

## Covid-19 coronavirus. Additional amendments to the rules for drawing-up and approval of annual accounts and holding of general shareholders' meetings

### The must-have Q&A for companies

Last 31 March, the Spanish Council of Ministers approved Royal Decree law 11/2020, dated 31 March (RDL 11/2020), adopting additional urgent measures in the social and economic fields to fight the Covid-19 crisis. This RDL 11/2020 is the third set of economic measures passed by the Spanish Government over the last weeks in relation to Covid-19 since the entry into force of Royal Decree 463/2020, of 14 March, pursuant to which the state of alarm in Spain was declared, and of Royal Decree-Law 8/2020 on extraordinary urgent measures to address the economic and social impact of Covid-19 (RDL 8/2020). Within all the measures set out in this new RDL 11/2020, there are some of a corporate kind that complement, clarify and, in some cases, amend, the corporate flexibility measures applicable to private companies and issuers of securities that were introduced by RDL 8/2020.

In particular, at the corporate level, RDL 11/2020 amends articles 40 and 41 of RDL 8/2020 and introduces the following measures:

#### **Functioning of governing and management bodies**

General shareholders meetings may be held by telematics means, without a specific provision in the by-laws, but resolutions may not be adopted just in writing and without physical meeting as it is allowed for management bodies

RDL 11/2020 introduces an important clarification: following the doubts that had arisen with the initial wording of article 40 of RDL 8/2020, the possibility to hold or attend meetings by remote communication systems or to adopt resolutions in writing and without a physical meeting, which were declared applicable to the "governing and managing bodies", shall also be applicable to general shareholders' meetings.

RDL 11/2020 specifies that general shareholders' meetings can also be held by videoconference or multiple telephone conference. However, this provision does not seem to apply to resolutions taken in writing and without a physical meeting, which are limited to

the management and governing bodies and are not expressly extended to general shareholders' meetings. This decision of the legislator is unusual, particularly when the General Directorate of Legal Security and Public Faith (Dirección General de Seguridad Jurídica y Fe Pública) has allowed to hold general shareholders' meetings in writing and without a physical meeting in exceptional circumstances, provided that this "does not offer less guarantees of authenticity than physical attendance" (Resolution of 8 January 2018).

Likewise, RDL 11/2020 clarifies the requirements that those meetings held by means of remote communication must comply with in order to ensure that they are validly held. RDL 8/2020 only made a general reference to "ensuring authenticity and bilateral or plurilateral connection in real time with image and sound of persons attending remotely", with the chairperson and secretary of the meeting assessing discretionally whether the authenticity requirement was met. Now, the legislator specifies that these means will be either videoconference or multiple telephone conference, if (i) all the members of the body/all the shareholders or their respective attorneys have the necessary means available for the remote attendance; and (ii) the secretary of the body acknowledges their identity and records it in the minutes. The minutes must be sent "immediately" by the secretary to each "of the attendees" by e-mail. There is no reference to the other directors of the company who have not attended the meeting, which raises doubts as to whether this obligation alters, in any way, the procedure for approving the contents of said minutes.

## **Deadlines for drawing-up and auditing annual accounts**

Companies may voluntarily benefit from the exceptional deadline but nothing prevents them from complying with the ordinary regime for drawing-up the annual accounts

RDL 11/2020 keeps the suspension of the deadline for drawing-up the annual accounts and, where appropriate, the management report (as well as any other documents that are legally

required) but clarifies some of the questions that many companies were asking after the publication of the RDL 8/2020, in particular:

- even if the period for drawing-up the annual accounts has been suspended, drawing-up the referred accounts by the relevant governing body during the state of alarm shall be valid;
- if the annual accounts are drawn-up during this period, they may also be audited within the legally prescribed period or benefit from the extension of the legal deadline up to two months following the end of the state of alarm; and
- this deadline for the audit of the annual accounts applies to both mandatory and voluntary audits.

