

# ARTICLE

## ADAPTATION OF THE RULES FOR HOLDING MEETINGS OF THE SHAREHOLDERS AND COLLECTIVE CORPORATE BODIES OF LEGAL PERSONS GOVERNED BY PRIVATE LAW AND OTHER ENTITIES

Private Equity M&A | 23/03/20 | Jérôme Brosset Virginie Desbois

In view of the exceptional situation facing our country and having a significant impact in all areas, including the organization of future annual general meetings of French companies, the emergency law to deal with the Covid-19 epidemic, definitively adopted on 22 March 2020, empowers the Government to take any measure by means of ordinances:

- « *Simplifying and adapting the conditions under which meetings and collective management bodies of legal persons governed by private law and other entities meet and deliberate, as well as the rules relating to general meetings.* »

- « *Simplifying, specifying and adapting the rules relating to the drawing up, approval, auditing, review, approval and publication of accounts and other documents that legal persons governed by private law and other entities are required to file or publish, in particular those relating to time limits, as well as adapting the rules relating to the allocation of profits and the payment of dividends.* »

Although the time limit for the adoption of the aforementioned ordinances is three months, there is no doubt that they will be published quickly, as all French companies closing their accounts at the end of the calendar year are entering the period of approval of their accounts and, as regards listed companies, some of them have already held their annual meeting<sup>[1]</sup> or published their convening notice. According to our information, the draft ordinance relating to the holding of general meetings and corporate bodies should be adopted towards the end of the week, but this deadline remains uncertain. For listed companies, the procedures for holding shareholders' meetings should also be clarified in a fact sheet and/or Q&A from the *Autorité des marchés financiers* (AMF). In addition, another ordinance is being prepared on the approval and publication of accounts and other documents and information that legal persons and entities without legal personality are required to file or publish in the context of the covid-19 epidemic.

In this respect, the aforementioned draft ordinance dealing with the rules for the deliberations of meetings, boards of directors and supervisory boards, which is still subject to modifications and adjustments, provides for measures aimed at adapting the procedures for the deliberations of meetings and boards of directors and supervisory boards of companies of any corporate form (including cooperatives, mutuals and unions and federations of mutuals<sup>[2]</sup>) and economic interest groupings, in order to enable them to ensure the continuity of their operations and activities so that, as far as possible, they do not have to postpone their annual meeting.

Indeed, it is stressed that any postponement could have significant consequences on these entities and their shareholders or partners (in particular in the event of a postponement of the dates of detachment and payment of dividends or of certain financial transactions, some of which could prove to be urgent in the current context) and, in the case of listed companies, on the financial markets.

As the above-mentioned draft ordinance stands, these measures concern mainly:

- The possibility of holding meetings without the "physical presence" of partners, shareholders or members, by decision (in the case of companies) of the collective management body or the manager. However, the shareholders, partners or members will continue to be able to exercise their other rights under the conditions applicable to each corporate form (in particular the right to ask questions or to propose the inclusion of amendments or new resolutions). Practitioners point out, however, that listed companies that are currently encouraging their shareholders to exercise their voting rights by using remote electronic voting or proxy voting cannot organise a real-time debate because they cannot check the shareholder status of the person who logs on during the meeting. Consequently, discussions are currently underway on the need to adjust these other rights in the absence of a debate during the meeting.

- The extension to all corporate forms - without the need for a clause of the by-laws and including in relation to the annual meeting to approve the accounts - of the possibility of attending the meeting by videoconference or by means of telecommunication that guarantee identification and effective participation, transmitting at least the voice of the participants and satisfying technical characteristics that allow the continuous and simultaneous retransmission of the deliberations. In practice, this procedure may be used by companies that have the technical means enabling them to organize dematerialized meetings that meet the above-mentioned requirements<sup>[3]</sup>.

- The extension of the use of written consultation for the adoption of collective decisions in civil partnerships (*sociétés civiles*), general partnerships (*sociétés en nom collectif*), limited partnerships (*sociétés en commandite simple*) and limited liability companies (*sociétés à responsabilité limitée*) (including, for the latter, with regard to the approval of accounts, the signing of a private deed being also possible).



