

June 2020

## COVID-19: How the lifting of the state of emergency will affect rules governing commercial companies

The various pieces of legislation published during the state of emergency, together with the statements by registrars and by the CNMV, have created a new exceptional regime governing numerous aspects of commercial companies. With the end of the state of emergency it becomes necessary to analyze the impact that the lifting of the declaration will have on the validity period of the various rules that have been approved.

We have set out below everything that companies should know about how the end of the state of emergency will affect the exceptional legislation passed in relation to calling and holding shareholders' meetings, holding meetings of governing bodies and adopting resolutions thereat, preparing, verifying and approving financial statements and reports, submitting the proposed allocation of profit/loss, dividends distributions, closure of the companies' registry sheets; legalizing corporate books, as well as grounds for winding up and directors' liability, shareholders' rights of withdrawal, registry periods and rules on foreign investments.

### Exceptional legal regime applying to commercial companies as a result of COVID-19

Laws involved:

- Royal Decree 463/2020, of March 14, 2020, declaring a state of emergency to manage the COVID-19 public health crisis. ([Official State Gazette -BOE- issue 67, March 14, 2020](#)).
- Royal Decree-Law 8/2020, of March 17, 2020, on urgent extraordinary measures to confront the economic and social impact of COVID-19. ([Official State Gazette -BOE- issue 73, March 18, 2020](#)).
- Royal Decree-Law 11/2020, of March 31, 2020, adopting additional urgent social and economic measures to confront COVID-19 ([Official State Gazette -BOE- issue 91, of April 1, 2020](#)).
- Royal Decree-Law 16/2020, of April 28, 2020, on procedural and organizational measures to confront COVID-19 in the sphere of the justice system. ([Official State Gazette -BOE- issue 119, of April 29, 2020](#)).
- Royal Decree-Law 18/2020, of May 12, 2020, on measures to safeguard employment. ([Official State Gazette -BOE- issue 134, of May 13, 2020](#)).
- Royal Decree 537/2020, of May 22, 2020, extending the state of emergency declared under Royal Decree 463/2020, of March 14, 2020, declaring a state of emergency to manage the COVID-19 public health crisis. ([Official State Gazette -BOE- issue 145, of May 23, 2020](#)).
- Royal Decree-Law 19/2020, of May 26, 2020, adopting additional measures on farming, scientific, economic, employment-related, social security and tax matters to mitigate the effects of COVID-19. ([Official State Gazette -BOE- issue 150, of May 27, 2020](#)).

- Royal Decree 555/2020, of June 5, 2020, extending the state of emergency declared under Royal Decree 463/2020, of March 14, 2020, declaring a state of emergency to manage the COVID-19 public health crisis. ([Official State Gazette -BOE- issue 159, of June 6, 2020](#)).
- Royal Decree-Law 21/2020, of June 9, 2020, on urgent prevention, containment and coordination measures to address the COVID-19 health crisis. ([Official State Gazette -BOE- issue 163, of June 10, 2020](#)).
- NIA-ES 706 (revised)
- NIA-ES 560
- NIA-ES 570
- Decision of the Directorate-General for Legal Certainty and Attestation, April 10, 2020.
- Decision of the Directorate-General for Legal Certainty and Attestation, March 13, 2020.
- Decision of the Directorate-General for Legal Certainty and Attestation, March 15, 2020.
- Decision of the Directorate-General for Legal Certainty and Attestation, May 28, 2020.
- Instruction by the Directorate-General for Legal Certainty and Attestation, June 4, 2020.
- Resolution by the Directorate-General for Legal Certainty and Attestation, June 5, 2020.
- Commercial Code.
- Instruction by the Directorate General for Registries and the Notarial Profession of February 12, 2015, on the legalization of business owners' books.
- Regulations on the Audit of Financial Statements
- Spanish Accounting and Audit Institute (ICAC): Resolution of an audit issue - Effect of Royal Decree-Law 8/2020, of March 17, 2020, in article 40, on the process of preparation, verification and approval of the annual financial statements of the various entities.
- Spanish Accounting and Audit Institute (ICAC) decision of March 5, 2019, implementing the financial instruments and other corporate law elements relating to capital companies
- Joint statement by the Association of Registrars of Spain (CRE) and by the Spanish Securities Market Commission (CNMV) regarding annual financial statements and the proposed allocation of profit/loss at commercial companies in the context of the COVID-19 health crisis (March 26, 2020).
- New joint statement by the Association of Registrars of Spain (CRE) and by the Spanish Securities Market Commission (CNMV) regarding the shareholders' meetings of listed companies (April 28, 2020).

