

Virtual general meetings of shareholders and board of directors' resolutions in listed companies as a result of the 'state of alarm'

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Art. 41 of Royal Decree-law 8/2020 sets out extraordinary measures for the holding of general meetings and prior board of directors resolutions, as well as for the delay in complying with regular reporting requirements.

As a result of the declaration of a 'state of alarm' on 14 March, lawmakers have laid down a set of extraordinary measures in art. 41 of Royal Decree-law 8/2020 that affect Spanish companies listed on stock exchanges and those that issue debt securities listed on the AIAF market, as well as Spanish companies whose securities are admitted to trading on a regulated market in the European Union.

These extraordinary measures concern the functioning of companies corporate bodies (the board of directors and the general meeting of shareholders) and the periodic public information of listed companies. In some respects, they also imply a *de facto* repeal of certain provisions of the Companies Act (abbrev. LSC) and the Securities Market Act (abbrev. TRLMV).

Listed companies may opt (or not) to benefit from these extraordinary measures, without prejudice to the lawmakers' intention to make it easier for corporate bodies to function in the most organised way possible and, for this subtype of public limited company, to comply with its regular reporting requirements.

In this respect, we should bear in mind the Considerations issued by the Spanish Securities Market Authority (abbrev. "CNMV") in its communication of 10 March 2020 regarding the shareholder meetings of listed companies in light of the health situation created by COVID-19. In these Considerations, the CNMV is of the opinion that it is reasonable to encourage attendance by proxy at general meetings and maximise the use of remote shareholder attendance and voting mechanisms. The CNMV even finds it feasible to hold fully virtual shareholders meetings, provided the company has mechanisms for remote attendance and voting by shareholders, including systems that allow virtual attendance or real-time electronic connection "or any other measure provided for in the articles of association or the internal rules of the general meeting of shareholders". The problem arises when the articles of association or the General Meetings Regulations contain no provisions (or just partial provisions) on these matters. Logically, the CNMV had to respect the current legislation in its Considerations. For this reason, and given that it is currently impossible for Spanish listed companies to hold general meetings of shareholders normally, Royal Decree-law 8/2020 includes the extraordinary measures described below, classified in accordance with the subject matter.

1. Extraordinary measures in connection with issuers' periodical public information [art. 41(1)(a)] and the audit report.

Art. 118 TRLMV provides a maximum time limit of four months following the end of each financial year to comply with the obligation to have the annual accounts audited and issue the annual financial report and auditors' report on the annual accounts. This time limit is now extended to six months following the financial year-end [art. 41(1)(a) of Royal Decree-law 8/2020].

The Royal Decree-law [art. 41(1)(a)] also extends by one month the maximum time limit for satisfying the obligation to prepare and disseminate the half-yearly financial report, which is usually three months following the end of the half-yearly period (art. 119 TRLMV).

The same four-month time limit is provided for the interim directors' report or quarterly financial report provided for in art. 120 TRLMV. The impact of this measure means that, since the maximum time limit for the quarterly report is 45 days following the closing date of the first and third quarters (art. 19 of Royal Decree 1362/2007 of 19 October), the *de facto* extension of the deadline is two and a half months. Note that the draft bill (dated 24 May

2019) amending the Companies Act and other financial regulations, in order to adapt them to Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017, amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, repeals art. 120 TRLMV, eliminating listed companies' obligation to publish quarterly financial information. The purpose of the repeal of art. 120 TRLMV is to bring the Spanish legislation into line with that of practically all EU countries and all relevant markets in Europe. Therefore, after this reform, publication of the quarterly financial report will be at the choice of the listed company. However, given the current situation, it was necessary to expressly include the new four-month time limit for the publication of the quarterly report.

2. **Extraordinary measures in connection with the functioning of the corporate bodies**

a) ***The ordinary annual general meeting: time limit and venue***

The time limit for holding ordinary general meetings of shareholders is extended for 2020 to the first ten months following the end of the financial year [art. 41(1)(b)]; the general time limit provided in art. 164 LSC is therefore extended by four months. Unlike unlisted companies (art. 40 Royal Decree-law 8/2020), the calculation of the *dies a quo* is not linked to the end of the state of alarm.

The venue for the meeting: as an exception to the rule of art. 175 LSC, the meeting is permitted "anywhere in the national territory", probably to allow the listed company to choose a space that respects the COVID-19 containment measures applicable to individuals, even if few people physically attend the meeting. It does not seem that the attendance of an "ordinary shareholder" at the general meeting is considered permissible travel under art. 7(1)(c) of Royal Decree 463/2020, of 14 March, declaring the state of alarm for the management of the health crisis situation caused by COVID-19 ("travel to the place of work to carry out employed, self-employed or business activities"), although we do believe that travel by the members of the board of directors to the venue of the meeting would be permitted.

Lastly, the venue for the meeting, if not the registered office or the venue provided in the articles of association, must be indicated in the notice of meeting.

b) ***The ordinary general meeting: possibility of providing for virtual attendance remote voting in the notice of meeting even if not provided for in the articles of association***

Royal Decree-law 8/2020 implements and gives the force and effect of an act of parliament to the CNMV's Considerations of 10 March 2020 regarding listed companies: in the current circumstances, boards of directors must be given the greatest possible degree of flexibility to "adopt measures and solutions that contribute to preserving people's health and preventing the spread of the virus, even if such measures are not expressly provided in the articles of associations, the General Meetings Regulations or in the notices of meeting called, provided that the shareholder rights to information,

attendance, voting and equal treatment between those in the same position are ensured".

