

Extraordinary measures applicable to legal entities governed by private law and to the functioning of the management bodies of listed companies established by Royal Decree-laws 8/2020 and 11/2020

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Madrid, 2 April 2020

On 1 April 2020, **Royal Decree-Law 11/2020 of 31 March** was published in the Official State Bulletin, **adopting additional urgent social and economic measures to deal with COVID-19 (“RDL 11/2020”)**. RDL 11/2020 establishes a new range of measures, mainly of a social and economic nature, which expand upon and enhance those already adopted through the Royal Decree-laws approved in recent days, as well as Royal Decree 463/2020, of 14 March, which declared the state of alarm for the management of the health crisis caused by COVID-19, and its subsequent extension, approved by Royal Decree 476/2020, of 27 March.

In this briefing, we provide a general analysis of the commercial measures approved in this area. Royal Decree 8/2020 of 17 March, on extraordinary urgent measures to address the economic and social impact of COVID-19 (“RDL 8/2020”) establishes in Article 40 certain *“Extraordinary measures applicable to legal entities governed by private law”* and in Article 41 certain *“Extraordinary measures applicable to the functioning of the management bodies of listed companies”*. The first final provision of RDL 11/2020 amends Articles 40 and 41 of RDL 8/2020. The most significant amendments affect Article 40 of RDL 8/2020. In this memorandum, we analyse the content of both provisions, highlighting those aspects that have been amended by RDL 11/2020.

1. Extraordinary measures applicable to legal entities governed by private law

Article 40 of RDL 8/2020 establishes different measures applicable to civil and commercial companies, associations, cooperatives, and foundations, concerning:

- (i) **The functioning of collegiate bodies:** Article 40 of RDL 8/2020 authorises governing and management bodies of civil and commercial companies and associations, as well as the boards of cooperatives and foundations to hold their meetings by videoconference during the state of alarm, even if their by-laws do not provide for this option. RDL 11/2020 provides the option of holding those meetings by teleconference, as long as all members of the body have the necessary means to participate in the meeting, the secretary of the body identifies the participating members and expressly reflects this in the minutes of the meeting, which must be circulated immediately to the email addresses of all participating members. This provision is also applicable to the delegated committees and other mandatory or voluntary committees of these entities.

The most significant amendment introduced by RDL 11/2020 in this area is to expressly provide that, during the state of alarm and, even if the by-laws do not provide for this option, the general shareholders’ meetings of companies or the associates’ assemblies may be held by means of “video or multiple teleconference” as long as all of those who are entitled to attend or their representatives have the necessary means to participate, the secretary of the meeting identifies them and states this in the minutes, which must be circulated by email immediately.

(ii) **Adoption of resolutions by the management bodies:** RDL 11/2020 has not amended section 2 of Article 40 of RDL 8/2020 which allows, during the state of alarm, the adoption of resolutions by the governing and management bodies of civil and commercial companies and associations, as well as the boards of cooperatives and foundations, in writing and without a meeting even if their by-laws do not provide this option, provided that the chairman agrees to it and at least two of the members of the relevant corporate body request it. As in the previous section, this provision is equally applicable to delegated committees and other mandatory or voluntary committees of these entities. The meeting shall be deemed to have been held at the registered office.

(iii) **Annual accounts:**

- **Drafting the annual accounts:** RDL 11/2020 (i) clarifies section 3 of Article 40 RDL 8/2020, which establishes that the obligation to draft the annual accounts, ordinary or abbreviated, individual or consolidated, and, if applicable, the management report and other legally required documents, within three months of the end of the financial year is suspended until the end of the state of alarm, and (ii) adds, as a new element, that, in any case, (a) the drafting of the annual accounts that may be carried out by the governing or management body of a legal person during the state of alarm shall be valid, and (b) the audit of the accounts may be carried out within the legally established period or with the option of the extension provided for in Article 40.4 of RDL 8/2020.