## Shareholders' meetings

Subject	Exceptional rule	Comment on expiry
<b>Shareholders' meetings</b>	Article 40.1 of RDL 8/2020, as amended by final provision four of RDL 21/2020	<p>Shareholders' meetings may be held by videoconference or by conference call until December 31, 2020, provided that all shareholders (or their representatives) have the necessary technology, the secretary of the body can identify them, and this is expressly stated in the minutes, which the secretary will send immediately to the email addresses.</p> <p>In all other respects, as from the end of the state of emergency, shareholders' meetings must be held in accordance with the Capital Companies Law ("LSC") and the corporate bylaws.</p>
<b>Listed companies. Annual shareholders' meetings</b>	Article 41.1 of RDL 8/2020, as amended by final provision one of RDL 11/2020	In 2020: (i) annual shareholders' meetings may be held in the first ten months of the fiscal year; (ii) when the annual shareholders' meeting is called, provision may be made for attendance through remote means and remote voting as envisaged in articles 182, 189 and 521 LSC and for the holding of the shareholders' meeting anywhere in Spain as provided in the exceptional regulations, even if these aspects are not envisaged in the bylaws; and (iii) if, as a result of the restrictions imposed due to the COVID-19 crisis, the annual shareholders' meeting cannot be held under the powers indicated above, the remaining measures envisaged in the exceptional regulations will still be possible (change in venue of a meeting already validly convened, holding at a later call exclusively through remote means even if this is not provided for in the bylaws, attendance of directors through remote means, etc.).
<b>Notarial minutes of the shareholders' meetings. Remote minutes</b>	Article 40.7 of RDL 8/2020, as amended by final provision one of RDL 11/2020	After one month following the end of the state of emergency, notarial minutes of shareholders' meetings will be governed by the provisions of article 203 LSC, and the notary will no longer be permitted to attend exclusively through remote means.
<b>Annual shareholders' meeting. Cancellation</b>	Article 40.6 of RDL 8/2020, as amended by final provision one of RDL 11/2020	<p>If a resolution published before the state of emergency went into effect calling an annual shareholders' meeting was revoked during the state of emergency, the managing body must call a new meeting within one month from the end of the state of emergency.</p> <p>Cancellation of shareholders' meetings once the state of emergency has ended will be governed by the provisions of the LSC, the bylaws and case law precedents (which are more flexible than the exceptional rules).</p>
<b>Special shareholders' meeting Cancellation</b>	It is not specifically defined in the examined provisions	It is not specifically defined in the examined provisions and, accordingly, it will be governed by the provisions of the LSC, the bylaws and case law precedents (which are more flexible than the exceptional rules).