## **Holding of ordinary general shareholders meetings' and profit allocation proposals**

Flexibility to review profit allocation proposals

RDL 11/2020 introduces a new section (6bis) in article 40 of RDL 8/2020 in order to clarify certain issues related to the holding of ordinary general shareholders' meetings and the allocation of profits. This new section is in line with the joint communication issued by the Spanish National Securities Market Commission (CNMV) and the Association of Registrars of 26 March (the **Communication**). In this sense:

- **Companies with their annual accounts drawn-up before 18 March 2020 (date of entry into force of RDL 8/2020) and which had not called their ordinary general shareholders' meeting yet:** companies that have already drawn-up their annual accounts but have called or will call their ordinary general shareholders' meeting after 18 March 2020, may replace the profit allocation proposal included in the notes to the accounts with another proposal adjusted to the Covid-19 situation. This will require a justification from the management body and a letter from the auditor stating that its audit opinion would not have been modified if it had known the new proposal at the time of its signature.

- **Companies with annual accounts drawn-up and the ordinary general shareholders meeting called, both before 18 March 2020: if the ordinary general shareholders meeting was called before 18 March 2020** and is scheduled to be held during the state of alarm, the management body may continue to hold the meeting removing from the agenda the profit allocation proposal and deferring a decision on the issue to a subsequent meeting. In principle, it is also possible to revoke the calling of the ordinary general shareholders meeting to re-convene it at a later stage without restating the annual accounts.

This subsequent meeting shall be called within one month after the end of the state of alarm. RDL 11/2020 does not provide for a specific deadline for holding the meeting and it only specifies that the meeting must be held "within the period legally established for holding the ordinary general shareholders' meeting". This reference is not clear, as the legally established period is 6 months following the end of the financial year (art. 164 LSC) or, under the exceptional measures provided for by RDL 8/2020, within 3 months following the end of the now-suspended deadline for drawing-up the accounts, which runs for 3 months since the end of the state of alarm.

None of these two solutions seems satisfactory. It would have been desirable for the legislator to determine more precisely the deadline to hold the meeting and to approve profit allocation. It is prudent, however, to consider that the meeting shall be held on a date that respects the minimum legal notice period from the date of the calling notice. Also, that the exceptional 3-month period running since the date of drawing-up to the accounts (considering that in this scenario, the accounts are going to be drawn-up) shall run from the date of end of the state of alarm.

This shall require that (i) the decision of the management body is published before the holding of the already called ordinary general shareholders meeting and (ii) the new proposal is accompanied by the justification of

the management body and the letter from the auditor.

Accounts approved by the ordinary general shareholders meeting (without approval of the allocation of profits) shall be filed with the Commercial Registry within the legal deadline (one month following approval). Afterwards, when the approval of profit allocation takes place, a supplementary certificate in relation to the allocation of profits shall be filed.

The Communication also provides for a third alternative in relation to profit allocation proposals, which, however, has not been included in RDL 11/2020. This refers to the restatement of the annual accounts, which is required in the event of risks arising between the date of the drawing-up and the date of the general meeting (as it would be the case with Covid-19), in accordance with the provisions of Article 38 of the Commercial Code and the Resolution of the Accounting and Auditing Institute (Instituto de Contabilidad y Auditoria de Cuentas) of 5 March 2019.

According to the Communication, when deemed necessary by the management body, the annual accounts shall be restated, and the profit allocation proposal included therein shall be modified, so that the annual accounts reflect the latest proposal to be submitted to the general meeting. In the event of restatement, it will be necessary to cancel the general shareholders' meeting, if already called, for which:

- the Company shall publish an advertisement on its website or, in the absence of one, in the Spanish Official Gazette (Boletín Oficial del Estado);
- the publication shall be made at least 48 hours prior to the date originally scheduled for the general shareholders meeting; and
- the new general shareholders meeting shall be called within the month following the end of the state of alarm (as established in article 40.6 in fine of RDL 8/2020).

## **Clarification for companies with securities admitted to trading on a regulated market in the European Union**

Specific regime for listed companies

RDL 11/2020 again reproduces the content of the Communication in relation to companies with securities admitted to trading on a regulated market in the European Union. The main clarification is that measures foreseen for non-listed companies under article 40 are generally applicable also to listed companies, when there is no specific provision expressly applicable to them.

