

2020 Shareholders' Meetings

MARCH 31, 2020

Under current circumstances of travel restrictions and gathering prohibitions in order to address the COVID-19 epidemic and limit its spread, the French government has just issued two important orders enabling companies to guarantee the legal security of the operations and decisions of their collegial governance bodies and shareholders' meetings, especially at this time, when the vast majority of French companies are about to hold their annual shareholders' meeting to approve the financial statements.

The orders are Order no. 2020-318 of March 25, 2020^[1] and Order no. 2020-321 of March 25, 2020^[2], issued pursuant to article 11 I, 2° paragraphs f) and g) of Act no. 2020-290 of March 23, 2020 as an emergency measure in order to address the COVID-19 epidemic, the so-called "health emergency act"^[3].

The legal framework implemented by the two orders includes exceptions and relaxing measures aiming to allow for the proper convening and meeting of the collegial governance bodies and shareholders of companies. Some measures neutralize the provisions appearing in the articles of incorporation and bylaws (*statuts*) of companies that may stand in the way of the implementation of this legal framework, and also exempt companies from providing in their bylaws and internal rules for what this legal framework authorizes.

The measures thus implemented by the two orders of March 25, 2020, are exceptionally applicable, for as long as administrative measures limit or prohibit gatherings for health reasons. They also apply temporarily, with retroactive effect from March 12, 2020 and until July 31, 2020, with the possibility to extend them by way of a decree to a date that may not be later than November 30, 2020.

The following developments describe and explain the measures of the two orders of March 25, 2020 applicable to the convening and holding of shareholders' meetings of French-listed companies with fiscal years ending on December 31 of each calendar year. Therefore, they also have to be read in light of the recommendations and opinions of the French *Autorité des Marchés Financiers* ("AMF") and the *European Securities and Markets Authority* ("ESMA").

MEETING OF COLLEGIAL GOVERNANCE BODIES

- **Meeting modalities of collegial governance bodies:**

- The highest flexibility is granted regarding the meeting modalities of the board of directors, the supervisory board, and the management board through a generalization of the use of conference calls, videoconferences, or written consultations^[4], by neutralizing the effects of any contrary provision appearing in the bylaws or in the internal rules of the company, as well as of the absence of any provision to this effect.
- This flexibility is granted regardless of the meeting agenda, and in particular (i) the determination or control of corporate and consolidated annual financial statements, or (ii) the convening of the shareholders to the shareholders' meeting.
- Such flexibility shall be applied *a fortiori* to meetings of committees of the board of directors or the supervisory board (audit committee, appointment, and compensation committee, etc.), regardless of the wording of their internal rules.

- **Applicable time period for the collegial governance bodies to determine the annual financial statements:**

- The time period imposed upon the board of directors and the management board to determine the annual financial statements and establish the accounting documents referred to in article L. 232-2 of the French Commercial Code^[5], i.e. four months following the end of the fiscal year, is extended by two additional months for any company ending its fiscal year between November 30, 2019 and June 23, 2020^[6].
- Moreover, the management board has three months after the three-month period following the end of the fiscal year to provide the supervisory board with the accounting documents (i) if the company ends its fiscal year between December 31, 2019 and June 23, 2020, and (ii) if the auditors did not issue their report on the financial statements before March 12, 2020^[7].

CONVENING OF THE SHAREHOLDERS' MEETING

- **Convening of holders of bearer shares:** The rules applicable to the convening of holders of bearer shares remain unchanged (meeting notice in the journal of official legal announcements "BALO", convening notice in the "BALO" journal and in a local legal gazette).
- **Convening of holders of registered shares:**
 - The company still has to convene the holders of registered shares by mail. However, no nullity of the shareholders' meeting is incurred in case of a convening by mail that could not have been delivered due to circumstances beyond the control of the company^[8]. This situation may result from a problem linked to the sending of the notices due to the quarantine of the employees of the company or its service providers, or a problem linked to the distribution of the notices by the postal services.
 - As a reminder, the company is still able to convene the meeting by electronic means instead of postal means, in accordance with the provisions of the French Commercial Code^[9], by submitting a proposal in this regard to the holders of registered shares and by receiving their approval no later than 35 days before the date of the shareholders' meeting.
 - In any case, it seems preferable to "combine" the notices sent by postal means and an information sent by electronic means to each holder of registered shares, where the company or its service provider has that information, which is consistent with the AMF recommendation^[10]
- **Modification of the place, date, or modalities of participation in the shareholders' meeting:**
 - **If the company has already published a convening notice:** The company does not have to renew the formalities already completed prior to the decision of its governance body to modify the place, date, or modalities of participation in the shareholders' meeting. The company has to inform its shareholders as soon as possible by way of a press release subject to a full and effective distribution^[11]. The modification of the elements appearing in the convening notice does not constitute an irregularity.