Thus, art. 41(1)(b) allows the board of directors to include the provisions of arts. 182, 189 and 521 of the Companies Act in the notice of meeting, even when virtual attendance (art. 182), remote voting (art. 189) and remote participation by shareholders of listed companies (art. 521) are not expressly provided for in the articles of association. And this is also applicable for those meetings already called prior to 18 March 2020 (date of entry into force of Royal Decree-law 8/2020), provided that an addendum to the notice of meeting is published within five calendar days prior to the date scheduled for the meeting; such addendum must include all or some of these points (virtual attendance, remote voting and remote participation in the meeting).

Art. 41 takes into account not only meetings called to be held during the validity of the state of alarm, but also the possibility that the state of alarm may be extended and, therefore, meetings called before 14 March for a date later than 29 March may not be held for such reason.

If the mechanisms of virtual attendance, remote voting and remote participation cannot be used, the Royal Decree-law offers two alternatives to listed companies:

- The first alternative is based on the assumption that the meeting has validly held at the place and venue set out in the notice of meeting. Although the quorum of 25% of the voting capital can be reached on first call, art. 193 LSC does not require a minimum quorum on second call, unless the articles of association provide a specific quorum. But the rule of no minimum quorum on second call is of little use in these cases, given that most annual general meetings of listed companies or issuers of securities in regulated markets that are scheduled for the first half of 2020, include as an agenda item a capital increase with delegation of powers to the board of directors, or modifications of the articles of association, or the issuance of obligations, so the minimum quorum required on second call for these meetings is also 25 percent of the voting share capital (Art. 194(2) LSC).
- Article 41(1)(d)(i) allows the company to hold the meeting on the same day at another place and venue within the same province, establishing a reasonable period for the transfer of the attendees. We understand that the circumstances referred to in said article are those in which the meeting assembles - and the quorum of 25 percent is reached with proxies or absentee ballots by postal correspondence - and then the attendees are transferred, if appropriate (since, in our opinion, the state of alarm precludes concentrations of people without respecting the recommended safe social distance), to another place within the same province. Although this is not the case, some listed companies have already announced on their website the change of venue for the initially planned meeting

(a congress hall) to its headquarters, despite the fact that the meeting is scheduled to be held days after the theoretical end of the state of alarm.

c) **Fully virtual annual general meeting**

If the general meeting could not be held (because of a failure to reach the minimum quorum provided in art. 194(2)), art. 41(1)(d)(ii) allows it to be held at a later date, notified "with the same agenda and the same publication requirements as the first date", at least five days before the date scheduled for the new meeting. This is an exceptional measure that deviates from the general time limit for publication of the notice of meeting provided in art. 176 LSC (one month). In this case, the board of directors may announce in the addendum to the notice of meeting that the meeting will be fully virtual, without the shareholders or their representatives being physically present, provided the notice of meeting offers the possibility of participating in the meeting "by each and every one of these channels": virtual attendance, a proxy granted to the chairperson of the meeting by electronic means and early voting by means of remote communication.

All the above is permissible even if not provided for in the articles of association, "as long as the same includes reasonable safeguards to ensure the identity of the person exercising the voting right".

The members of the board of directors may attend the meeting by audio or video conference. The meeting shall be deemed to have been held at the registered office, "regardless of the location of the chairperson of the meeting"; this provision is intended to avoid situations in which the meeting can be deemed to have been held outside Spain if, for any reason, the chairperson is abroad. It also intends to solve the problem of the chairperson of the meeting or the members of the board of directors not being physically able to go to the place from where the general meeting is being streamed, which should be the registered office. This follows the CNMV's Considerations of 10 March 2020 which considers it reasonable to "allow for the possibility of telephone or videoconference attendance by the directors or other persons obliged to be present at the general meeting who, for health reasons or possible travel restrictions, cannot attend in person".

d) **Resolutions of virtual board meetings held prior to the general meeting of shareholders.**

In the event of a fully virtual general meeting, art. 41(2) gives legal validity to resolutions of the board of directors and the audit committee which, as the case may be, must be notified in advance when they are passed by videoconference or teleconference, even if this possibility is not envisaged in the articles of association, as long as the directors have the necessary means to do so and the secretary recognises their identity, which must be stated in the minutes and in any certified transcripts of the resolutions. The meeting will be deemed a single meeting held at the registered office. The Royal

Decree-law does not refer to any resolutions of the appointments and remuneration committee that may be necessary in relation to the appointment or re-election of members of the board of directors. Given the current pandemic, the validity of the resolutions of the appointments and remuneration committee passed with the same safeguards referred to in art. 41 (2) could be justified.

On the other hand, there are several trusted applications on the market that allow board resolutions to be passed by combining e-mail with acknowledgment of receipt and videoconferencing, in order for board meetings and board committee meetings to be validly held. Within the flexibility recommended by the CNMV, we see no problem in using them.