- **Verification of the annual accounts:** Article 40.4 of RDL 8/2020 is slightly amended. This provision extends the deadline for the accounting verification of the annual accounts for two months from the end of the state of alarm. RDL 11/2020 clarifies that (a) the regulation applies to those cases in which the annual accounts were drafted before, or during, the state of alarm, and (b) that the regulation applies to both mandatory and voluntary audits.

- **Approval of the annual accounts:** Article 40.5 of RDL 8/2020 is not amended. According to said article, the ordinary general shareholders' meeting must meet to approve the annual accounts of the previous financial year within three months of the end of the period to draft the annual accounts.

(iv) **Notification of meeting prior to the state of alarm and subsequent convocation:** RDL 11/2020 maintains the wording of Article 40.6 of RDL 8/2020, which granted the management body two alternatives: (i) changing the place and time of the meeting; or (ii) revoking the meeting to proceed with a new meeting within one month of the end of the state of alarm.

In both cases, this must be done at least forty-eight hours in advance through an announcement on the website, or if there is no website, in the Official State Bulletin ("Boletín Oficial del Estado").

- (v) **Proposed distribution of profits:** RDL 11/2020 introduces a new section 6 *bis* in Article 40 of RDL 8/2020 in keeping with the *Joint Communication of the Spanish Association of Registrars and the Spanish Securities Market Commission (CNMV) regarding the annual accounts and the proposal for the distribution of profits of commercial companies in light of the health crisis arising from COVID-19*, of 26 March 2020.

In accordance with this new regulation, companies which, having drafted their annual accounts, convene the general shareholders' meeting from the date of the entry into force of this regulation, may replace the proposal for the distribution of profits with a new proposal. The management body shall explain the replacement of the proposal for the distribution of profits, based on the situation arising from COVID-19. This explanation must be accompanied by a letter from the auditor stating that they would not have changed their opinion if they had known about the new proposal at the time of its signing.

If the general shareholders' meeting has already been called, the management body may withdraw the proposal for the distribution of profits from the agenda and must submit the new proposal to a subsequent general shareholders' meeting to be held within the legally established period. In this case, the decision of the management body must be published prior to the convocation of the already called general shareholders' meeting. The new proposal must comply with the aforementioned requirements, both the explanation and the written statement from the auditor. The certification of the management body for the purposes of filing the annual accounts shall be limited, if appropriate, to the approval of the annual accounts, and an additional certification regarding the approval of the proposed application of results shall subsequently be filed with the Commercial Registry.

- (vi) **Notarial deed:** Article 40.7 of RDL 8/2020 remains unchanged. In accordance with this provision, the Notary who has been required to attend the general shareholders' meeting and prepare the notarial minutes may use real-time remote means of communication.
- (vii) **Shareholders' right of exit from a company:** RDL 11/2020 does not amend Article 40.8 of RDL 8/2020, which prevents shareholders from exercising their exit rights from a company, even if there are legal or statutory grounds, until the end of the state of alarm.
- (viii) **Reimbursement of contributions to cooperative members:** Article 40.9 of RDL 8/2020 is not amended; the period set out in Article 51 of Law 27/1999 of 16 July 1999, on Cooperatives for the reimbursement of contributions to the share capital in the event of the withdrawal of a member of a cooperative, allows for an additional period of six months for the cooperative to reimburse members who terminate their membership during the state of alarm.
- (ix) **Dissolution of the company:** sections 10 and 11 of Article 40 of RDL 8/2020 are not amended, according to which (a) if during the state of alarm the statutory term of duration of the company elapses, the dissolution will not take place until two months have elapsed since the end of the state of alarm, and (b) if before the declaration of the state of alarm

and during the effect of said state, there is a legal or statutory reason for the dissolution of the company, the legal period the management body has to call the general shareholders' meeting to adopt the resolution to dissolve the company or to revoke the reason for dissolution, is suspended until the end of the state of alarm.

- (x) **Liability of directors for not promoting the dissolution:** section 12 of RDL 8/2020 remains unchanged. In accordance with this provision, in the event that the legal or statutory reason for dissolution has occurred during the state of alarm, the directors will not be liable for the debts incurred by the company during this period.

