The Corporate Governance Review

Fifth Edition

Editor
Willem J L Calkoen

Law Business Research

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EDITOR'S PREFACE

I am proud to present this new edition of *The Corporate Governance Review* to you.

In this fifth edition, we can see that corporate governance is becoming a more vital and all-encompassing topic with each year that passes. We all realise that the modern corporation is one of the most ingenious concepts ever devised. Our lives are dominated by corporations. We eat and breathe through them, we travel with them, we are entertained by them, most of us work for them. Most corporations aim to add value to society and they very often do. Some, however, are exploiting, polluting, poisoning and impoverishing us. A lot depends on the commitment, direction and aims of a corporation's founders, shareholders, boards and vital staff members. Do they show commitment to all stakeholders and to long-term shareholders only, or mainly to short-term shareholders? There are many variations on the structure of corporations and boards within each country and between countries. All will agree that much depends on the personalities and commitment of the persons of influence in the corporation.

We see that everyone wants to be involved in 'better corporate governance': parliaments, governments, the European Commission, the US Securities and Exchange Commission (SEC), the Organisation for Economic Co-operation and Development (OECD), the UN's Ruggie reports, the media, supervising national banks, shareholder activists and other stakeholders. The business world is getting more complex and overregulated, and there are more black swans, while good strategies can quite quickly become outdated. Most directors are working diligently, many with even more diligence. Nevertheless, there have been failures in some sectors, so trust has to be regained. How can directors do all their increasingly complex work and communicate with all the parties mentioned above?

What should executive directors know? What should outside directors know? What systems should they set up for better enterprise risk management? How can chairs create a balance against imperial CEOs? Can lead or senior directors create sufficient balance? Should most outside directors understand the business? How much time should they spend on the function? How independent must they be? What about diversity? Should their pay be lower? What are the stewardship responsibilities of shareholders?

Governments, the European Commission and the SEC are all pressing for more formal inflexible legislative acts, especially in the area of remuneration. Acts set minimum standards, while codes of best practice set aspirational standards.

More international investors, voting advisory associations and shareholder activists want to be involved in dialogue with boards about strategy, succession and income. Indeed, wise boards have 'selected engagements' with stewardship shareholders to create trust. What more can they do to show all stakeholders that they are improving their enterprises other than through setting a better 'tone from the top'? Should they put big signs on their buildings emphasising integrity, stewardship and respect?

Interest in corporate governance has been increasing since 1992, when shareholder activists forced out the CEO at General Motors and the first corporate governance code – the Cadbury Code – was written. The OECD produced a model code and many countries produced national versions along the lines of the Cadbury 'comply or explain' model. This has generally led to more transparency, accountability, fairness and responsibility. However, there have been instances where CEOs gradually amassed too much power or companies have not developed new strategies and have fallen into bad results – and sometimes even failure. More are failing in the financial crisis than in other times, hence the increased outside interest in legislation, further supervision and new corporate governance codes for boards, and stewardship codes for shareholders and shareholder activists. The European Commission is developing a regulation for this area as well.

This all implies that executive and non-executive directors should work harder and more as a team on policy, strategy and entrepreneurship. It remains a fact that more money is lost through lax directorship than through mistakes. On the other hand, corporate risk management is an essential part of directors' responsibilities, and sets the tone from the top.

Each country has its own measures; however, the chapters of this book also show a convergence. The concept underlying the book is of a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that permit convenient comparisons, where a quick 'first look' at key issues would be helpful to general counsel and their clients.

My aim as editor has been to achieve a high quality of content so that *The Corporate Governance Review* will be seen, in time, as an essential reference work in our field. To meet the all-important content quality objective, it was a condition *sine qua non* to attract as contributors colleagues who are among the recognised leaders in the field of corporate governance law from each jurisdiction.

I thank all the contributors who helped with this project. I hope that this book will give the reader food for thought; you always learn about your own law by reading about the laws of others. Further editions of this work will obviously benefit from the thoughts and suggestions of our readers. We will be extremely grateful to receive comments and proposals on how we might improve the next edition.

