



Change of the company's registered address after the approval of Royal Decree-Act 15/2017, of 6 October, on urgent measures concerning the mobility of economic operators within the national territory ("RDA 15/2017")

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1. Purpose of the reform introduced by RDA 15/2017 and legal background

The registered address of a company, understood as the place where a company exercises its rights and fulfils its obligations, is considered a key element when the company is being incorporated and must be specified in the bylaws.

Although the authority to amend the company's bylaws generally corresponds to the general shareholders' meeting, the authority to change the company's registered address has been granted to the company's managing body.

Initially, the company's managing body only had the authority to relocate the registered address within the same municipality where the company was already located, unless otherwise provided for in the bylaws (article 285.2 of the Companies Act approved by means of the Royal Legislative Decree 1/2010, of 2 July ("CA") in its original wording).

Later, Law 9/2015, of 25 May, on urgent measures related to insolvency matters, modified article 285.2 of the CA, and extended the authority of the managing body to include the change of the company's registered address within the national territory. However, the limitation regarding the absence of a provision to the contrary in the bylaws was maintained.

Actually, by means of the RDA 15/2017, which entered into force on 7 October 2017, article 285.2 of the CA has been modified once again with the aim of clarifying that (i) the general rule is that it is the managing body of the company that has the authority to relocate the registered address within the national territory, and (ii) when there is a "provision to the contrary in the bylaws".

In this regard, after establishing that the authority to amend any provision of the company's bylaws corresponds to the general shareholders' meeting, new article 285 of the CA adds in its section 2, which has been modified by RLD 15/2017, that "2. As an exception to the provisions of the preceding section, the managing body shall be authorised to change the registered address within the national territory, unless otherwise provided for in the bylaws. Only when the bylaws expressly specify that the managing body does not hold this authority, will it be considered that a provision to the contrary exists in the bylaws."

This modification clarifies what is meant by "provision to the contrary in the bylaws": it will be deemed that there is a provision to the contrary in the bylaws only when they expressly provide that the company's managing body does not hold the authority to change the registered address.

For the avoidance of any doubt in the application of new article 285.2 of the CA, the RDA 15/2017 introduces a single transitory Provision ("Rules governing bylaws approved before the entry into force of this royal decree-act"), which sets forth that "for the purposes of article 285.2 of the consolidated text of the Companies Act, with the wording given by this royal decree-act, it shall be understood that there is a provision to the contrary in the bylaws only when, after the entry into force of this royal decree-act, an amendment to the bylaws has been approved expressly stating that the managing body does not have the authority to change the registered address within the national territory".

Therefore, it is clear that the CA grants the authority to change the registered address within the national territory to the company's managing body, which will be the only governing body with the exclusive and exclusionary authority to relocate the registered address, unless otherwise provided for in the bylaws. If the shareholders wish to retain control over the change of the company's registered address within the national territory, they must hold a general shareholders' meeting after 7 October 2017 to agree an amendment to the provisions of the bylaws expressly stating that the authority to relocate the registered address, within the national territory, is granted to the general shareholders' meeting and that the managing body does not have such authority.

2. Legal requirements to make effective the change of the registered address within national territory

When changing a company's registered address within the national territory the following requirements must be fulfilled¹:

2.1 Formal and procedural requirements

- (a) A resolution passed by the managing body (or, as the case may be, by the general shareholders' meeting in accordance with the wording in the bylaws approved after 7 October 2017).
- (b) Recording of said resolution in a public deed.
- (c) Filing of tax form no. 600, reflecting that the company is exempt of the Company Operations' Tax.
- (d) The registration of the public deed formalising the change of the registered address with the Commercial Registry and publishing it in the Official Gazette of the Commercial Registry (BORME). The registration procedure begins with the submission of the public deed to the Commercial Registry in which the company is registered; then said Registry issues an excerpt of all the Company's recorded entries. Once this certification has been issued it will be submitted, together with the public deed of relocation of the registered address, to the Commercial Registry where the new registered address has been relocated to.

2.2 Substantive requirements

Security of transactions requires that the registered address is unique, stable and recognizable by third parties, and that it matches with the place where the company "has its central management and control, or its head office or main operations". That is, the registered address of a company as provided for in the bylaws ("registered address") must match with its real seat. This requirement is set forth in article 9.1 of the CA, whose article 10 adds that, in the event of discrepancy between the company's registered address and its real seat, "third parties may consider as the registered address any of the two".

Therefore, there shall be a connection between the registered address of a company and its real seat, in the sense that it should correspond to the effective centre of its activity, either because its central management and control are located there, or because its head office or main operations are (therefore, the duplicity of addresses as well as a fictitious or rotating address is prohibited). This is a requirement of mandatory law, whose fulfilment is not only required at the time of the company's incorporation, but also throughout its entire duration.

"Central management and control" means the place where the directors usually take the decisory functions inherent to their position regarding the company's senior management (which may or not coincide with their personal address²). "Head office or main operations" of a company means the physical place equipped with material and human resources where the corporate purpose of the company is mainly developed.

Therefore, a valid change of registered address, needs to (a) be justified on entrepreneurial grounds and be in the interest of the company; and (b) be necessarily regularized by a relocation in one of the previous mentioned aspects (equipping the new registered address with the material and human resources needed to host the company's senior management decision-making or the physical move and location needed to develop the company's main activity in the place chosen to be the new registered address).

