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Draft changes in Spanish companies and securities legislation and other financial regulations

On 27 May the Spanish Ministry for the Economy and Enterprise (*Ministerio de Economía y Empresa*) published a draft law amending the Spanish Companies Act (*Ley de Sociedades de Capital,* LSC), the Spanish Securities Market Act (*Ley del Mercado de Valores,* LMV) and other financial regulations. This is to adapt to the EU Directive as regards the encouragement of long-term shareholder engagement (Directive (EU) 2017/828), the deadline for transposition of which is 10 June 2019.

The draft bill is in the public hearing phase until 14 June 2019, so there is still a long way to go before its approval.

Proposed changes include:

- **Encouraging loyalty**: Listed companies are allowed to change the proportion between the nominal value of shares and the right to vote, to attach an **extra vote** to each share held by the same shareholder for **at least two whole years**. Articles of association can make this period longer.

  Extra votes for loyalty will be considered: (i) to determine the quorum at meetings and voting majorities (except where articles of association establish otherwise) and (ii) for the purpose of meeting the obligation to disclose significant shareholdings and to make takeover bids.

- **Related party transactions**: Listed companies must publicly announce (on their websites and through regulatory filings with the Spanish stock market regulator, the CNMV), no later than the transaction date, related party transactions that exceed: (i) 5% of their net worth according to the latest individual or consolidated balance sheet, or (ii) 2.5% of the annual turnover in the individual or consolidated income statement. Companies must also publish information regarding transactions between their related parties and their subsidiaries.

  The draft law has opted to require that this announcement is accompanied by an independent expert report assessing whether or not the transaction is fair and reasonable from the perspective of the company and of the shareholders who are not a related party, including minority shareholders.

  Shareholders that are considered related parties cannot exercise their right to vote, unless transactions were approved by a majority of independent directors. Where transactions are subject to board approval, directors

concerned are required to recuse themselves from deliberations and voting on the resolution.

As an exception to this system of approval are transactions: (i) conducted on standard terms, at general prices or rates and in value not exceeding 0.1% of the company's annual revenues (the current threshold of 1% is lowered); (ii) between group companies, conducted within the ordinary course of business and at arm's length; (iii) between parents and wholly-owned subsidiaries; (iv) that involve reorganisations; (v) relating to directors' remuneration; (vi) entered into by credit institutions on the basis of measures, aimed at safeguarding their stability, adopted by the competent authority in charge of prudential supervision.

- **Directors' remuneration**: More detailed requirements are set out for what must be included in **remuneration policies**. These are to be published on companies' websites, stating the date and result of the relevant vote by shareholders, from their approval and at least whilst applicable.

  Advisory votes are maintained on the **annual report on remuneration** (included in management reports), the requirements for which are further detailed. These reports must now be kept available on the CNMV's and companies' websites for at least **10 years**.

  Spanish statutory audit law is also amended to require companies' auditors to check that annual reports on remuneration have been provided.

- **Right to know shareholders' and beneficial owners' formal identity**: The right of companies to know who their shareholders are is extended to also knowing who their beneficial owners are. This information can be requested directly from intermediaries or indirectly through the central securities depositary.

  Associations of shareholders that represent less than 1% of the share capital will only be entitled to know the identity of shareholders holding at least 0.5% of the voting rights in the company. However, only associations representing a stake of at least 3% will be entitled to know who companies' beneficial owners are.

- **Shareholder information and facilitating the right to vote**: Rules are set out for how companies provide information to shareholders and beneficial owners, to enable them to exercise the rights attached to their shares, and for intermediaries to pass on information to companies related with rights exercised by beneficial owners.

- **E-voting**: Companies must confirm receipt of votes cast by electronic means. After general meetings, shareholders or their proxies and beneficial owners can request confirmation that companies have properly recorded and counted the votes attached to their shares.

- **Proxy advisors**: They must publicly disclose on their websites the reference to a code of conduct which they apply and how that code is applied. This information is to be updated every year. They must also report annually on their research, advice and voting recommendations. That information should remain publicly available on their website for a period

of at least three years. Proxy advisors are also required to inform their clients about any actual or potential conflicts of interest.

The regulations apply to proxy advisors that have their registered or head offices in Spain (unless they have their registered offices in another Member State) or an office in Spain (unless they have their registered or head offices in another Member State).

- Changes are made to the Spanish law on **collective investment schemes** (*Ley 35/2003, de 4 de noviembre, de Instituciones de Inversión Colectiva*) and **regulations for private equity firms** (*Ley 22/2014, de 12 de noviembre, por la que se regulan las Entidades de Capital Riesgo*):

  - To require collective investment scheme management companies and private equity firms to (i) draw up and publish shareholder engagement policies that describe how they integrate shareholder engagement in their investment strategy; (ii) on an annual basis, publicly disclose how their engagement policy has been implemented, including a general description of voting behaviour, an explanation of the most significant votes and the use of the services of proxy advisors, and (iii) publicly disclose how they have cast votes in the general meetings of companies in which they hold shares (such disclosure may exclude votes that are insignificant due to the subject matter of the vote or the size of the holding in the company). This information must be publicly available free of charge on management companies' websites. In a departure from the Directive, the Spanish draft law removes the possibility for firms to explain why they have chosen not to develop and publicly disclose a policy on shareholder engagement.

  - Asset managers for institutional investors (insurance firms or pension schemes or funds) will disclose, on an annual basis, to their clients how their investment strategy and its implementation complies with the arrangements between them and contributes to the medium to long-term performance of the assets of the institutional investor or of the fund. Unlike the Directive, which only included institutions for occupational retirement provision, the Spanish draft law extends the application of this article to individual pension funds and schemes.

- An amendment is made to Spanish law 20/2015 of 14 July 2015 on the organisation, supervision and solvency of **insurers and reinsurers**. Life assurance firms and reinsurers are required to draw up and publicly disclose an engagement policy that describes how the firm is engaged as a shareholder in its investment strategy. Firms are also required to publicly disclose information explaining how the main elements of their equity investment strategy are consistent with the profile and duration of their liabilities and how those elements contribute to the medium to long-term performance of their assets.

- **Other changes**

  - The **definition of a listed company** in arts. 495.1 and 496.1 LSC is changed to refer to companies that are listed on a regulated market that is situated or operates in a **Member State**.

- Art. 529 bis LSC is changed to establish that **directors of listed companies must necessarily be individuals**.

- Art. 120 LSC is repealed. Issuers of shares admitted to trading on a Spanish regulated market or another regulated market situated in the European Union, where Spain is the home Member State, are therefore no longer required to publish **quarterly reports**.

- The following **exceptions are introduced to the obligation for companies** (other than listed companies) **that issue securities** traded on official securities markets to publish **an annual corporate governance report** (art. 540 LSC): (i) issuers to which the exemptions under art. 121 LMV apply, and (ii) issuers of securities that are traded on regulated markets where Spain is not their home Member State.

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