

French Government Adopts Measures Adapting Shareholders' Meeting Requirements Amid COVID-19 Pandemic

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March 27, 2020



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The COVID-19 pandemic, which coincides with the annual shareholders' meetings season, raises significant concerns regarding the ability of companies, in particular listed companies, to convene their board of directors' and shareholders' meetings.¹ Meetings of more than 100 persons were prohibited in France as of March 14, 2020, and a lockdown has been enforced throughout the French territory since March 17, 2020. On March 25, 2020, the French government adopted governmental ordinance (ordonnance) No. 2020-321 adapting the rules regarding shareholders' meetings and board meetings² (Ordinance) to address such concerns. The Ordinance implements several temporary measures to ease companies' decision-making process, at the level of both meetings of the board of directors and shareholders, to ensure that listed companies are not paralyzed by the current lockdown.

Board of Directors' Meetings

- The Ordinance allows the board of directors of a French company to adopt any decision remotely (via the use of videoconference, telecommunications or written consultation), *i.e.*, without its members being obliged to physically attend the relevant meetings, including the approval of annual financial accounts (the only matter for which physical attendance is required under French law). This new rule applies even within companies where such remote decision-making process is prohibited, or not provided for, by their articles of association or internal regulations.
- The legal requirements regarding the use of videoconference or telecommunications are similar to those currently in force for meetings where remote attendance is authorized. Such technical means must ensure the identification of the directors and guarantee their effective participation, as well as the integrity and the quality of the discussions with shareholders.

General Shareholders' Meetings

On March 6, 2020, the French Financial Market Authority (Autorité des Marchés Financiers) (AMF) issued recommendations regarding the organization of listed companies' annual general shareholders' meetings (GSM), and encouraged shareholders to vote remotely, using the following means:

¹ While this memorandum focuses on listed companies, most of these rules also apply to non-listed companies, including those that are not public limited companies (*sociétés anonymes*).

² Ordinance No. 2020-321 of March 25, 2020, adapting the rules for general meetings and deliberations of the meetings and governing bodies of legal persons and entities without legal personality under private law as a result of the COVID-19 pandemic, published in the *Journal Officiel* of March 26, 2020.

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- voting by correspondence using a paper voting form;
- proxy voting, including by providing a “blank” proxy to the chairman of the board of directors; or
- online voting via a secure voting platform,³ if provided for by the issuer's articles of association.

Such recommendations were, however, insufficient to reconcile the shareholders' right to physically attend a GSM and the lockdown measures. The Ordinance addresses this challenge.

Possibility to (i) hold the GSM with no shareholders being physically present or (ii) postpone the GSM

The Ordinance enables the board of directors or, upon delegation, the CEO to decide that the GSM will be held without any shareholders attending physically if measures restricting or prohibiting collective gatherings for health reasons are in place on the date of its convening or on the date of the GSM. Shareholders would exclusively vote remotely, either by (i) correspondence, via a voting paper form,⁴ (ii) providing a “blank” proxy to the chairman or (iii) online via a secure platform⁵ if provided for by the issuer's articles of association and if this voting procedure is provided for by the issuer for the relevant meeting.⁶ As a practical matter, all votes will be cast before the GSM.

Such measures enable listed companies to maintain their GSM in spite of the confinement measures, and thus, *inter alia*, to approve the payment of their dividend to their shareholders, as well as to authorize financial delegations. The AMF recommends that listed issuers broadcast their GSM live on their website.⁷ The Ordinance also provides for the possibility of holding a GSM via videoconference, which listed issuers are not expected to favor due to technical issues, in particular regarding the identification of their shareholders.

Moreover, on March 25, 2020, the French government adopted another governmental ordinance⁸ which allows companies to postpone the approval of their annual financial accounts, and thus the holding of the GSM, up to nine months after the end of the financial year (as compared to six months under normally applicable French law).

³ E.g., the “VOTACCESS” platform.

⁴ Which shall be received no later than D-2 at 3 p.m.

⁵ Which shall be cast no later than D-1 at 3 p.m.

⁶ Art. R. 225-61 of the French Commercial Code; Guide Méthodologique du Traitement des Votes en Assemblée Générale, Association Française des Professionnels des Titres (AFTI).

⁷ AMF, press release issued on March 6, 2020.

⁸ Ordinance No. 2020-318 of March 25, 2020, adapting the provisions relating to the preparation, decree, audit, review, approval and publication of accounts and other documents and information that legal persons and entities without legal personality under private law are required to file or publish in the context of the COVID-19 pandemic, published in the *Journal Officiel* of March 26, 2020.

The postponement of the GSM appears to be favored by several proxy advisers, who have encouraged companies to consider adjusting their dividend amounts in light of the COVID-19 pandemic's potential impact on their business. However, companies must bear in mind that dividend payments to shareholders must be distributed within nine months from the end of the financial year, after approval at the GSM. This rule has not been modified by the Ordinance. The issuer may seek an order from the presiding judge of the relevant commercial court to postpone such dividend payment to shareholders. However, submitting such requests in the event of an extended shutdown of the courts may prove difficult.

