BARTOLOME & BRIONES

Legal Status

July 2021

1. Corporate
2. Disputes
3. Tax

CORPORATE

Remote General Meetings. The new regulation of the Spanish Companies Act (Ley de Sociedades de Capital) included by Law 5/2021, of April 12

GERARD LLEBOT
Associate
gllebot@bartolomebriones.com

Law 5/2021, of April 12 ("Law 5/2021") in force as from May 3rd, 2021, includes important amendments to the Spanish Companies Act ("SCA") regarding the right to attend General Shareholders Meetings ("GSM") of Spanish companies.

1. Remote GSM.

In accordance with the wording in force at the time of its entry into force, Article 182 of the SCA (currently amended by Law 5/2021) regulated the possibility that, by explicit provision in the company's By-Laws, shareholders of Joint Stock Companies ("*Sociedades Anónimas*") (the "SA") could attend the GSM remotely, provided that certain requirements intended to verify the identity and interaction capacity of the attendees were accomplished.

Regarding the limited liability companies ("*Sociedades Limitadas*") (the "**SL**"), the omission in the initial wording of article 182 SCA of the shareholders' possibility to attend GSM remotely, was rectified by the DGRN in its resolution of December 19th, 2012, which underwrote such possibility by including the relevant provision in the company's By-Laws. In any case, Law 5/2021 has provided a new wording to article 182, which removes any doubts regarding the possibility to attend the GSM by remotely in both the SA and the SL.

2. Article 182 *bis*.

Furthermore, Law 5/2021 has made an important advance in the area in question by including a new article 182 *bis* SCA by virtue of which, and subject to the explicit provision in the By-Laws with the majorities regimes detailed below, the GSM of an SA and an SL may be held exclusively remotely.

To this end, article 182 *bis* establishes in its third, fourth and fifth sections a series of requirements to be accomplished and intended to safeguarding the shareholders' rights such as "*the identity and legitimisation of the shareholders and their representatives must be duly guaranteed and all those attending must be able to participate effectively in the meeting by means of appropriate remote communication media, such as audio or video, complemented by the possibility of written messages during the course of the meeting, both to exercise in real time the rights of speech, information, proposal and vote to which they are entitled, and to follow the interventions of the other attendees by the aforementioned means. To this end, the directors must*

implement the necessary measures in accordance with the state of the art and the circumstances of the company, especially the number of shareholders".

The foregoing is a significant new change as until the date of entry into force of article 182 *bis*, remote attendance to the GSM was articulated as an additional and complementary faculty to the right that, in any case and in all events, the shareholders hold to attend the GSM personally and physically.

3. Majority regime for the implementation of the possibility to attend the GSM remotely. Problems for SLs.

The inclusion in the By-Laws of the relevant article authorising to hold a GSM exclusively by remotely means involves significant fit problems with the existing majorities regimes established by the SL.

Effectively, the second section of Article 182 *bis* SCA established that the amendment of the By-laws intended to include the possibility of holding a GSM exclusively remotely "*shall be approved by shareholders representing at least two thirds of the capital present or represented at the meeting*". The foregoing is a clear reference to the majority regime applicable in SA in order to amend the company's By-laws.

Furthermore, Section 7 of the aforementioned Article 182 *bis* defines that "*The provisions contained in this article shall also apply to SLs*".

"The amendment of the By-laws intended to include the possibility of holding a GSM exclusively remotely "shall be approved by shareholders representing at least two thirds of the capital present or represented at the meeting"

Let us now review the differentiated treatment of the majorities regimes applicable to amend the articles of association of and SA and for and SL:

(a) SA (articles 194 and 201 SCA):

(i) First GSM call: It requires the attendance of shareholders which at least represents the 50% of the subscribed share capital and an absolute majority of affirmative votes.

(ii) Second GSM call: It requires the attendance of shareholders which at least represents the 25% of the subscribed share capital and, as long as this quorum does not reach 50% of the share capital, the resolution shall be approved by 2/3 of the affirmative votes of the share capital attending the GSM.

(b) SL (article 199 (a) SCA): The majorities regime required to amend the By-Laws is simplified and requires the favourable vote of

more than half of the votes corresponding to the company's share capital. Hence, there is no direct reference to the quorum, although indirectly it is required that at least a majority of the share capital attends the GSM.