## Board of directors

Subject	Exceptional rule	Comment on expiry
<p><b>Form of holding meetings of the managing body and of its executive, voluntary or mandatory, committees</b></p>	<p>Articles 40.1 and 40.2 of RDL 8/2020, as amended by final provision four of RDL 21/2020</p>	<p>Even if the practice is not established in the bylaws, meetings of the board of directors and its executive committees may be held by videoconference or by conference call until December 31, 2020, provided that certain conditions are met (necessary technology, identification by the secretary of the body in the minutes and immediate sending of the minutes to attendees, by email). The meeting will be deemed to have been held at the registered office.</p> <p>In all other respects, when the state of emergency ends, meetings must be held in accordance with the Capital Companies Law and the corporate bylaws.</p>
<p><b>Listed companies. Adoption of resolutions of the board of directors and of its audit committee, relating to the calling of the annual shareholders' meeting</b></p>	<p>Article 41.2 of RDL 8/2020, as amended by final provision one of RDL 11/2020</p>	<p>For the purposes of calling the annual shareholders' meeting during 2020, any resolutions by the board of directors, or resolutions by the audit committee on which reports must be submitted, as the case may be, in advance of the meeting, will be valid where they are adopted by videoconference or by conference call, even if this option is not envisaged in the bylaws, provided that the requirements set out in the exceptional rule are met. Whether this exceptional rule applies only to the call and preparation of the annual shareholders' meeting held exclusively through remote means (article 41.1.d) of RDL 8/2020) or whether it also applies to annual shareholders' meeting held both in person and remotely is a subject of debate. However, the scope for practical purposes will be limited to those cases where board regulations do not provide the option of attending the meetings by phone.</p>
<p><b>Adoption of resolutions of the managing body and of its executive, voluntary or mandatory, committees, by written consent and without holding a meeting</b></p>	<p>Article 40.2 of RDL 8/2020, as amended by final provision four of RDL 21/2020</p>	<p>Even where not expressly envisaged in the bylaws, resolutions of the managing body and its committees may be adopted in writing and without a meeting until December 31, 2020 (whenever the chairman so decides or at the request of at least two members).</p> <p>The meeting will be deemed to have been held at the registered office.</p> <p>In all other respects, when the state of emergency ends, meetings must be held in accordance with the Capital Companies Law and the corporate bylaws.</p>

## Annual financial statements (and accounting documents)

Subject	Exceptional rule	Comment on expiry
<b>Preparation of financial statements (ordinary or abridged, on an individual or consolidated basis)</b>	<p>Article 40.3 of RDL 8/2020, as amended by final provision eight of RDL 19/2020</p> <p>Spanish Accounting and Audit Institute Resolution 2 of April 2020</p> <p>Directorate-General for Legal Certainty and Attestation (DGSJFP) Resolution of June 5, 2020</p>	<p>The obligation to prepare annual financial statements was suspended until June 1, 2020. After that point, an additional three months will be allowed (i.e., the financial statements must be prepared by August 31, 2020).</p> <p>The preparation of financial statements performed during the state of emergency will be valid.</p> <p>If the financial statements should have been prepared before the start of the state of emergency, the above-mentioned suspension will not apply. However, the extension afforded for audit of such statements, indicated below, will apply (which could affect the term for approving the financial statements).</p>
<b>Repreparation of financial statements</b>	<p>There is no express reference. Article 38 of the Commercial Code</p>	<p>Under general corporate legislation, nothing prevents companies from repreparing their financial statements after the end of the preparation period if the managing body deems it advisable following prudent criteria. To that end, the potential impact of COVID-19 on the company in question must be assessed, bearing in mind that repreparation should only occur in exceptional cases that have an extremely high bearing on the company's equity position of risks which existed at the end of the financial year but became known thereafter. In general, such repreparation should occur until the process to approve the financial statements starts.</p>
<b>Audit review</b>	<p>Article 40.4 of RDL 8/2020, as amended by final provision one of RDL 11/2020</p> <p>Article 40.3 of RDL 8/2020, as amended by final provision eight of RDL 19/2020</p> <p>Spanish Accounting and Audit Institute Resolution 2 of April 2020</p>	<p>If the annual financial statements were prepared before or during the state of emergency, the statements may be audited (on both a mandatory and voluntary basis) in the period envisaged in the LSC or during a two-month extension period as from the end of the state of emergency, irrespective of what is stated in the corresponding audit agreement. The auditor is not required to give notice that the audit cannot be performed in the agreed period (as applicable) and it is not necessary to indicate as much in the auditor's working papers.</p> <p>If the annual financial statements are prepared after the end of the state of emergency, the audit must be completed in the periods established in article 270.1 LSC and in the corresponding audit agreement.</p>

