

# ARTICLE

## COVID-19 - THE HOLDING OF THE COLLECTIVE CORPORATE BODIES' MEETINGS OF THE ENTITIES IS FACILITATED: NEW RULES AND PRACTICAL DIFFICULTIES

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In the continuation of our previous article, following the publication of the law n°2020-290 of 23 March 2020 of emergency to face the epidemic of Covid-19, two orders dated 25 March 2020 concerning the functioning of legal entities and other entities without legal personality were published: (i) order n°2020-321 *adapting the rules of meeting and deliberation of the shareholders and governing bodies of legal persons and entities without legal personality under private law due to the covid-19 epidemic* and (ii) order n°2020-318 *adapting the rules relating to establishment, closing, auditing, review, approval and publication of accounts and other documents and information that incorporated and unincorporated entities under private law are required to file or publish in the context of the covid-19 epidemic*. In this context, a guide "holding the shareholders' meeting and respecting accounting deadlines in the context of the Covid-19 crisis" was published by the Ministry of the Economy on 26 March, to assist the entities in the implementation of these rules[1].

This article presents the rules provided by the first order n°2020- 321 relaxing the holding of meetings[2]. All incorporated and unincorporated entities under private law will thus benefit from these measures provided, which includes companies of all forms but also, for example, economic interest groups, French *sociétés en participation*, mutual companies, cooperatives, associations (whether declared or not), foundations, endowment funds (*fonds de dotation*) or groups of holders of securities or financial securities.

The first aforementioned order no. 2020-321 should be supplemented very soon by a decree.

These new rules apply to the meetings of the collegiate bodies held between 12 March 2020 and 31 July 2020[3] and cover the following matters.

- The convening rules in "listed" companies[4]: the failure to convene the shareholders' meeting by post - when it is in principle required - does not result in the nullity of the meeting if justified by "*circumstances external to the company*". This includes notably the situation where the company is preventing to prepare the necessary convocations in the current context. However, this rule only applies to listed companies, even though unlisted companies (which may also have many shareholders) could also face similar difficulties.

- The right of communication prior to shareholders' meetings: possibility of communication by electronic message (if the electronic address is given by the shareholder). This measure concerns all entities. For listed companies, the AMF recommends that, in the current context, shareholders and issuers use electronic means of communication whenever possible in their dealings and communications relating to general meetings[5].

- Shareholders' meetings held "in camera": possibility for the convening body[6], for all entities, and for any shareholders' meeting, to hold meetings without the presence (i) in person or (ii) by means of videoconference or telecommunication of their members and other persons convened[7]. This derogation is subject to the fact that "*the meeting is convened in a place affected on the convening date[8] or on the date of the meeting by an administrative measure restricting or prohibiting collective gatherings for health reasons*".

The report to the French President related to the order specifies that this measure entails an exceptional and temporary waiver of the right of members of the meetings to attend meetings and of other rights whose exercise requires attendance at the meeting, such as, in particular, the right during the meeting to ask oral questions or to propose the amendment to draft resolutions. However, the waiver of these rights is not clearly provided by the order. On the other hand, the right, prior to the meeting, to ask written questions and to propose the inclusion of resolutions on the agenda (in accordance with the regulations applicable to the corporate form in question) is maintained.

The impossibility of revising certain draft resolutions during the meeting could pose practical difficulties for companies that have already begun the formalities for convening the shareholders' meeting before the publication of the order and have already published their draft resolutions (that are no longer subject to revision prior to the meeting). Indeed, in the current context, a number of listed companies, in particular, are wondering about the amount of the dividend distribution to be proposed to shareholders, and some are even considering (or have decided) to postpone their shareholders' meeting.

In addition, since shareholders will not be able to ask questions during the meeting due to the closed session, the AMF invites listed companies (i) to agree to receive and process, as far as possible, shareholders' written questions that are sent to the issuer after the deadline provided for by the regulatory provisions and before the general meeting and (ii) to create an email address dedicated to shareholders' questions relating to the shareholders' meeting and to widely inform shareholders, in particular on the website, of the existence of this address[9].

In any event, these derogations shall have no effect on the shareholders' right to vote. This right must then be exercised





either by proxy[10], or by remote mail voting (via the voting form if this method is provided for), or via a secure voting platform (if this method is available)[11]. The AMF therefore recommends (i) broadcasting the shareholders' meeting live, in audio or video format, by streaming or by any other means that is easily accessible to shareholders from the issuer's website, (ii) after the live broadcast, maintaining free access for shareholders to the video of the shareholders' meeting on the issuer's website and (iii) publishing the minutes of the shareholders' meeting on the issuer's website as soon as possible.

In the event that a meeting "in camera" is held, the members of the meeting and the other persons entitled to attend shall be notified by any means[12] that ensures that they are effectively informed of the date and time of the meeting, as well as of the conditions under which they may exercise all the rights attached to their shareholder's quality or to their right to attend the meeting.

- Shareholders' meetings held by telephone or audiovisual conference: the extension to all entities and for all types of decisions - without the need for a clause in the articles of association (or in the contract of issuance), notwithstanding any clause to the contrary and including for the annual meeting to approve the accounts - of the possibility of attending the shareholders' meeting by telephone or audiovisual conference provided that the identification of participants and their effective participation are guaranteed, that at least their voices are transmitted and that the technical characteristics allowing continuous and simultaneous retransmission of the deliberations are met.