Restrictions associated with GSMs without physical attendance of shareholders

Beyond technical and practical adaptations, issuers opting for GSMs with no shareholders physically present will have to adjust these new measures to several principles of French corporate law, including:

- **Shareholders' notices.** Where a listed company is required to convene its registered shareholders at its GSM by post, the GSM shall not be considered irregular if “circumstances external to the company” made convening the meeting by post impossible. If a listed company decides to hold a GSM behind closed doors, it should inform its shareholders, via a press release, at least three business days prior to the date of the GSM.
- **Shareholders' right to request documents or information prior to the GSM.** Such communication may validly be made by electronic communication, provided that the shareholder's request indicates their email address.
- **Shareholders' right to ask questions during the GSM.** In principle, shareholders have a right to ask oral questions during the GSM, and to submit written questions prior to the GSM. The Ordinance does not expressly waive the right of shareholders to ask oral questions during the GSM, but such right becomes necessarily moot if there are no physical attendees at the meeting (and no participation via videoconference or the like, which seems likely due to the technical challenges of verifying the shareholders' identifications). Hence, boards of directors should vigilantly uphold the shareholders' right to ask written questions ahead of the GSM, as provided for in the AMF press release issued on March 6, 2020.
- **The GSM bureau (bureau de l'assemblée).** The Ordinance does not provide for any particular rule regarding the GSM bureau, but indicates that every participant of the GSM should be able to attend it remotely. In practice, a physical meeting of the bureau shall therefore not be necessary, as long as the bureau members have been able to calculate the quorum and

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votes before the GSM is held. For GSMs with no shareholders physically present, the role of the bureau members will be limited to recording the votes received prior to the GSM to ensure the quorum has been met and determine whether each resolution has been adopted. The bureau should, in principle, be composed of the board chairman and two persons representing the two largest shareholders, but may be composed of other shareholders if the two largest ones are not willing to be members of the GSM bureau. The bureau also may be composed of only the chairman if no shareholders are willing to accept such role.⁹ In the event that no shareholders are present, as a practical matter, it is likely that a number of listed companies will ask two members of management or employees (who are also shareholders) to fulfill such role.

- **Shareholders' right to request a vote on a new resolution and "live" voting.** The Ordinance does not expressly waive the possibility for shareholders to propose resolutions during the GSM. As it is expected that all votes will occur ahead of the GSM, it will be in practice impossible for shareholders to vote on new resolutions. As an alternative, a company could opt for voting via "remote transmission," assuming that it meets the requisite conditions to do so. However, in light of the technical issues that videoconferencing (or other remote transmission means) raises, such as appropriate identification of shareholders and live remote voting, this option seems unlikely. In practice, listed issuers are likely to favor a mere broadcast of the GSM.
- **Statutory auditors' and management's reports.** In practice, various documents are made available to the shareholders at the time of the GSMs. Notifying shareholders that such documents are available would be good practice. The Ordinance does not provide for waivers to present the management report, nor the statutory auditors' report, at the GSM despite the fact that in the absence of any physical presence at the GSM, such a formality appears questionable. In practice, as the AMF recommends that GSMs be broadcasted, listed issuers

are likely to decide that such reports should be presented as per previous years, via a live or recorded podcast to be broadcasted at the time of the GSM or via the uploading of slides on the company's website.

Transitional measures for already convened GSMs

For listed companies that have already carried out all or part of the convening formalities for their GSM prior to the issuance of the Ordinance, the Ordinance provides for a temporary regime if their board of directors decides to use one of the options discussed above:

- Shareholders shall be informed of the board of directors' decision as soon as possible, via a press release.
- The convening formalities already carried out prior to the board of directors' decision do not have to be renewed. In this context, such modification would not amount to an infringement of French provisions regarding formalities.

Retroactive Effect

The Ordinance applies retroactively from March 12, 2020, until July 31, 2020, with a possible extension until November 30, 2020. As a consequence, the Ordinance retroactively validates GSMs which have been held behind closed doors since the prohibition of meetings of more than 100 persons entered into force on March 14, 2020. An upcoming decree will provide for additional details. The AMF updated its recommendation on March 27, 2020, and issued a best practice guide. The most significant recommendations are, for issuers, (i) to actively communicate on the practical modalities of the GSM (including voting procedures), (ii) to agree to receive and answer, to the extent possible, written questions from shareholders that are sent before the GSM but after the regulatory deadline (*i.e.*, four business days before the GSM) and (iii) to communicate broadly any information regarding the GSM, which shall be easily accessible via their website.

⁹ In this case, the AMF recommends explaining the situation in the minutes of the GSM.