Subject	Exceptional rule	Comment on expiry
<b>Approval of financial statements</b>	<p>DGSJFP Resolution of June 5, 2020</p> <p>Article 40.5 of RDL 8/2020, as amended by final provision eight of RDL 19/2020</p> <p>Spanish Accounting and Audit Institute Resolution 2 of April 2020</p> <p>DGSJFP Resolution of June 5, 2020</p>	<p>The annual financial statements for the preceding year must be approved by the annual shareholders' meeting within two months from the end of the period for preparing the statements (i.e., not later than October 31, 2020), even if the statements were prepared before or during the state of emergency.</p> <p>If the statements should have been prepared before the state of emergency began, the above-mentioned extension will not apply.</p>
<b>Listed companies: Annual financial report, half-yearly financial reports and interim management statements</b>	<p>Article 41.1 of RDL 8/2020, as amended by final provision one of RDL 11/2020</p>	<p>In 2020, the obligation to publish and send their annual financial reports to the CNMV and auditor's reports on their financial statements may be performed within up to six months after their fiscal year-ends. That time period will be four months for the publication of interim management statements and half-yearly financial reports.</p>
<b>Proposed allocation of profit/loss</b>	<p>Article 41.6 bis of RDL 8/2020, as amended by final provision one of RDL 11/2020</p>	<p>Companies that have prepared their financial statements and call their annual shareholders' meeting on or after April 2, 2020 may replace the proposed allocation of profit/loss contained in the notes to the financial statements with another proposal, under certain conditions (directors' report providing justification, based on the situation caused by COVID-19 and statement by the auditor confirming that they would not have modified their opinion in light of the new proposal) and up until one month after the end of the state of emergency.</p> <p>For companies that had called their annual shareholders' meeting by April 2, 2020, the managing body may also, within one month from the end of the state of emergency and subject to the same conditions as those described in the preceding paragraph, remove the proposed allocation of profit/loss from the agenda for the purpose of submitting a new proposal for approval at an annual shareholders' meeting that must be held not later than October 31, 2020.</p> <p>See below for information on the impact of eliminating the proposed allocation of profit/lost on the right of withdrawal.</p>
<b>Listed companies: New proposed allocation of profit/loss</b>	<p>Article 41.3 of RDL 8/2020, as amended by final provision one of RDL 11/2020</p>	<p>The new proposed allocation of profit/loss, the directors' report and the auditor's statement must be published on the company's website and submitted to the CNMV as soon as they are approved.</p>

Subject	Exceptional rule	Comment on expiry
Prohibition on distribution of dividends by companies applying ERTE temporary layoff rules	Article 5 of RD 18/2020	Companies that decide to apply ERTE temporary layoff rules and use the public funds earmarked for these procedures (except those companies with less than 50 employees as of February 29, 2020) may not distribute dividends related to the fiscal year in which such temporary layoff procedures are applied (i.e., dividends out of 2020 earnings, which means they can distribute dividends in 2020 provided they are out of 2019 earnings), unless they first repay the amount relating to the relief taken for their social security contributions.
Closure of the company's registry sheet upon failure to file annual financial statements	DGSJFP Resolution of June 5, 2020	To avoid closure of the company's registry sheet due to failure to file annual financial statements, those companies that are able to prepare their annual financial statements up until August 30, 2020 must file their statements by May 31, 2021.

### Legalization of corporate books

Subject	Exceptional rule	Comment on expiry
Legalization of mandatory books (articles 25 and 26 of the Commercial Code and article 333.2 of the Commercial Registry Regulations)	DGSJFP Decision of April 10, 2020 (NB: in explaining the rationale behind the decision, the Directorate-General itself acknowledges that there is no legal support for its decision)	<p>The general rules on the legalization of mandatory books will apply to those companies for which the time period for preparing their annual financial statements had already ended as of March 14, 2020, or whose fiscal year end date is after June 1, 2020.</p> <p>Conversely, any companies for which the time period for preparing their annual financial statements had not ended as of March 14, 2020 and that must prepare such accounts before August 30, 2020 have four months from June 1, 2020 to file their mandatory books for legalization.</p>

