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What must companies consider in order to make effective their change of registered office address to one outside their place of origin?

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Resolutions to change the registered office address must be regularized by relocating the company's real seat, i.e. by relocating to the new registered office either the central management and control, or the head office or main operations. A discrepancy between the registered office address and the real seat constitutes an anomalous situation due to the infringement of the Spanish Companies Act, which may lead to a challenge against the resolutions passed and, where applicable, the liability of the directors who passed or executed such resolutions.

1. Introduction

Below we will analyse, from an eminently practical point of view, what are the procedural and substantive requirements that must be met in order for a company limited by shares to validly change its current registered office address to a different one within the national territory. Neither a change within the municipality nor a cross-border transfer - a structural change and, as such, subject to the particularities of this type of business operations - will therefore be covered (arts. 92 et seq. of the Commercial Companies (Structural Changes) Act 3/2009 of 3 April[1]).

[1] *Ley 3/2009, de 3 de abril, sobre modificaciones estructurales de las sociedades mercantiles.*

Consideration of this matter is justified at this moment in time, not only because of its topicality, but also because of the importance for operators of being aware of the legal consequences that may follow from a decision or resolution to change the registered office address, which the law in principle assigns to the company's directors, and which must therefore be taken or passed with due care and in an informed manner. The most important point to bear in mind is that a change of registered office address requires a relocation of the company's real seat and in this briefing note we will provide some indications or criteria as to how such relocation can be deemed to have taken place.

2. Procedural issues (Royal Decree-Act 15/2017)

Despite involving an alteration of the company's articles of association – which, as a rule, requires a resolution of the general meeting of shareholders – and unless otherwise provided for in said articles, the power to direct a change of the registered office address within the national territory lies with the governing body (art. 285(2) of the Companies Act (Recast)[2] [*LSC*] as amended by Insolvency Matters (Urgent Measures) Act 9/2015 of 25 May[3] [Act 9/2015]).

Assigning to the governing body the power to alter this specific element within the articles of association was justified at the time with the argument that such a decision appertains to the furtherance of the object of the company, i.e. that it is a management-related decision and not one related to a change in the contractual rules of the company which must be structurally reserved for the general meeting of shareholders. The statutory assignment of this power to the governing body to decide on a change of registered office address (unless there is a provision to the contrary in the articles of association) prevents shareholders from interfering with the resolution passed by the board of directors, even through the instructions referred to in art. 161 *LSC*.

From the foregoing, it is clear that identifying when there is a "provision to the contrary in the articles of association" for the purposes provided in art. 285(2) *LSC* is of real importance.

The Directorate-General for Registers and Notaries[4] (*DGRN*) states in its Decisions of 3 February (Official Journal of Spain [*BOE*] of 20 February) and 30 March 2016 (*BOE* of 13 April) that a rule within the articles of association which merely reproduces the wording of the law in force until its amendment would not be understood to mean a "provision to the contrary". In accordance with the same (settled, inter alia, in its Decision of 10 October 2012), references within the articles of association where the shareholders refer to the legal system in force (whether by

[2] *Real Decreto Legislativo 1/2010, de 2 de julio, por el que se aprueba el texto refundido de la Ley de Sociedades de Capital*.

[3] *Ley* 9/2015, de 25 de mayo, de Medidas Urgentes en Materia Concursal.

[4] *Dirección General de los Registros y del Notariado*.

means of an express or generic referral to the Law or by means of a reproduction in the articles of suppletory legislation) must be interpreted as indicative of the intention to submit to the suppletory system chosen by the legislator from time to time. Consequently, if the suppletory body of legal rules is amended, the articles should not be construed as constituting provisions to the contrary.

The complaints resolved by the aforementioned decisions were clear. The articles of association gave the governing body the power to change the registered office address within the same municipality (or, equally, within the same "city") and it was considered that this provision limited itself to reproducing the letter of the law and that, therefore, after the amendment, the directors would have the power to relocate, within the national territory, the registered office outside the municipality.

In reality, however, the wording of articles of association varies widely. At times, they expressly assign to the general meeting the power over any alteration of the same and, in particular, to decide on a change of registered office address without exception or, drawn up after the amendment of 2015, reproduce the 'typical' articles prior to the amendment.