- **If the company has not yet published a convening notice:** Any company having already announced the place, date, or modalities of participation in the shareholders' meeting by way of a meeting notice that does not constitute a convening notice, by way of a financial notice or on its website mentions the modification of the place, date, or specific modalities of participation (videoconference, closed meeting, etc.) in the next notice to be published in the "BALO" journal and put online on its website, by drawing the shareholders' attention to these modifications.

THE AMF RECOMMENDS THAT COMPANIES INFORM PROPERLY THE SHAREHOLDERS BY PROVIDING, AS SOON AS POSSIBLE BEFORE THE SHAREHOLDERS' MEETING, A CLEAR, PRECISE, AND ACCESSIBLE COMMUNICATION ABOUT THE TERMS OF INFORMATION, VOTING, AND HOLDING OF THE SHAREHOLDERS' MEETING UNDER THE HEALTH CRISIS CIRCUMSTANCES¹².

RIGHTS OF THE SHAREHOLDERS PRIOR TO THE HOLDING OF THE SHAREHOLDERS' MEETING

- **Filing of the annual financial report:**

The time period applicable to the filing of the annual financial report, i.e. four months following the end of the fiscal year, remains unchanged, since French law is not relevant to depart from this provision coming from the incorporation of Directive 2004/109/EC, so-called "Transparency Directive".

ESMA INVITED THE RELEVANT AUTHORITIES OF THE MEMBER STATES TO SHOW SOME INDULGENCE AS PART OF THEIR SUPERVISION OF ISSUERS ENDING THEIR FISCAL YEAR BETWEEN DECEMBER 31, 2019 AND APRIL 1, 2020 REGARDING COMPLIANCE WITH THE TIME PERIOD GIVEN TO FILE THEIR ANNUAL FINANCIAL REPORT, WITHIN THE LIMITS OF A TWO-MONTH DELAY¹³. ANY ISSUER CONCERNED BY A PUBLICATION DELAY SHALL INFORM THE MARKET AND ITS RELEVANT AUTHORITY THEREOF AS SOON AS POSSIBLE.

- **Adapted shareholders' rights:**

- **Right of communication:** The right of communication of shareholders is adapted by enabling the company to validly respond by electronic means to a request for communication of information or documents, provided that the shareholder mentions its electronic address in its request^[14].

Failing that, the sending has to be made by mail. The French Ministry for Economy and Finance^[15] specifies that the company shall not be held liable if the documents sent by mail do not reach the shareholder concerned due to circumstances beyond the control of the company.

- **Consultation of documents on site:** The administrative measures limiting travels make it impossible for the shareholders to exercise their right to consult or make a copy of a number of corporate documents at the registered office or where the administrative management of the company is located^[16]. This shall not prevent the companies having such possibility to leave said documents at their registered office.

Please note that most of these documents are covered by the right of communication of the shareholders and shall be published by the company on its website, which makes it possible to guarantee access thereto to shareholders.

THE AMF RECOMMENDS THAT COMPANIES AUTHORIZE THE SHAREHOLDERS, WHERE POSSIBLE, TO EXERCISE THEIR RIGHT OF COMMUNICATION, BY ELECTRONIC MEANS, REGARDING DOCUMENTS THAT ARE, IN THEORY, MADE AVAILABLE TO THEM AT THE REGISTERED OFFICE OF THE COMPANY, IF SAID DOCUMENTS ARE NOT AVAILABLE ON THE WEBSITE OF THE COMPANY¹⁷.

- **Unchanged shareholders' rights:**

The following rights of the shareholders remain unchanged and may be fully exercised under the health crisis circumstances:

- request to add items and draft resolutions to the agenda of the shareholders' meeting; and
- right to ask written questions, a significant increase of which is to be expected this year.