## Winding-up

Subject	Exceptional rule	Comment on expiry
Winding up by operation of the law due to expiration of the company's term (art.360.1.a) LSC)	Article 40.10 of RDL 8/2020, as amended by final provision one of RDL 11/2020	For companies whose terms as determined in the bylaws ended while the state of alarm was in effect, their winding up by operation of the law cannot occur until two months have run from the end of the state of emergency.
Winding up on statutory or bylaw grounds (art. 363 LSC) prior to the state of emergency	Article 40.11 of RDL 8/2020, as amended by final provision one of RDL 11/2020	At companies where <u>before the declaration of the state of emergency</u> , a statutory or bylaw ground for winding up the company existed, the statutory period for the managing body to call the shareholders' meeting for the purpose of adopting the resolution to wind up the company or the resolutions for the purpose of removing the ground, will continue to run once that state of emergency ends.
Winding up on statutory or bylaw grounds (art. 363 LSC) existing during the state of emergency	Article 40.12 of RDL 8/2020, as amended by final provision one of RDL 11/2020	At companies where a statutory or bylaw ground for winding up the company arose <u>while the state of emergency was in place</u> , the statutory period for the managing body to call the shareholders' meeting for the purpose of adopting the resolution to wind up the company or the resolutions for the purpose of removing the ground, will start to run after that state of emergency ends.
Director's liability for statutory or bylaw grounds for winding up (art. 363 LSC) that arose during the state of emergency	Article 40.12 of RDL 8/2020, as amended by final provision one of RDL 11/2020	If the statutory or bylaw ground for winding up arose during the state of emergency, the directors will not be liable for the corporate debts incurred in that period.
Suspension of the ground for winding up due to losses (art. 363.1.e) LSC)	Art. 18 of RD 16/2020	Solely for the purpose of determining the existence of the ground for winding up due to losses (art. 363.1 e) LSC), the losses for fiscal year 2020 will not be taken into consideration.  If in the results for fiscal year 2021 losses are found which reduce net equity to an amount below half the share capital, the shareholders' meeting must be called and held to wind up the company, unless the capital is increased or reduced to a sufficient extent.



## Right of withdrawal

Subject	Exceptional rule	Comment on expiry
Right of withdrawal at capital companies (arts. 346 et seq. LSC)	Article 40.8 of RDL 8/2020, as amended by final provision one of RDL 11/2020	Shareholders will only be able to exercise their rights of withdrawal after the end of the state of emergency.  If the resolution entitling them to withdrawal had already been published before the state of emergency, the time periods will resume from June 4, 2020, for the number of days that remained on March 14, 2020.
Right of withdrawal at capital companies (arts. 346 et seq. LSC) that do not distribute dividends due to applying the special ERTE temporary layoff regime	Art. 5 of RD 18/2020	The fiscal year in which the company does not distribute dividends under the prohibition established for companies that decide to apply the special ERTE temporary layoff regime will not be taken into consideration for the purpose of exercising shareholders' rights of withdrawal under Art. 348.1 bis LSC.
Right of withdrawal (voluntary departure) at cooperatives	Article 40.9 of RDL 8/2020 (as amended by final provision one of RDL 11/2020)	The repayment of contributions of cooperative members who have left the cooperative during the state of emergency must take place within six months after the end of the state of emergency. In all other cases, the ordinary rules will apply to the withdrawal of members.

## Registration time periods

Subject	Exceptional rule	Comment on expiry
Registration time periods	<p>Art. 42 of RDL 8/2020 (as repealed by additional provision four and final provision four of RDL 21/2020)</p> <p>DGSJFP Decisions of March 13, March 15 and May 28, 2020 and Instruction of June 4, 2020</p> <p>Article 10 of RD 537/2020</p>	<p>The time periods for entries at the registry expiring after a certain time (filing entry, preventive notings, references, notes in the margin, among others) were suspended from March 14 and resumed on June 10, 2020, for the remaining number of days on the suspension date.</p> <p>The time period for requesting a replacement assessment and for bringing an appeal against the registrar's assessment commenced (if it was not notified before the entry into force of the state of emergency) or resumed for the remaining number of days (if it was notified before that entry into force), starting on June 1.</p> <p>The time period for calculating statutes of limitations and time bars recommenced on June 4, 2020.</p> <p>The assessment time period is the ordinary one provided in the Commercial Registry Regulations since June 11, 2020.</p>

## Foreign investments

Subject	Exceptional rule	Comment on expiry
<b>Suspension of the liberalization regime for direct foreign investment in specific strategic sectors of the Spanish economy</b>	Final provision four of RDL 8/2020  Additional provision two and additional provision three of RDL 11/2020	Permanent amendment of Law 19/2003.