As in these cases it could be interpreted that there is a "provision to the contrary in the articles" which denies the power of the governing body, Royal Decree-Act 15/2017 on urgent measures regarding the mobility of economic operators within the national territory was passed, which: (a) adds a new paragraph to art. 285(2) *LSC* to "clarify" that "a provision to the contrary in the articles will be deemed only when they expressly provide that the governing body does not hold this power" and (b) provides a single transitory provision ("Rules governing the articles approved before the entry into force of this royal decree-act"), according to which, "for the purposes provided in article 285(2) *LSC*, with the wording given by this royal decree-act, a provision to the contrary in the articles shall be understood only when, after the entry into force of this royal decree-act, an alteration of the articles has been approved expressly stating that the governing body does not have the power to change the registered office address within the national territory".

In light of the foregoing, the conclusion is that unless the operators have expressly stated in the articles that the governing body does not have the power to change the registered office address (unlikely given that the powers of the bodies are normally written in a positive sense), this is an exclusive and exclusionary power of the governing body and, therefore, the procedure for the change of the registered office address only requires the resolution passed by the governing body to be recorded in a public instrument and at the Register of Companies. If the shareholders wish to retain control over the change of registered office address within the national territory, they must instigate an alteration of the articles of association in the terms set out by Royal Decree-Act 15/2017.

3. Substantive issues

3.1. *Limits to the nationwide mobility of companies*

Spanish legislation on companies limited by shares - and this is a question that was not addressed either by Act 9/2015 or by Royal Decree-Act 15/2017 - is posited on a freedom of choice of registered office address within the national territory (*territoriality principle*), but limits this freedom when it provides that Spanish companies limited by shares "shall establish" their registered office address in that place where their "central management and control" actually abides or their "head office or main operations" are to be found (art. 9).

The connection between the registered office address and the real seat is based on the principle of veracity of the registered office address which, for reasons of security of transactions and protection of public policy interests, requires a connection between the registered office address in the articles and the real seat. Security of transactions requires that the address must be unique, stable and recognizable by third parties, which implies a prohibition of a merely nominal or fictitious, rotating, mobile or more than one address.

It should be borne in mind that the registered office address shall determine with civil effects the place of performance of the debtor's obligations (art. 1170 of the Civil Code (*Código Civil*) [*CC*]), the jurisdiction of the civil court (art. 51 of the Civil Procedure Act (*Ley de Enjuiciamiento Civil*) [*LEC*]), the jurisdiction of the territorial Register of Companies to keep the company's registration sheet (art. 17 of the Register of Companies' Rules (*Reglamento del Registro Mercantil*) [*RRM*]) and other matters associated with this keeping of records such as the appointment of independent experts (arts. 67 and 353 *LSC*) or the appointment or removal of the auditor (art. 265(2) *LSC*). Likewise, there are countless external rules that establish legal presumptions based on the place where the registered office is situated (e.g., the presumption of identity between registered office address and the centre of main interests (COMI) of art. 10 of the Insolvency Act (*Ley Concursal*) [*LC*]).

From a legal policy point of view, it is possible to debate whether third parties would be equally protected by way of recognising the possibility of an arbitrary choice of registered office address, but granting third parties option rights (art. 10 *LSC*), or by way of less demanding connections (as in the Public Limited Companies Act 1951 (*Ley de Sociedades Anónimas*) [*LSA*]) and without the need to necessarily tie the registered office address to the real seat. However, the fact is that, as things stand in our legislation, the registered office address is not conceived as a mere article that makes it possible to establish the registered office where it is in the best interest of the shareholders, but rather as an (extraordinary) management act that is within the powers of the directors and that can only

be established in the real seat. Third parties may, in turn, validly trust that the registered office of a company limited by shares (to which the application of all the aforementioned rules is attached) will not be situated in the place indicated by the shareholders on the basis of their sole and exclusive interest, but will necessarily be located where the head office or main operations are to be found or where the central management and control actually abides, as required by the Companies Act.

The conclusion to be drawn from the above is that the registered office address must match the company's real seat in either of the two senses mentioned above. This is a requirement of mandatory law and is not only required at the time of incorporation, but throughout the entire life of the company, and so the registered office address must be altered if the location of the central management or head office changes. Conversely, if the company changes the registered office address, it must also relocate its central management or head office (the company must relocate the real seat).

