holding the meeting there.

General meetings can, however, be held, as has been stated, "**exclusively online**, that is, with none of the shareholders or their representatives physically present", in the terms of RDL 8/2020 [Article 41.1.d)], provided that they are allowed to attend via online means and given the possibility of exercising or delegating their vote remotely. In these cases, the directors, who are legally required to attend general meetings (Article 180 LSC), may do so by conference call or videoconference [Article 41.1.d) RDL 8/2020]. Even the Notary Public, in cases where the latter officially records the meeting, "may use remote means of communication in real time which adequately guarantee compliance with notarial duties" (Article 40.7 RDL 8/2020).

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