

## DRAFT LAW TO ENCOURAGE LONG-TERM SHAREHOLDER ENGAGEMENT IN LISTED COMPANIES: MAIN AMENDMENTS

8 SEPTEMBER 2020

### KEY ISSUES

The Spanish Council of Ministers (*Consejo de Ministros*) has submitted to the Spanish Parliament (*Cortes Generales*) the Draft Law (*Proyecto de Ley*) to amend the revised text of the Spanish Companies Law approved by Royal Legislative Decree 1/2010 of 2 July and other financial regulations, to encourage long-term shareholder engagement in listed companies (the "**Draft Law**"). If passed, further to transposing the so-called SRD II<sup>1</sup> directive, it will include other important amendments. We highlight the following:

- **Related-party transactions:** the Draft Law eases the regime for related-party transactions within a group of companies, and removes the mandatory abstention of conflicting proprietary directors. Additional procedural and transparency duties are set out for listed companies and, under certain conditions, related-party transactions that have not been approved by the board of directors are allowed.
- **Loyalty shares:** the Draft Law introduces double voting shares for listed companies that decide to do so (opt-in), allowing significant shareholders who commit to the long term (two years) to strengthen their shareholding position (e.g. a shareholder with a 17% stake could have voting rights representing up to 29%, if no other shareholders request double voting shares). In addition, double voting may be retained if the shares are transferred through a structural modification (merger, spin-off, etc.).
- **Easing the regime for share capital increases and issue of convertible notes in listed companies:** the period for trading rights is reduced to ten days and, where pre-emptive subscription rights are excluded (and subject to certain conditions), an independent expert's report will no longer be required. The share capital increase deed will no longer need to be registered with the Commercial Registry in order to register the shares with Iberclear and have them admitted to trading.
- **Encouraging shareholder engagement:** the law may not lead to greater shareholder engagement, but asset managers and other institutional investors will be required to disclose their engagement policies and how they are implemented. The right of issuers and certain shareholders to know the identity of shareholders and ultimate beneficial owners is also developed.
- **Remuneration:** a greater level of detail in remuneration policies will be required and, unless the legislator dictates otherwise, such policy will need to be approved prior to the financial year in which it is to be implemented. If confirmed, this will prevent any immediate amendments to the policy.

► The Draft Law is available at this [link](#).

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<sup>1</sup> Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.

## 1. RELATED-PARTY TRANSACTIONS

**Competent body for the approval of related-party transactions:** the management body retains the general power with the following exceptions:

- (i) if the value of the transaction is equal to or greater than 10% of the assets, according to the last balance sheet approved by the company, it must be approved by the **general shareholders' meeting**; and
- (ii) the authorisation of certain ordinary related-party transactions or those that do not reach particular materiality thresholds may be delegated if there are control mechanisms for monitoring compliance.

**The significant shareholder as a person related to the “proprietary” director in unlisted companies:** in unlisted companies, the definition of individuals related to directors is extended to include, as is already the case for listed companies, shareholders who have a representative in the management body.

**Transactions considered as related-party transactions in listed companies:** in listed companies, related-party transactions are those carried out by the company or its affiliates with:

- (i) directors;
- (ii) shareholders who hold 10% or more of the voting rights or who are represented on the board of directors of the company; and
- (iii) other individuals who must be considered as related-parties in accordance with IAS 24, which includes, in particular, senior managers.

In addition, it is clarified that the following shall **not be deemed to be related-party transactions**: (i) those carried out by the company and its **wholly-owned subsidiaries**; (ii) the executive directors and senior managers' agreements; and (iii) those carried out by **credit institutions** on the grounds of being aimed at **safeguarding their stability**, adopted by the competent authority responsible for the prudential oversight under European Union law.

**Proprietary directors of the group can vote even if they are conflicted:** in both listed and unlisted companies, conflicted directors are allowed to vote on related-party transactions between companies of the same group. If their vote is decisive and the transaction is challenged, those directors and the company itself must prove that the transaction was in the company's best interest (thereby reversing the burden of proof).

**Relevance of the vote of independent directors in listed companies on related-party transactions submitted to the general shareholders' meeting:** with regard to listed companies and the related-party transactions that must be submitted to the general shareholders' meeting (those exceeding 10% of the assets), in order for the conflicted director to be able to vote at the meeting, the transactions must first be approved by the board without the majority of independent directors voting against it.

**Mandatory engagement of the audit committee in listed companies:** before the board or the general shareholders' meeting approves the transaction, as appropriate, a prior explanatory report by the audit committee is required in the case of listed companies, without the conflicted directors been involved, to attest that the transaction is fair and reasonable from the perspective of the company and external shareholders.

**Additional disclosure requirements for listed companies:** listed companies must disclose related-party transactions (of the company or the entities of its group) that reach or exceed 5% of the assets or 2.5% of the annual turnover:

- (i) as soon as they are agreed;
- (ii) through the website of both the company and the Spanish National Securities Market Commission; and
- (iii) including the audit committee's report.

## 2. LOYALTY SHARES

Shareholders of listed companies may have double voting rights for their shares if the following conditions are met:

- (i) **Company's decision:** that the issuer, by means of a general shareholders' meeting resolution passed by a qualified majority, includes the concept of loyalty shares (opt-in) in its articles of association.

- (ii) **Shareholder's decision:** that the shareholder concerned holds the shares uninterruptedly for a minimum of two years (the articles of association may require a longer holding period).
- (iii) **Shareholder's prerogative:** the double vote will be limited to those shares that the shareholder expressly indicates and the minimum holding period will only begin when the shareholder requests their registration in the special share register for shares with double voting rights. The shareholder may waive the double voting right at any time. The aforementioned special register will be available to all shareholders.