The decision of the directors, in a resolution of the board of directors or following the resolution of the general meeting of shareholders, to change the registered office to a place other than the real seat infringes mandatory legislation and, apart from the liability of the directors who take or execute these decisions, can be challenged for infringement of the law by any person entitled to do so within the established time limits, which vary according to whether it involves a board or general meeting resolution and whether the company is listed or not (arts. 251, 204, 206 and 495(2) *LSC*). Moreover, one cannot rule out a reasoning that these are resolutions that affect the public interest, so that a public policy infringement challenge could be brought by almost anyone (any shareholder or third party even without demonstrating a legitimate interest) and, except in the case of listed companies, at any time (arts. 205(1), 206(2) and 495(2) *LSC*). Such actions to challenge could be combined with actions for restoration of the registered office where the real seat is situated, and the directors who passed or executed an unlawful resolution would be liable for all of this.

The fact that the resolutions have been recorded at Register of Companies does not reduce the risk of challenges because the register's detection and prevention of a discrepancy between the registered office address and the real seat is practically impossible. This is so at the time of incorporation because the law itself recognises that the registered office address is determined on the basis of a mere "forethought" of the possible locations of the real seat, which is unobjectionable for the registrar (cf. art. 120 *RRM*). And in the event of a change of registered office address because, in principle, it is also not feasible for the registrar to check whether or not there is any discrepancy between the (new) registered office address and that which would be appropriate in accordance with art. 9 *LSC*. In the case of the Decision of the *DGRN* of 17 July 1956, the discrepancy between the place where the board of directors discharged its duties and the registered office address could be deduced from the articles of association themselves, but it is doubtful whether

the registrar of origin or the registrar of destination can refuse to register because of a noticed divergence, especially in view of the plurality of factors to be taken into account in situating the real seat of a company.

The validity of the resolutions to change the registered office address therefore requires that the governing body instigates its regularization by relocating the central management or head office to the "new" registered office address, for which a certain period of time must be recognised (cf. the one-year period provided by art. 459 *LSC* for the 'Societas Europaea').

3.2. *Relocation of the real seat*

This brings us to the central question of this paper, which is to determine how such regularization should be carried out to avoid challenging of the resolutions and other consequences inherent in the change of the registered office address to one other than where the real seat is situated, a regularization which consists precisely of relocating the real seat to the new registered office address.

The first point to bear in mind is that the new real seat must be *recognisable* or *identifiable* as such by third parties, since, for the reasons mentioned above, it is necessary to protect the trust that third parties can validly place in the fact that its registered office address and real seat will coincide.

On the basis of the foregoing, the regularization of the decisions of the directors or the resolutions of the board may require a relocation of the *head office* or *main operations* or only of the *central management and control*, which, like the change of registered office address itself, must be decided on the basis of business criteria, in accordance with the care, skill and diligence of a reasonably diligent person and always in the best interest of the company.

The *head office* is a physical place, equipped with material and human resources, which primarily serves to attract or retain clients; the *main operations* refers to the place where the object of the company is furthered (e.g., the factory or distribution centre) which, like the registered office address, can only be one (the "main" one). The determination of the head office or main operations, as opposed to those that can be considered secondary, must be the result of the consideration of a plurality of factors (sales turnover or production output, number of workers, etc.). Once one or the other has been identified, it must be materially and physically relocated in the place chosen as the registered office address.

The *central management and control* is the place where the decisions concerning the company's senior management are usually taken in a manner that is recognizable by third parties and which is usually related to the place where the company's "central offices" are

located. The concept of "legal representation" in art. 41 *CC* (or the repealed art. 5 *LSA*) was already interpreted as the place where the "highest body of continued action", the "top management of the company" or the "centre of decisions of the highest level" were to be found and not necessarily the place where the governing body was located, regardless of its contractual and institutional representation.

The location of the central management and control is a *matter of fact* and has a *financial-business* nature, so it must be based on the analysis of the internal organizational structure of the company in order to identify the place where the basic organizational, strategic and financial decisions relating to the management of the company are taken. Obviously, this excludes from the analysis the place where the general meeting of shareholders is held because this body does not manage the company on a permanent basis, but can only decide on "certain" management issues (or on business with essential assets).