In light of the above, it is clear that the system of majorities established in the second paragraph of Article 182 *bis,* which requires the approval of the corresponding amendment to the Articles of Association by "*two thirds of the capital present or represented at the meeting*" does not fit in with the existing majority regime of SLs, since no reference is made to the minimum share capital that such 2/3 of favourable votes shall represent in the total company's share capital.

Let us take as an example a of a SL with a share capital divided into 100 shares, owned equally by 10 shareholders at a rate of 10 shares for each of them.

A literal interpretation of Article 182 *bis* would lead us to the absurd situation of accepting that the resolution intended to include the statutory provision at hand, would be validly adopted with the sole favourable vote of a shareholder attending the GSM, even if this shareholder only represents 10% of the company's share capital. This would lead to the paradox that a minimum majority would be required in order to adopt a resolution for whose adoption the legislator wished to provide a reinforced majority regime. Indeed, it is worth noting that such minimum majority would not be sufficient to approve any other corporate resolution of an SL.

According to the existing doctrine on the matter at hand, and in the absence of resolutions and jurisprudence on the date hereof, other possible interpretations of the provision in question could be as follows:

- "Corrected" literal application: This would consist of equating the reinforced majority regime applicable to SLs with those of SAs and as such, the same minimum attendance quorum applicable in SA would be required to SL (see section 3 (a) above).

  The problem with this interpretation lies, first, in the lack of any related provision in the SCA and, second, from the fact that the quorums required in SA vary depending on whether the GSM is held on first or second call, whereas, in the case of SL, the meeting is always held on first call.

- Referral to the second type of enhanced legal majority: This interpretation is based on the assumption that the legislator's will is to establish a rights-based system of majorities in the case of SL. Hence, and fully ignoring any reference to the literal wording of the Article 182 bis LSC, paragraph (b) of Article 199 LSC would be applicable, which requires that the affirmative votes represent at least 2/3 of the share capital.

- Combination of enhanced legal majorities: A third alternative would be to combine and accumulate the majority regimes provided in Article 182.2 bis with the majority regime provided in Article 199 (a) SCA. Based on this interpretation, a vote in favour would be required from 2/3 of the shareholders attending the

GSM, (as required by article 182.2 bis) and, additionally, that these affirmative votes attending the GSM represent, at least, 51% of the company's share capital in accordance with the provisions of article 199 (a) of the SCA.

4. Conclusion

It is clear that article 182 bis of the SCA has established notable advances by including the possibility of holding GSM exclusively remotely. However, it is also clear that the majority system applicable to SL needs to be clarified in order to include the relevant majority regime required to adopt the relevant corporate resolution for such purpose.

This is particularly relevant as far as the adoption of a resolution approving the inclusion of the possibility of holding meetings exclusively remotely without complying with the relevant majority regime, could not only lead to the invalidity of such resolution but also, could imply the correlative invalidity of all the subsequent resolutions adopted by the GSMs, provided, of course, that such resolutions were adopted in a GSM held exclusively remotely.

July 2021

DISPUTES

Liability of the director of a company to the Public Administrations

ANTONI FAIXO
Of Counsel
afaixo@bartolomebriones.com

It is well known that the Capital Companies Act regulates the joint and several liability of company directors as well as the different actions available to demand liability: corporate action, individual action, claims by the company itself, by a shareholder, or by a creditor.

The liability of directors is also well known and is regulated in insolvency law, which includes a section for insolvency qualification to ascertain whether the director is jointly and severally liable for the payment of debts.

Less known, however, is the administrator's liability vis-à-vis the Public Administrations, which have a privileged and exceptional channel given that the regulations allow them to act against the administrators and declare their liability directly, by the Public Administration itself, without the need to go to the ordinary courts.

In this regard, we must distinguish between two different types of liability against different Public Administrations:

(1) Joint and several liability of the administrator for the company's debts to the Social Security General Treasury.

The General Social Security Act establishes that company directors are responsible for compliance with the company's obligations, and that this personal liability, in the event of non-compliance, may be declared by the Treasury itself.

This precept is linked to the Capital Companies Act, which establishes the joint and several liability of the director in the event of failure to act when the company is in a situation of dissolution or insolvency.

