

May 12, 2020

The special regime on winding up and the right to withdrawal at companies is adapted to COVID-19

During the state of emergency, various pieces of legislation have been published which affect the corporate bodies of companies. Some of the key new provisions affect matters relating to winding up and shareholders' right of withdrawal.

In this table we outline the new rules that companies must be aware of in relation to the various grounds for winding up, arising from the measures adopted in royal decree-laws 8/2020, 11/2020 and 16/2020. We also analyze how the shareholders' right of withdrawal has changed at capital companies and at cooperatives.

Special regime on winding up and the right of withdrawal which applies to companies as a result of COVID-19

Legislation 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, of March 14, 2020), https://www.boe.es/diario_boe/txt.php?id=BOE-A-2020-3692)
- 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, of March 18, 2020), <https://www.boe.es/boe/dias/2020/03/18/pdfs/BOE-A-2020-3824.pdf>)
- 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), <https://www.boe.es/buscar/act.php?id=BOE-A-2020-4208>)
- 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), https://www.boe.es/diario_boe/txt.php?id=BOE-A-2020-4705)

To be noted also:

Art. 4.2 of the Civil Code “Criminal laws, exceptional laws and temporary laws shall not apply to facts or at times other than those expressly falling within their scope.”

Winding up

Subject	Exceptional rule	Content	Comment
Winding up by operation of the law due to expiration of term (art.360.1.a) Capital Companies Law (LSC)).	Art. 40.10 RD-L 8/2020, (as amended by final provision one of RD-L 11/2020).	If, while the state of emergency is in force, a company's term as determined in the bylaws elapses, winding up by operation of the law shall not occur until two months following the end of that state of emergency.	<ol style="list-style-type: none"> 1. It applies to companies that had a fixed term, when this period ends while the state of emergency is in force. 2. Even from when the state of emergency ends, a two-month period commences, in which extension of the company's term may be approved and can be registered (see art. 238.3 Commercial Registry Regulations (RRM)).
Winding up on statutory or bylaw grounds (art. 363 LSC) prior to the state of emergency.	Art. 40.11 RD-L 8/2020, (as amended by final provision one of RD-L 11/2020).	If, before the declaration of the state of emergency and while it is in place, statutory or bylaw grounds for winding up the company exist, 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 grounds, is suspended until that state of emergency ends.	<ol style="list-style-type: none"> 1. See art. 11 of RD-L 16/2020, on the obligation to file a petition for an insolvency order. 2. 2. is that of a company which is subject to a ground for winding up before the state of emergency and this situation has not been resolved or has not been removed. 3. It seems that it should also be applied when the statutory or bylaw grounds for winding up arise while the state of emergency is in force. 4. The effect of the provision is that the two-month period for calling a shareholders' meeting is suspended. Once the state of emergency has passed the period resumes. 5. The penalty of joint and several liability of the directors for debts due to breach of the obligation to call the shareholders' meeting within two months under article 367 LSC must be interpreted accordingly.
Winding up on statutory or bylaw grounds (art. 363 LSC) existing during the state of emergency.	Art. 40.12 RD-L 8/2020 (as amended by final provision one of RD-L 11/2020).	If the statutory or bylaw grounds for winding up have arisen while the state of emergency is in place , the directors <u>will not be liable for the corporate debts incurred in that period.</u>	<ol style="list-style-type: none"> 1. Doubt regarding the interpretation of this provision. 2. The most reasonable interpretation would seem to be that even where the directors breach (when the state of emergency has ended) the provisions of art. 367 LSC, they will not under any circumstances be liable for the debts incurred during the state of emergency.
Suspension of the grounds for winding up due to losses (art. 363.1.e) LSC).	Art. 18 RD-L 16/2020.	Solely for the purposes of determining the existence of the grounds 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	<ol style="list-style-type: none"> 1. This provision does not affect the obligation, if any, to file a petition for an insolvency order. 2. This provision excludes the losses which are incurred in the year 2020 from the calculation to determine whether net equity is below 50% of the share capital. 3. The provision does not provide for cases of companies whose fiscal year does not coincide with the calendar year.

Subject	Exceptional rule	Content	Comment
		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.	4. It seems that whether the grounds for winding due to losses exist will only be determined in relation to fiscal year 2021 at the end of that fiscal year (without taking into account, under any circumstances, the losses for fiscal year 2020) and not during that fiscal year.

Right of withdrawal

Subject	Exceptional rule	Content	Comment
Right of withdrawal at capital companies (arts. 346 et seq. LSC).	Art. 40.8 RD-L 8/2020 (as amended by final provision one of RD-L 11/2020).	Even if statutory or bylaw grounds exist, at capital companies, members cannot exercise the right of withdrawal until the end of the state of emergency and any extensions thereof that are approved.	<ol style="list-style-type: none"> 1. The provision limits its scope to capital companies (corporations (S.A.), limited liability companies (S.L.) and partnerships limited by shares). 2. The provision adopts as the end date of the suspension the date on which the state of emergency and its extensions end. 3. Various scenarios can be distinguished: <ul style="list-style-type: none"> (i) if the ground for withdrawal is before the state of emergency, part of the period for exercising it may have already elapsed (art. 348.2 LSC); in that case, the period will be resumed for the remaining time once the state of emergency has passed. (ii) if the ground for withdrawal exists when the state of emergency has been declared, the period provided in art. 348.2 will begin to run once that state of emergency has passed. (iii) if the ground for withdrawal arose since the declaration of the state of emergency (March 14) and before RD-L 8/2020 (March 17), it can be considered that the period was also suspended under the additional provision four of RD 463/2020). 4. The provision does not apply to cases of exclusion of the member.
Right of withdrawal (voluntary departure) at cooperatives.	Art. 40.9 RD-L 8/2020 (as amended by final provision one of RD 11/2020).	The refund of contributions to members of cooperatives who leave while the state of emergency is in place is extended until six months after the end of the state of emergency.	<ol style="list-style-type: none"> 1. To fill the gap previously pointed out in relation to other corporate forms, art. 40.9 excludes the voluntary departure of members of cooperatives. 2. In this case the structure of the provision is quite different, since while for capital companies the exercise of the right of withdrawal is suspended, in the case of cooperatives it refers only to the duty to repay refundable contributions. 3. The provision does not modify the necessary prior notice of the right of voluntary departure or the bylaw possibilities not to exercise it for a number of years.