THE ROLE OF THE PERSONS IN CHARGE OF THE RELATIONSHIPS WITH SHAREHOLDERS AND THE USEFULNESS OF THE SPECIFIC TOOLS IMPLEMENTED IN ORDER TO EXCHANGE WITH SHAREHOLDERS (SHAREHOLDER WEBSITE, SHAREHOLDER CLUB, ETC.) WILL BE INCREASED DURING THE PERIOD PRECEDING THE SHAREHOLDERS' MEETING, AS WELL AS DURING SEVERAL MONTHS AFTER THE HOLDING OF THE SHAREHOLDERS' MEETING.

HOLDING OF THE SHAREHOLDERS' MEETING

Under current health crisis circumstances, listed companies are unable to hold their shareholders' meeting physically and/or in normal conditions. For these reasons, Order no. 2020-321 provides that the shareholders' meeting may be held by conference call, by videoconference, or as a closed meeting^[18].

Using these measures is only possible if the place where the shareholders' meeting is convened is impacted, on the date of the convening notice or on the date of the holding of the shareholders' meeting, by an administrative measure limiting or prohibiting gatherings for health reasons. These conditions are met on the date hereof but may no longer be met in May or June.

The decision to use one of these exceptional measures is the responsibility of the governance body that is responsible for convening the shareholders' meeting. It then applies to all shareholders, and also to all persons authorized to participate in the shareholders' meeting (auditors, representatives of the social and economic committee), it being specified that the company shall inform them of the conditions in which they may exercise their rights.

- **Holding of the shareholders' meeting by conference call or videoconference:**

- Conference calls or videoconferences have the advantage of enabling the shareholders to exercise all their rights, including the right to ask questions verbally or to modify the draft resolutions during the meeting, since they participate in the meeting. These solutions, which contribute to the continuation of shareholder democracy, should therefore be preferred by issuers compared to closed meetings.
- The use of these communication means is, however, extremely difficult for listed companies (identification of shareholders, logistical issues, implementation periods, cost). This is incidentally why these means are not very successful whereas the provisions of the French Commercial Code already enable companies to use them, if their bylaws provide so^[19].

- Holding of the shareholders' meeting as a closed meeting:
- **Closed meeting:** The holding of a closed shareholders' meeting implies that the meeting be held "physically" in a place, in the presence of a group of persons whose participation is essential, subject to compliance with the rules on social distancing.

Where possible, this group has to include, in our opinion, all members of the bureau of the shareholders' meeting, namely the chairman of the shareholders' meeting and two scrutineers-shareholders, who appoint the secretary, as well as a representative of the securities service provider of the company and the persons in charge of the technical aspect of the transmission of the meeting.

At least, this group should, in any case, include the chairman of the shareholders' meeting, possibly assisted by the secretary, and the persons in charge of the transmission of the meeting. Indeed, the absence of one and/or the other scrutineer(s) in order to form a full bureau of the shareholders' meeting does not constitute a ground for nullity of the shareholders' meeting^[20], although said situation must be explained in the minutes^[21].

Members of management (senior management, financial management) and a representative of the auditors may also participate in this closed shareholders' meeting in order to report on the business and the financial statements of the company. For these persons, as well as for the scrutineers and the representative of the securities service provider, a participation by conference call or videoconference seems possible, provided that their intervention be shared by live transmission to the shareholders.

- **Remote voting:** As a consequence of the closed meeting, all shareholders will be invited to vote remotely, prior to the shareholders' meeting, through the means that are generally made available to them, by opting for the sending of voting forms by electronic means in order to avoid the risks related to a sending by mail, or by using an electronic vote where a secured voting platform has been created in accordance with the bylaws of the company.
- **Live transmission:** A closed meeting does not, in our opinion, stand in the way of a live transmission of the meeting, even if an interaction with the shareholders is not made possible. On the contrary, if it is not possible to set up a shareholders' meeting by videoconference, the combination of the closed meeting and the online transmission of the meeting on the website of the company seems like a compromise solution making it possible to guarantee a good level of information of the shareholders.
- **Oral questions and modifications of draft resolutions during the meeting:** Closed meetings will not enable the shareholders to exercise their right to ask questions verbally during the meeting or to modify the draft resolutions.

IN CASE OF A CLOSED SHAREHOLDERS' MEETING, THE AMF RECOMMENDS THAT THE ISSUERS PROVIDE FOR LIVE TRANSMISSION OF THE SHAREHOLDERS' MEETING, IN AUDIO OR VIDEO FORMAT, ON THE WEBSITE OF THE COMPANY.