In practice, this procedure may be used by companies that have the technical means to organize electronic meetings that meet the above-mentioned requirements. In view of these requirements, the question of the possibility of voting by telephone seems questionable, due to the difficulty in ensuring identification of members. However, many "small" companies will not be able to organize a videoconference in the current context. Furthermore, if this modality of meeting is chosen, the need to comply in any event with the specific conditions required by the regulations applicable to each corporate form (not expressly ruled out by the order) is not clearly regulated[13].

Finally, this procedure is not necessarily practical for listed companies or those with a very large number of shareholders because the current technical possibilities do not allow for live internet voting under satisfactory security conditions, nor for the organization of a live debate with shareholders. Indeed, if this procedure is used and contrary to a meeting held "in camera", nothing seems to justify the waiver of the members' rights during the meeting to ask oral questions or to propose the amendment to draft resolutions. This would thus suppose to be in a position to guarantee the effective exercise of these rights and the identification of their owners.

The signing of the minutes of the shareholders' meeting and the attendance sheet, in accordance with the applicable regulations, must subsequently be carried out (electronic signature is now possible under certain conditions), nothing derogatory being provided for in this respect by the order.

- Collective shareholders' decisions taken by written consultation: when written consultation is already provided for by law[14], the neutralisation of clauses in the articles of association (or of the contract of issuance) to the contrary and the absence of prior need for such clauses, for the adoption of shareholders' decisions, whatever the object of the decision (including, for example, with regard to the approval of the accounts). On the other hand, this alternative method of decision-making is not extended to all forms of companies. However, any other alternative modes of collective decision-making provided for in the articles of association in accordance with the regulations applicable to the corporate form (e.g. private deed) remain possible.

- Entity that has already proceeded to convene a shareholders' meeting before 25 March: for entities that have already begun the procedure for convening their shareholders' meeting before 25 March and whose competent body decides to modify the procedures for holding the planned meeting in favor of one of the above-mentioned procedures, the order secures the modification. The formalities already completed need not be renewed (without prejudice to those still to be completed) and this change does not affect the regularity of the meeting. Members must be informed of the change in the procedures for holding the meeting by any means, three working days before the date of the meeting, or, in the case of companies whose shares or other securities are "listed", by means of a press release that is effectively and fully disseminated by the company.

- Holding of meetings of the collegial administrative, supervisory or management bodies, by electronic means or by written consultation: this mode of collective decision-making is extended to meetings of the collegial bodies of all entities (including when not currently provided for), for all decisions (including those relating to the approval or examination of the annual accounts), without the need for a provision in the article of association or the internal regulations and notwithstanding any clause to the contrary. With regard to the electronic meeting, the means must allow the identification of members, their effective participation, transmit at least the participants' voices and satisfy technical characteristics allowing the continuous and simultaneous retransmission of deliberations. Therefore, as with shareholders' meetings, the question of the simple use of a conference call and telephone voting is debatable[15]. In the case of written consultation, this presupposes for the collegial body the ability to ensure prior collegiality of the debates.

[1] <https://www.tresor.economie.gouv.fr/Articles/2020/03/27/covid-19-tenir-son-ag-et-respecter-les-delaix-comptables>

[2] Another article presents the rules set out by the second order.

[3] Unless this period is extended by decree and no later than 30 November 2020. Application including Wallis and Futuna.



[4] i.e. whose shares are admitted to trading on a regulated market or a multilateral trading facility of a Member State of the European Union or party to the Agreement on the European Economic Area or on a market considered equivalent to a regulated market by the European Commission (pursuant to Article 25(a)(4) of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014).

[5] AMF press release of 27 March 2020.

[6] Or the legal representative acting on its delegation.

[7] In particular, the auditor and representatives of staff representative bodies.

[8] Which should also include the date of the meeting notice (*avis de réunion*) in listed entities.

[9] AMF press release of 27 March 2020

[10] The AMF draws the attention of shareholders to the difficulties that may result, in the context of a general meeting held in camera, from the use of a proxy voting given to a person of one's choice (other than a "blank proxy"). Listed companies should clarify the different voting procedures available, specifying on their websites and in their announcements about the general meeting how proxy voting will be handled in this context.

[11] For technical reasons, this vote is generally carried out before the meeting.

[12] In the case of listed companies, if the formalities for convening the meeting have not been completed by the date of the order, shareholders are informed of the decision to hold the meeting in camera via the convening documents, but the publication of a press release that the company ensures is effectively and fully disseminated is also encouraged in this case.

[13] For example, in public limited companies (*sociétés anonymes*), the setting up of a dedicated website (with an identification process of the shareholders) or the existence of an opposition right in the event of a fully dematerialised meeting. Given the wish to neutralize the provisions of the articles of association, this right of opposition should be neutralized. However, this is not clearly provided by the order.

[14] Case of the SARL, the SNC or the *société civile*.

[15] However, in certain corporate forms (e.g. SAS), the articles of association provide for this type of meeting, as the legal and regulatory requirements specific to the corporate form concerned do not provide for such requirements.

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