Issuers that adopt the loyalty share regime must include **updated information** on their website on the number of shares with double voting rights existing from time to time, as well as those registered shares which loyalty period provided for in the articles of association is pending completion.

Double voting rights will generally terminate when the shares are transferred, except in the case of intra-group transfers, transfers between family members or, under certain conditions, transfers through structural modifications.

Loyalty shares must be taken into account for the purposes of, among others:

- (i) calculating the **quorum of the general shareholders' meeting and the relevant majorities** for the approval of resolutions;
- (ii) complying with the **obligation to notify significant holdings**; and
- (iii) determining the existence of a controlling interest that triggers the obligation to launch a **takeover bid**.

### 3. ISSUANCE OF SHARES AND CONVERTIBLE NOTES BY LISTED COMPANIES

**Easing requirements:** the minimum term of the pre-emptive subscription period is reduced from 15 to 10 calendar days.

In addition, shares issued pursuant to a share capital increase **may be registered with Iberclear and, therefore, transferred once the deed executing the share capital increase has been executed and need not first be registered with the Commercial Registry**, which should ease the process of admitting the shares to listing.

**Fair value and expert reports regarding share capital increases and issuances of convertible notes excluding pre-emptive subscription rights ("DSP"):** when listed companies exclude DSPs, **no independent expert report will be necessary**, except:

- (i) When the market value of the shares does not represent their fair value.
- (ii) When, exceptionally, the shares are to be issued at a price below their fair value (a price more than 10% below the quotation price may not be considered as fair value).

**No independent expert report will be required either for the issuance of convertible notes.**

**Authorised share capital excluding DSP:** in line with what has been a good governance practice thus far (although without going as far as the existing recommendations or those resulting from the policies of some proxy advisors), delegations to increase share capital will be limited to 25% of the existing share capital when DSPs are excluded (currently 50%). The same rule applies to convertible notes issuances excluding DSPs in relation to the shares to be issued.

**Spanish Alternative Stock Market (*Mercado Alternativo Bursátil*):** these regulations –together with those provided for in the Spanish Companies Law and which include, for example, the right to identify shareholders or the maximum treasury stock limit–, will also apply to companies listed on the Spanish Alternative Stock Market (MAB).

**First admissions to listing:** share capital increases made before the first admission of shares to listing on a regulated market or on the MAB may apply the provisions that allow for a shorter period in which the rights are traded, the exclusion of pre-emptive subscription rights by the management body and avoiding, if appropriate, the independent expert's report.

#### 4. REMUNERATION OF LISTED COMPANIES' DIRECTORS

**Remuneration policies must be approved prior to the beginning of the first financial year** in which they are to be applied, thus it will not be possible to approve policies to be applied with immediate effect.

**Remuneration policies may include procedures for their temporary repeal** under certain conditions.

A **greater level of detail** is required regarding remuneration policies and annual remuneration reports.

If the policy is **rejected** by the general shareholders' meeting, **the existing approved policy may remain in force, but a new policy must be proposed at the following ordinary general shareholders' meeting.**

However, should the general shareholders' meeting **reject the annual remuneration report** (advisory vote), **the policy in force may only be applied until the following general shareholders' meeting** (whether that is an ordinary one or otherwise).

#### 5. OTHER DEVELOPMENTS

**Identification of shareholders and ultimate beneficial owners:** the right of the issuer (and, under certain conditions, of the significant shareholders or shareholder associations) to know the identity of both the shareholder and the ultimate beneficial owner (i.e., the person on whose behalf the intermediary institution acts as a shareholder by virtue of the accounting record) is regulated. It has been clarified that the company is not party to the relationships between the ultimate beneficial owner and the intermediary entity or entities and that, therefore, it is not bound vis-a-vis the ultimate beneficial owners.

In the case of **electronic voting, the issuer must send confirmation to the shareholder.** In addition, both the shareholder and the ultimate beneficial owner may request confirmation that their votes have been correctly accounted within one month of the meeting (unless they already have this information).

**Proxy advisors:** proxy advisors who (i) have their domicile in Spain; (ii) have their main place of business in Spain but their domicile is outside the European Union; or (iii) have an establishment in Spain but their domicile and main place of business are outside the European Union, must comply with certain disclosure and transparency obligations; and be subject to the CNMV supervision regime.

**Engagement of institutional investors:** certain transparency and disclosure obligations are imposed on: (i) **collective investment scheme management companies** (*sociedades gestoras de instituciones de inversión colectiva*); (ii) **closed-end collective investment management companies** (*sociedades gestoras de entidades de tipo cerrado*); and (iii) **investment firms and credit institutions** providing discretionary and individualised portfolio management services. Those obligations mainly consist of:

- (i) developing and publicly disclosing an engagement policy that describes how they integrate shareholder engagement in their investment strategy; and
- (ii) publicly disclosing, on an annual basis, the application of their engagement policies, their voting behaviour and whether or not they have engaged the services of proxy advisors.

**Prohibition of legal persons in listed companies:** directors of listed companies are prohibited from being legal persons, with the exception —possibly not particularly well explained— of public sector companies.

**Removal of interim management statements (quarterly reports):** the obligation for listed companies to disclose financial information on a quarterly basis is removed, without prejudice to the fact that (i) issuers may continue to disclose such reports on a voluntary basis; and (ii) the Spanish National Securities Market Commission may require this information to be published.

**Exemption from publication of a prospectus in connection with an offer of securities:** the threshold above which an offer of securities in the European Union will require the publication of a prospectus has been increased from five to eight million Euros. This threshold is measured over a twelve-month period.

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