IN ORDER TO OVERCOME THE IMPOSSIBILITY TO ASK QUESTIONS VERBALLY, THE AMF RECOMMENDS THAT THE ISSUERS ACCEPT TO DISCUSS THE WRITTEN QUESTIONS SENT BY THE SHAREHOLDERS AFTER THE DEADLINE, THAT IS TO SAY AFTER THE FOURTH BUSINESS DAY PRECEDING THE DATE OF THE SHAREHOLDERS' MEETING.

POSTPONEMENT OF THE SHAREHOLDERS' MEETING

The shareholders' meeting shall meet within six months from the end of the fiscal year.

- **Extension of the time period given to hold the shareholders' meeting:**

- The legal six-month period is extended by three months for any company (i) ending its fiscal year between September 30, 2019 and June 23, 2020 and (ii) whose auditors did not issue their report on the financial statements before March 12, 2020 ^[22], in order to give more time to companies whose financial statements were in the process of being established or audited and were suspended or made difficult with the entry into force of the administrative measures relating to the quarantine.
- In any case, a company (i) that would not meet the conditions to benefit from the three-month extension, or (ii) that would want to obtain an extension of more than three months, may obtain an extension by way of an order rendered by the Chief Judge of the relevant commercial court, provided that the courts get back their full capacity to handle files on the date of the application.

- **Postponement of the shareholders' meeting within the legal six-month period (extended, as the case may be):**

- The issuers may freely postpone the date of their shareholders' meeting within the initial six-month period, as extended, as the case may be, by three additional months.
- If the date of the shareholders' meeting has already been announced, it will be necessary to comply with the rules and recommendations related to the modification of the date of the shareholders' meeting set forth above (see *Convening of the shareholders' meeting*).
- Moreover, if the date of the shareholders' meeting is postponed to a date that comes after the end date of Order no. 2020-321 and if said order is not extended by way of a decree ^[23], the exceptional measures relating to the terms of holding of the shareholders' meeting will not be applicable. The shareholders' meeting shall thus be held in normal conditions.

^[1] Order no. 2020-318 of March 25, 2020, adapting the rules relating to the establishment, determination, audit, review, approval and publication of the financial statements and other documents and information that legal entities and private-law entities without legal personality (have to file or publish under the COVID-19 epidemic circumstances, JORF no. 0074, March 26, 2020, Text 41.

^[2] Order no. 2020-321 of March 25, 2020, adapting the rules relating to the meeting and decisions of shareholders and management bodies of legal entities and private-law entities without legal personality due to the COVID-19 epidemic, JORF no. 0074, March 26, 2020, Text 47.

^[3] JORF no. 0072, March 24, 2020, Text 2.

^[4] Articles 8 and 9 of Order no. 2020-321.

^[5] Obligation which is applicable to any company which, on the end date of the last fiscal year, has 300 employees or more, or whose net turnover is equal to 18 million Euro, in accordance with article R. 232-2 of the French Commercial Code.

^[6] Article 4 of Order no. 2020-318.

^[7] Article 1 of Order no. 2020-318.

^[8] Article 2 of Order no. 2020-321.

^[9] Articles R. 225-63 and R. 225-68 of the French Commercial Code.

^[10] AMF news release of March 27, 2020.

^[11] Article 7 of Order no. 2020-321.

^[12] AMF news release of March 27, 2020.

^[13] ESMA, Public statement, ESMA31-67-742, March 27, 2020.

^[14] Article 3 of Order no. 2020-321.

^[15] French Ministry for Economy and Finance, *Tenir son AG et respecter les délais comptables dans le contexte de la crise du Covid-19*, FAQ, March 26, 2020, point 8.

^[16] Articles R. 225-89 and R. 225-90 of the French Commercial Code.

^[17] AMF news release of March 27, 2020.

^[18] Articles 4 and 5 of Order no. 2020-321.

^[19] Articles L. 225-107 and R. 225-97 of the French Commercial Code.

^[20] Rep. Min. Sudreau, AN, November 1970, p. 5074, no. 13768.

^[21] AMF Recommendation no. 2012-05, proposal no. 3.2.

^[22] Article 3 of Order no. 2020-318.

^[23] Article 11 of Order no. 2020-321.

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