This means that the governing body with authority to change the registered address does not have complete liberty to take such decision, because if it approves and implements it arbitrarily or based on reasons that are not related to the business's activity or the corporate

¹ This analysis does not deal with the cross-border transfer of the registered address, which is a structural change subject to the specific regulations covered by the Structural Changes Act, or with particularities applicable to listed companies.

² This is a matter of fact that must be analysed on a case by case scenario and based on the internal organization of each company. If the directors have delegated their executive functions, and have retained those related to supervision and control, it shall be deemed that central management and control is the place where these executive decisions are taken.

interest, as well as breaching the mandatory provisions of article 9.1 of the CA (i.e. disconnecting the company's registered address from its real seat), the resolution changing the registered address may be challenged for infringing the law (article 204.1 of the CA):

- (a) by any of the company directors, third parties proving a legitimate interest, and shareholders representing, individually or collectively, at least one per cent (1%) of the company's share capital (article 206.1 of the CA), within a period of one (1) year, if the resolution is adopted by the general shareholders' meeting (article 205.1 of the CA); and
- (b) by the company directors or the shareholders representing one per cent (1%) of the share capital within a period of thirty (30) days from, respectively, its adoption or from the date on which they became aware of said resolution, provided that no more than one (1) year has elapsed since its approval, if the resolution is adopted by the board of directors (article 251 of the CA).

It may also be possible to challenge the resolution changing the registered address if it damages the company's interest to the benefit of one or more shareholders or third parties and, also, and even if the company's net worth has not been damaged, if the resolution is abusively imposed by the majority. The resolution will be understood to be imposed in an abusive manner when, without responding to a reasonable need of the company, it is approved by the majority in its own interest to the unjustified detriment of the other shareholders (article 204.1 of the CA). Therefore, the minority shareholders may challenge those resolutions concerning the change of the registered address which may be deemed as a manoeuvre detrimental to them, because the registered address would be relocated away from their personal address, making it unreasonably more difficult for the minority shareholders to attend the general shareholders' meetings, and to exercise their rights before the company.

Likewise, and given that these resolutions would affect the public interest, it cannot be discarded that the resolution to change the registered address could be challenged based on the infringement of public order, in which case, anyone would be practically able to contest such change (any shareholder or third party without having to prove a legitimate interest) and at any time (articles 205.1 and 206.2 of the CA).

The above mentioned actions to carry out this challenge could be combined with actions for restoration of the registered address where the real seat is located, and where appropriate, with liability actions against the company's directors who adopted or executed an illegal resolution, which was not covered in their legal duty of diligence or was to the benefit of the company.

3. Main consequences and implications of relocating the registered address

The location of the registered address is important for many reasons since it determines:

- (a) The nationality of the company (article 8 of the CA).
- (b) The place where legal relationships with third parties lawfully take place and where said parties must send any notifications addressed to the company.
- (c) The place of performance of a debtor's obligations (article 1,170 of the Civil Code).
- (d) The local or regional regulations applicable to the business activity.
- (e) The address where anyone wishing to sue the company must serve legal notices, as well as the competent court in matters related to the challenge of corporate resolutions (articles 51 and 52.1.10 of the Civil Procedure Act).
- (f) The competent Commercial Registry, for all purposes: (a) the registry in which all the records of the company are documented (incorporation, bylaws, offices, amendment of the bylaws, winding-up, liquidation, insolvency, etc.); (b) if requiring or requesting the appointment of an auditor or independent expert, the jurisdiction of said appointment shall correspond to the Commercial Registrar of the Commercial Registry where the company's registered address is located; and (c) the registry where the company submits the annual accounts to be filed (article 279 of the CA),

where the corporate books are legalized (article 329 of the Commercial Registry Regulations) and are deposited in the event of insolvency (unless liquidators assume the custody obligation), etc.

- (g) The place where the general shareholders' and the board of directors' meetings are held (unless otherwise provided for in the bylaws), in accordance with article 175 of the CA. The breach of the provisions of this article may lead to the annulment of the general shareholders' meeting. If the call does not set forth the place where the general shareholders' meeting is to be held, the meeting shall be understood as being called to be held at the company's registered address.
- (h) The place where shareholders may exercise their essential rights.

The change of the registered address considerably affects the position of the shareholders and their rights of participation in corporate life.

Thus, the registered address is where:

- (i) shareholders exercise their right to information (articles 196 and 197 of the CA);
- (ii) shareholders must be able to access any documentation related to the annual accounts, amendments to the bylaws and an increase or a reduction in the share capital (articles 272, 287, 300, 301 and 308 of the CA);
- (iii) shareholders of a public limited liability company (*sociedad anónima*) deposit bearer shares to obtain the advanced legalization to attend the shareholders' meetings (article 179.3 of the CA); and
- (iv) as a general rule, dividends are paid (article 276.2 of the CA).

Likewise, the registered address determines (a) the address where a judicial secretary or a commercial registry clerk may send a notification if he/she wishes to convene a general shareholders' meeting, if it has not already been called within the corresponding legal or statutory period (article 169 of the CA); (b) the judge with the jurisdiction to decide on a judicial winding-up (article 366 of the CA); and (c) the newspaper where corporate information, if necessary, shall be published, which must have a large circulation in the place where the company has its registered address (articles 119, 173 and 319 of the CA).

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