2. Extraordinary measures concerning the functioning of the management bodies of listed companies

RDL 11/2020 has also amended Article 41 of RDL 8/2020, but exclusively regarding the proposal for the distribution of profits.

RDL 8/2020 establishes several exceptional measures that apply, for 2020 only, to companies with securities admitted to trading on a regulated market in the European Union. These measures relate to:

- (i) **Deadlines:** several deadlines applicable to listed companies have been amended as follows:
 - **Annual financial report and audit report:** the obligation to publish and submit these reports may be fulfilled for up to six months from the end of the financial year, instead of the four-month period that applied until now.
 - **Intermediate management statement and semi-annual financial report:** the obligation to publish and submit these reports may be fulfilled for up to four months after the end of the financial year, instead of the two or three months period (depending on the date of publication of the annual report) that applied until now.
 - **Ordinary general meeting:** it may be held within the first ten months of the financial year, instead of within the first six months that applied until now.
- (ii) **General shareholders' meeting:** the board of directors may include in the call to the general shareholders' meeting the possibility of remote attendance and voting in real-time, as well as the holding of the meeting in any location within the Spanish territory, even if the by-laws of the company do not provide for this possibility. If the call had been published before the entry into force of RDL 8/2020, the publication of a supplementary notice providing for these options will be allowed. The notice shall be published at least five calendar days before the date of the general shareholders' meeting.

In the event that the general shareholders' meeting cannot be held at the physical location provided for in the notification and, due to the measures imposed by the public authorities, the abovementioned option cannot be used, the following measures are permitted:

- If the general shareholders' meeting has been validly constituted, said general shareholders' meeting may approve the holding of the meeting on the same day, but in another location within the same province (provincia), establishing a reasonable period of time for the transfer of the attendees.
 - If the general shareholders' meeting cannot be held, the notification of the subsequent general shareholders' meeting may be announced with the same agenda and publicity requirements as the general shareholders' meeting which was not held, provided that the notification is published at least five days prior to the date set for the general shareholders' meeting. In this event, the board of directors may provide in the supplementary notice that the meeting is held exclusively through teleconference, provided that it offers the shareholders the possibility of participating by all of the following means: (a) telephone attendance, (b) proxy granted to the chairman of the general shareholders' meeting using remote communication, and (c) early voting through remote communication. All the foregoing, notwithstanding that some of the abovementioned forms of participation are not provided for in the company's by-laws (but provided that reasonable guarantees are put in place to ensure the identity of the person exercising his or her voting rights). The general shareholders' meeting shall be deemed to have been held at the registered office regardless of the location of the chairman of the general shareholders' meeting, and board members may attend to the general shareholders' meeting via audio or video conference.
- (iii) **Resolutions of the board of directors and the audit committee:** for the purposes of the preceding sections and on an exceptional basis, the resolutions approved by the board of directors and, where appropriate, by the audit committee, shall be valid when they have been adopted by videoconference or multiple teleconferences even if this possibility is not provided for in the by-laws, provided that all members of the board of directors have the necessary means to do so and the secretary identifies the members. This circumstance must be expressed in the minutes and the certification of the resolutions adopted, considering the meeting to be held at the registered office.
- (iv) **Proposed distribution of profits:** RDL 11/2020 introduces section 3 in Article 41 of RDL 8/2020. In accordance with this new rule, when listed companies apply any of the measures provided in Article 40.6 bis of RDL 8/2020 (which allows, from the date of entry into force of this provision, the substitution of the proposed distribution of profits if the ordinary general shareholders' meeting has already been convened or if the annual accounts are have already been drafted), the new proposal for the distribution of profits, its justification by the management body and the auditor's report must be made public, as soon as they are approved, as supplementary information to the annual accounts on the

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company's website and on the website of the CNMV as other relevant information or, if required, as privileged information.

The information contained in this Briefing is of a general nature and does not constitute legal advice. This Briefing was prepared on 2 April 2020 and Pérez-Llorca does not undertake any commitment whatsoever to update or review its content.