In other words, when a company fails to meet its obligations to the Social Security General Treasury, this agency can take action against the company's administrator and declare their joint and several personal liability for the payment of the existing debt, although here it is necessary for the Social Security General Treasury to justify the existence of a situation of dissolution or insolvency of the company other than simply the existence of the Social Security debt.

(2) Subsidiary liability of the administrator for tax debts.

The General Tax Law establishes the subsidiary liability of the administrator

for the company's tax debts, which may be declared by the corresponding Public Administration through a direct administrative procedure.

In this case, only the existence of the debt is required, and the liability is objective, there is no requirement to analyse whether the company is in a situation of dissolution or insolvency.

In the case of companies with more than one director, this liability is joint and several for the members of the Board. In this regard, for instance, the decision of the *Tribunal Económico-Administrativo Central* [Central Economic-Administrative Court] of 19.10.20 defines solidarity for all the directors, even if there are Managing Directors, who are the ones who exercise the actual management of the company.

This liability can be declared by any Public Administration that processes tax obligations, from the Tax Agency to a City Council.

It is worth noting that in both cases the administrative procedure to declare the administrator's liability theoretically requires prior notification to the administrator so that they can present the corresponding allegations, but it may happen that this notification is made at the company's address, not at the administrator's personal address, and if the notification is negative, the Administration can proceed to declare liability without the person having direct knowledge of it; the person would find out after being the object of an administrative seizure in their bank accounts.

Therefore, it is highly advisable to have very exhaustive control and knowledge of the fulfilment of the tax and Social Security obligations of the company of which you are the director in order to avoid the risk of these declarations of liability that are not processed before ordinary courts but directly by the Public Administrations.

July 2021

TAX

New developments in the Business Activity Tax for energy traders: the definitive solution?

MIGUEL BENITEZ
mbenitez@bartolomebriones.com

For years, City Councils and energy traders have been engaged in a war over the Business Activity Tax.

Local entities, energy traders themselves, the government and even the Spanish National Commission for Markets and Competition had given their opinion on this conflict, but finally, as of May 2021, we have a qualified opinion that will presumably help to solve the problem, that of the Supreme Court.

According to the local Councils, the traders had an obligation to register for the Tax on Economic Activities in each of the municipalities in which they traded energy.

This was largely due to the fact that the trading activity, *strictu sensu*, was not regulated in the list of charges of the aforementioned tax as this regulation predated the date of liberalisation of the electricity market, when distribution was separated from trading activity.

This long-standing issue was solved in 2021 with the approval of the 2021 Budget Law, which added section 151.6 on electricity trade to the law on fees and the Economic Activities Tax instruction, including the possibility of opting to apply a national, provincial or local quota.

However, there still remained a problem in relation to all those disputes initiated prior to 2021, as the solution provided by the 2021 budget law did not apply to them.

The solution to these conflicts has now finally arrived with the recent Supreme Court ruling of 12 May 2021.

Against the background of the argument put forward by the local entities and based on the "legal loophole" caused by the lack of updating of the legislation on the Tax on Economic Activities after the liberalisation of the electricity sector, and the consultation of the Directorate General of Taxes of 2015 through which it was interpreted that the activity of electricity commercialisation should be included in epigraph 659. 9, this being a hotchpotch in relation to the retail trade of non-food industrial products carried out in permanent establishments, the Supreme Court establishes that the correct interpretation prior to the approval of the 2021 Budget Law should be to include the aforementioned activity under heading 151.5 of transport and distribution of electricity, as this is more in line with the reality of the activity carried out.

The aforementioned Supreme Court ruling of 12 May 2021, in which the Court ruled in

favour of the energy traders annulling the registration in the Economic Activities Tax, heading 659.9, carried out by local entities, on the grounds that this was incorrect and not in accordance with the law, opens up two possible paths for marketing companies:

- In the case of companies that had appealed against the registration in the Economic Activities Tax register carried out by local entities, they should wait for the current appeal to be resolved and see if the competent court takes up the new Supreme Court doctrine. Otherwise, they should include it in the new appeal to be filed.

- In those cases, in which no appeal had been lodged, the recommendation would be to apply for a refund of undue income for those periods for which the statute of limitations has not expired, based on the aforementioned Supreme Court ruling.

In any case, we believe that trading companies should not miss the opportunity that this new ruling gives them to recover a tax unduly paid to local authorities.

July 2021

www.bartolomebriones.com

*This text is for information purposes only and does not constitute legal advice.