This means that, for instance, listed companies must follow the procedure set out in article 40.6 bis of RDL 8/2020 when amending or revoking the call of the general shareholders meeting. RDL 11/2020 clarifies that the new proposal, its justification by the board of directors and the auditor's letter must be made public as soon as they are approved: (i) on the company's website, as supplementary information to the annual accounts; and (ii) on the website of the CNMV, as other relevant information or, when necessary, as privileged information.

## **Frequent Q&As on measures included in RDL 8/2020 and RDL 11/2020 related to corporate obligations**

**Is it possible to hold a board meeting by telephone or videoconference? Is there any requirement to comply with?** It is possible to hold it by using a videoconference system or multiple telephone conferences as long as all the directors have the necessary means to do so and the secretary acknowledges this fact and states so in the minutes. The secretary must "immediately" send by email to the attendees these minutes. It is advisable that the secretary sends the minutes at the end of the meeting to the attending directors for their approval and then, once approved, send them to the other directors that have not attended the meeting.

For listed companies, although article 41 of RDL 8/2020 does not foresee the immediate delivery of the minutes, it is prudent to understand that, as far as possible, the secretary of the board will have to proceed in the same way.

**Am I obliged to draw-up the annual accounts after the declaration of the state of alarm?** No. After the declaration of the state of alarm, the deadline for drawing-up the annual accounts has been suspended and will be resumed for an additional 3-month period from the date of end of the state of alarm.

**Even if the period for drawing-up the annual accounts is suspended, is it valid if I draw-up the annual accounts during the state of alarm?** Yes, even if the drawing-up deadline has been suspended, drawing-up of the annual accounts by the board of directors during the state of alarm will be valid.

**If I draw-up or I have drawn-up the annual accounts, must the auditor prepare the audit report?** Yes, although in this case, the company may choose between (i) carrying out the audit within the legally established period or (ii) taking advantage of the 2-month extension from the end of the state of alarm.

**Is it possible to call the general shareholders' meeting to approve the accounts during the state of alarm? Is it possible to hold that general shareholders' meeting?** Yes, there is nothing preventing the meeting from being called and held during the state of alarm. However, given the mobility restrictions imposed by Royal Decree 463/2020, this meeting will have to be held by remote attendance means (including videoconference or multiple telephone conference) and will also have to meet the following requirements: (i) all the shareholders or their attorneys will need to have the necessary means; (ii) the secretary shall recognise their identity and express this circumstance in the minutes.

The general shareholders meeting may also be held in writing and without a physical meeting if this is provided for in the by-laws.

**The general shareholders meeting was called before 18 March 2020, but it is not going to be possible to hold it physically and we do not have the means to ensure remote attendance as required by RDL 8/2020, what should we do?** In this case, the board of directors may amend the place and time set for holding the meeting or, if necessary, revoke it in order to call a new general shareholders meeting once the state of alarm ceases. In this case:

- the Company shall publish an advertisement on its website or, in the absence of one, in the Spanish Official Gazette (Boletín Oficial del Estado);
- the publication shall be made at least 48 hours prior to the date originally scheduled for the general shareholders' meeting; and
- the new general shareholders' meeting shall be called within the month following the end of the state of alarm (as established in article 40.6 in fine of RDL 8/2020).

In case of listed companies, the date of the meeting may be postponed, and will have to be announced at least 5 days before the date initially scheduled for the meeting. At least the same items on the agenda and the publicity requirements of the previously called meeting must be maintained.

**The distribution of a dividend was foreseen in the profit allocation proposal made by the board of directors in the notes to the**

**accounts but the board of directors considers now that it is preferable not to distribute profits, what can be done?**

- If the ordinary general shareholders meeting has not yet been called, then the board of directors may replace, with appropriate justification, the profit allocation proposal contained in the notes to the accounts with another proposal adjusted to the Covid-19 situation. The auditors shall prepare a written statement indicating that they would not have modified the audit opinion if they had known the new proposal at the time of its signature.
- If the meeting was already called prior to 18 March 2020 and is scheduled to be held during the state of alarm, in addition to the general alternatives (amendment of the date or revocation of the call), if the board of directors resolves to continue holding the meeting, it may withdraw the profit allocation proposal from the agenda and delay the decision on this issue to a subsequent general shareholders meeting.

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