- The extension, for the boards of directors and supervisory boards of public limited companies (*sociétés anonymes*), to decisions relating to the preparation or examination of the annual accounts, of the possibility of adopting them by means of videoconferencing and telecommunication, without the need for a provision of the by-laws or the internal regulations and notwithstanding any clause to the contrary. However, the extension of the use of written consultation for these decisions is not provided for at this stage.

In the case of companies whose shares are admitted to trading on a regulated market or a multilateral trading facility and which have already carried out some or all of the formalities for convening their shareholders' meeting before the management body decides to use one of the more flexible meeting procedures referred to above and thus to change the arrangements for participation in this meeting convened, a transitional regime shall apply:

- Shareholders shall be informed as soon as possible by means of a press release, which the company shall ensure is effectively and fully disseminated, without prejudice to the formalities that remain to be completed on the date of this decision.
- There is no need to renew the convening formalities already completed prior to the aforementioned decision.
- A change in the modalities of the meeting does not constitute an irregularity in the convening rules.
- Article R.225-85 of the French Commercial Code would be amended to allow a shareholder who has requested an admission card or a certificate of participation to vote by remote electronic voting provided that the instruction is received within the legal timeframe.

In addition, given the necessity to secure the holding of the meetings of the shareholders and the collective corporate bodies which would be held in a difficult context before the entry into force of the abovementioned measures and to allow legal entities to keep operating under satisfactory legal certainty despite the current situation, a retroactive entry into force of these measures should be provided (the envisaged date being 12 March 2020) as well as an implementation at least until 30 July 2020.

Indeed, following the ban on gatherings of more than 100 people (which followed the ban on gatherings of more than 1,000 people already affecting a number of listed companies<sup>[4]</sup>), some listed companies with a meeting scheduled for March or April had anticipated this by deciding to hold their shareholders' meetings without the physical presence of shareholders<sup>[5]</sup> or by drawing their shareholders' attention to the fact that the procedures for physical participation in the meeting might change<sup>[6]</sup>, encouraging in any event (in accordance with the AMF press release of March 6) remote voting or proxy voting (with a retransmission of the meeting).

All of these measures are thus an initial response to the need for a majority of French companies - whether listed or not - to hold their annual meetings despite the current context. In companies with many shareholders, however, in practice this will mean having the technical means to enable remote voting and the holding of dematerialized meetings. Companies with a small number of shareholders will be able to use alternative meeting procedures (written consultation or signature of a private deed) or more flexible meeting procedures provided for in the articles of association<sup>[7]</sup>, to the extent permitted by the regulations applicable to their corporate form.

The draft ordinance, as it stands, provides only an imperfect response, and practitioners are calling for more adjustments, particularly on the following topics: (i) meeting procedures, composition and tasks of the *bureau* of the general shareholders' meeting, (ii) procedures for convening registered shareholders, statutory auditors and representatives of the CSE (*Comité Social et Economique*, a workers' representation body) and for requesting information (the use of postal mail being not appropriate), (iii) easing of certain time limits, such as the six-month period for approving the accounts or the four-month period for drawing up the annual financial report (for certain companies).

[1] For example, Argan's general meeting held in "camera" on March 19, 2020.

[2] The list of companies and entities referred to in the final ordinance could be extended to include, *inter alia*, associations, foundations, trade unions, insofar as the law covers all legal persons governed by private law and other entities. This ordinance could also apply to meetings of bondholders.

[3] In public limited companies (*sociétés anonymes*), Article R.225-61 of the French Commercial Code makes this procedure subject in principle to the setting up of a dedicated website, which shareholders can only access after identifying themselves by means of a code provided prior to the meeting. In addition, the implementation of electronic voting during the meeting requires special technical precautions and may therefore prove difficult, as we believe that other voting methods (in particular voting by show of hands) remain possible for companies with few shareholders or partners.

[4] In 2019, thirteen listed companies under French law had held general meetings with more than one thousand shareholders.



[5] For example, the companies Vinci, Vicat and Elixor.

[6] For example, LVMH and Klépierre.

[7] For example in the French SAS.

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