In companies limited by shares, the management of a company on a permanent basis aimed at achieving the common goal pursued by its shareholders and, therefore, the company's senior management is the responsibility of the governing body, so that, in principle, the central management and control is the place where the members of said body in fact perform the decisory functions appurtenant to their position (which may or may not coincide with their personal domicile). The place where the material functions ancillary to those of governance are performed or where the dependent managers of the administrative body normally responsible for the technical execution of the business decisions taken by the governing body are located is irrelevant (e.g., production, purchases, contracts with suppliers, human resources) provided that it is recognizable by third parties that the company's senior management is performed from a certain place. It seems obvious that this place, the new registered office address, must be equipped with the material and human resources necessary to support the effective management of the business.

If the body is configured as a board of directors, the central management and control cannot normally be identified with the place where such board occasionally meets in plenary to debate and decide on the approval of the company's business plan, budget or general policies (non-delegatable powers according to art. 249 bis in connection with art. 529 ter *LSC*) or to perform its functions of management control and supervision (e.g., venue of the quarterly meeting under art. 245(3) *LSC*). What matters is to identify where decisions regarding the company's senior executive management are taken by the directors with executive functions, normally in coordination with management committees. In the absence of such directors, the person or persons conferred by the board of directors the most senior management powers of the company must be taken into consideration.

If, due to the peculiarity of its operation, such senior management can be said to be collegially performed by the board itself and only subordinate managers appear in

the next step of the structure, whether or not they are also directors, then the board of directors must be relocated to the new registered office in a manner that is, once more, recognisable by third parties.

3.3. *The best interest of the shareholders*

Decisions of the governing body (or of the general meeting) on a change of the registered office address and, necessarily, the real seat must be justified as being in the best interest of the company. Obviously, if the shareholders disagree with the decision taken by the directors, they will react by passing resolutions concerning the assignment of powers in the terms of (current) art. 285(2) *LSC* and will decide what they consider to be in their best interest from among the options permitted in the law.

However, while the regularization process is being completed, or perhaps definitively, it may be appropriate to instigate mechanisms that minimize the impact that a change of registered office address can have on the shareholders.

It should be borne in mind that the municipality where the company has its registered office is the place where, as a rule, the company's bodies meet (arts. 175 and 246(2) *LSC*) and the place of exercise of shareholder rights such as those relating to the inspection of documents (arts. 272(3) and 287 *LSC*), the deposit of bearer shares for early shareholder entitlement (art. 179(3) *LSC*) or the place of payment of dividends. The courts where the company has its registered office are competent to resolve litigious corporate issues such as challenges against company resolutions, corporate liability and derivative claims or applications for mandatory reductions of capital in public limited companies or winding up orders.

Companies, however, may alter the "standard" place for the exercise of shareholder rights for the benefit of the latter (e.g. the place of payment of dividends is altered or the possibility of depositing the shares in any "secondary" office is established). In particular, an alternative to the municipality could be established in the articles of association to hold general meetings, if desired (cf. Decision of the *DGRN* of 3 October 2016, *BOE* of 18 October).

4. Conclusions

By way of conclusion, the following should be noted:

(a) Spanish legislation on companies limited by shares does not recognize the possibility of relocating the registered office to any place in the national territory, but rather the place of destination must coincide with the place where the company's *real seat* is located.

(b) Consequently, the decisions of the directors on a change of registered office address must be regularized, within a maximum period of one year, by relocating the company's real seat. This means relocating either the head office or main operations, or the central management and control, a decision that must be taken by applying business criteria and in accordance with the best interest of the company.

(c) In the event of relocating the central management and control, the new registered office must have the material and human resources necessary to enable the executive decision-making function of the company's senior management to be performed, in a manner that is recognisable by third parties. In the case of the board of directors, if this body performs supervisory and control functions, as well as holding plenary meetings at the new registered office, decisions of an executive nature must also be taken there, either by directors with executive functions or by the company's senior management. If the board of directors regularly directs the business in a collegial manner, the board of directors must be relocated to the new registered office address.

(d) Managers in charge of the technical execution of business decisions taken by the board of directors as the company's governing body (e.g., production, purchases, contracts with suppliers, human resources) need not be relocated, provided that it is recognizable by third parties that the company's senior management is found at the new registered office address.

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