

# Virtual board of directors meetings and passing of resolutions in writing at in absentia meetings during the 'state of alarm'

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## 1. Holding digital board meetings

**1(1).** Art. 40(1) of Royal Decree-law 8/2020 of 17 March on urgent extraordinary measures to deal with the economic and social impact of COVID-19 (RDL 8/2020) states:

*Although articles of association may have not established it, during the state of alarm, meetings of governing bodies of associations, business partnerships and commercial companies, of boards of directors of cooperatives and of boards of trustees of foundations may be held via videoconference ensuring the authenticity and bilateral or multilateral connection in real time with sound and image of the remote attendees. This rule will apply to executive committees and to other obligatory or voluntary committees. Meetings will be deemed to be held at the registered office of the legal person.*

In accordance with the foregoing, for as long as the state of alarm lasts, meetings of boards of directors of public companies and limited liability companies may be held via videoconference. What is new in this provision in respect of the general (non-exceptional) rules?

**1.2.** Actually, in the Spanish Companies Act (abbrev. LSC), there does not appear to be anything from preventing board meetings from being held virtually, i.e. digitally, or from the board members attending the meeting remotely. This applies to both public limited companies as well private limited companies. Note that, in effect, meeting the exact conditions to preserve the deliberative principle (see 1.4), it can be affirmed that a real meeting is being held, as what is relevant is not the physical presence of the members of the board but the ability to deliberate, voice opinions, be informed and decide on the items of the agenda (through a system that ensures simultaneousness and multilateral interaction).

Furthermore, neither does the LSC require an express provision in the articles of association (bylaws) for this manner of holding a board meeting to be admissible. Except perhaps in Art. 246(2) LSC, since in this particular case the law requires establishing a physical location to hold the meeting that the board members may attend (thus it is necessary to establish in the articles of association the possibility of holding a virtual board meeting convened by one-third of the directors –provided that, logically, this possibility is admitted in the aforementioned scenario-).

**1.3.** As such, Art. 40(1) RDL 8/2020's main issue is that it is not innovative with regard to the boards of directors of companies limited by shares. The problem is knowing if the rule allows holding board meetings by videoconference even when the articles of association have expressly established that meetings must be in person.

**1.4.** On the other hand, the specific reference to videoconferences is understandable, as, in the current state of technology, it is naturally the form chosen to establish necessary communication. What is really important however, according to RDL 8/2020, is that the system chosen must ensure “*authenticity and a bilateral or multilateral connection in real time with image and sound for those attending remotely*”. This means acceptable communication systems with only sound (without images) may not be used. The truth is there does not seem to be a clear reason for this limitation. Indeed, what matters is that the system of debate is preserved (for which the communication system chosen must allow the members of the board to participate in deliberations). For this, the system must ensure “interactivity”, i.e. it must allow board members to make proposals, statements, ask questions, be aware of the remaining actions, and, in general to take part in the decision-making process and, lastly, that votes may be cast. It does not appear that image is necessary for all this (the problem of identifying the participants in the meeting could be solved by other means of non-visual identification).

**1.5.** This rule adds that the meeting will be understood as held at the corporate address (and it should be understood that the resolutions adopted will be valid although the articles of association establish another place to hold in-person meetings of the board –which, on the other hand, should not be too common-).

## **2. Passing resolutions in writing at in absentia meetings**

**2.1.** Art. 40(2) of Royal Decree-law 8/2020 of 17 March on urgent extraordinary measures to deal with the economic and social impact of COVID-19 (RDL 8/2020) states:

*Although articles of association may have not established it, during the state of alarm, meetings of governing bodies of associations, business partnerships and commercial companies, of boards of directors of cooperatives and of boards of*

*trustees of foundations may pass resolutions in writing at in absentia meetings provided that the chairperson decides to do so, and must be passed when requested by at least two members of the board. This rule will apply to executive committees and other obligatory or voluntary committees. The meeting will be deemed to be held at the registered office. Resolutions established in Art. 100 of Royal Decree 1784/1996, of 19 July, approving the Rules of the Register of Companies, will apply to all these [sic], even if they are not commercial companies.*

**2.2.** The possibility that the board of directors of public limited companies to pass resolutions in writing at in absentia meetings is expressly recognised in Art. 248(2) LSC, which does not require that this manner of proceeding be authorised by the articles of association. It only requires that no board member oppose this procedure. Thus, for this type of company, it is irrelevant that the articles of association have not established this manner of passing resolutions (the issue lies in determining if this provision wishes to allow the passing of resolutions in writing even in the case of articles of association expressly prohibiting such a practice).

**2.3.** According to its wording, the rule is not applicable to private limited companies. In principle, and given its exceptionality (allowing a collegial body to pass resolutions without meeting or prior debate), it is often maintained that it is not directly applicable to private limited companies (despite what Art. 100(1) of the Rules of the Register of Companies states). However, nothing seems to prevent articles of association of private limited companies from authorising the board to pass resolutions in writing at in absentia meetings (Art. 245(2) LSC). Therefore, in relation to this type of company, the provision allows this procedure even when the articles of association do not expressly establish it.

**2.4.** Art. 248(2) LSC expressly permits omitting one of the basic elements of the rules on collegial bodies, which is the need for the resolutions to be passed after carrying out the appropriate deliberations. The exceptional nature of this rule states that it is left to any board member to force the board to meet and carry out the appropriate deliberations: it is necessary, for resolutions to be passed in writing at an in absentia meeting, that no board member object to such a procedure (it is not clear to what extent articles of association may disregard this requirement and always permit the passing of resolutions in this manner, even with the objection of a board member).

Art. 40(2) RDL 8/2020 clearly amends in this regard the system of the LSC. For the duration of the state of alarm, the resolutions must be passed in writing at in absentia meetings (regardless if any board member objects to it) in two scenarios: (i) when the chairperson of the board decides to do so; and (ii) when any two board members (regardless of the positions they hold on the board and the percentage they represent of total board members).

**2.5.** This rule establishes, in a strikingly contradictory manner, that in these cases “*meetings will be understood as held at the registered address*”, therefore there being no such “meeting” of the board. The matter is not of importance, which we comment on below (see 2.6)

**2.6.** Art. 40(2) 8/2020 provides that Art. 100 of the Rules of the Register of Companies (abbrev. RRM) will apply to the passing of resolutions in writing at in absentia meetings. This provision assumes particular significance –as its own drafting shows– on resolutions of bodies of legal persons that are not commercial companies. In any case, it is worth noting that: (a) According to Art.

100(1) RRM, resolutions will be considered passed at the registered office and on the date of reception of the last vote cast (a more precise enunciation than that in RDL 8/2020, see 2.5); and (b) Of course, despite what Art. 100(2) RRM sets out, given what we have explained above (see 2.4), it is not necessary to state on the minutes that any member of the board has objected to passing the resolutions in writing at an in absentia meeting.

**2.7.** Finally, we note that, while Art. 40(2) RDL 8/2020 refers to written resolutions, there is nothing that prevents electronic means from being used (e.g., email or programs already existing on the market that ensure the reliability and accuracy of the online communications) so that the board members issue the vote, provided that the authenticity of the vote is guaranteed. What does seem reasonable is a vote-casting procedure that allows to save the declaration on a storage medium for later evidence.