Willem J L Calkoen
NautaDutilh
Rotterdam
March 2015

Chapter 24

SPAIN

Carlos Paredes and Rafael Núñez-Lagos[1]

I OVERVIEW OF GOVERNANCE REGIME

i Introduction

Corporate governance of listed companies in Spain is primarily regulated by the standard compulsory corporate legislation and by a corporate governance code, the recommendations of which are generally addressed to listed companies and may be followed voluntarily. Although these two sets of rules and recommendations follow different structures, there is no strict separation between them, as legal rules have been enacted following recommendations on corporate governance given by the prevailing corporate governance codes and, in turn, the latter use concepts and structures provided for by the legislation.

The applicable corporate legislation is mainly composed of the Companies Law, approved by Royal Legislative Decree 1/2010, of 2 July (the Companies Law 2010), which sets out the rules for all limited liability companies, including a section with specific rules for listed companies. A major amendment of the Companies Law 2010 came into force on 24 December 2014. This amendment implements the proposal issued by an *ad hoc* expert committee appointed by the government in 2013 and has had a significant impact on matters such as the following:

a the rights and obligations of directors, including directors' liability;
b directors' remuneration;
c the composition and functioning of the board and its committees;
d shareholders' rights; and
e shareholders' meetings.

1 Carlos Paredes and Rafael Núñez-Lagos are partners at Uría Menéndez.

A number of the new legal provisions have merely enacted pre-existing recommendations of the Unified Code, which now are mandatory.

As to the voluntary corporate governance codes, the first corporate governance code (the Olivencia Code) was drafted by the Olivencia Committee in 1998 as a response to a demand by the markets and the economic agents to increase efficiency, agility, accountability and transparency in the governance of listed companies, as well as to ensure a more effective protection of shareholders. The Olivencia Code – the recommendations of which were limited to the scope of the functions of the board of directors – was very much influenced by the developments that had originated in the Anglo-Saxon world and that had spread to different countries. Nevertheless it adapted these developments to the peculiarities of the Spanish economy, where the process of the privatisation of public companies determined an increase in the number of shareholders and an awareness of the need for adequate safeguards for their position. Although its recommendations were not generally followed by Spanish listed companies, the Olivencia Code for the first time in the Spanish market highlighted the debate regarding the composition, practices and functioning of boards of directors, led to a thorough analysis of the Spanish market in terms of listed companies, shareholding structure and board behaviour, and created the basis for the growth of the corporate governance practices over the coming years with the introduction of new concepts, such as that of independent directors and the disclosure of conflicts of interest.

A second wave of corporate governance reforms came in 2003 with the creation of the Aldama Committee and the production of a new corporate governance code, which not only focused on the role of the board but also on the functioning of general shareholders' meetings and the rendering of services by outside professionals, such as auditors or investment banks. This was completed by the enactment of compulsory legislation relating to some of the most important recommendations included in the Olivencia Code, which, until that date, were not generally followed by Spanish companies (such as a detailed regulation of the fiduciary duties of directors as regards conflicts of interest, including the duty to abstain and refrain from participating in board discussions relating to a subject for which a conflict of interest exists).

The current version of the Spanish corporate governance code (the Unified Code) is a harmonisation and review of the recommendations and principles previously stated by both the Olivencia and the Aldama Committees. It adopts modern trends in corporate governance, stated by different entities and institutions such as the OECD, the Basel Committee on Banking Supervision and the European Commission, and it takes into account the comments and proposals put forward by economic operators and institutions. The Unified Code was presented in 2006 and was then approved by the National Securities Market Commission (CNMV) as the document that includes the 58 recommendations that listed companies may follow when preparing their annual corporate governance reports. Although its recommendations are voluntary, the concepts and definitions of the Unified Code are compulsory, and each listed company must explain its level of compliance with its provisions on a yearly basis. The recommendations range from those relating to general shareholders' meetings to those referring to the board or its directors, including board composition and functions, selection, appointment and removal of directors, remuneration and internal committees of the board (executive committee, audit committee and remuneration and appointments committees). The

Unified Code is currently under review by the CNMV, with the assistance of the expert committee, to adapt it to the recent reform of the Companies Law 2010. The update is expected to be implemented early in 2015.

ii Legislation and supervision

The Unified Code shares the international standards that characterise the recommendations on good governance practices. According to the Companies Law 2010, recommendations are given on a 'comply or explain' basis. It is up to companies to decide whether or not to follow corporate governance recommendations, but in the event that a recommendation is not followed, a reasoned explanation must be given.

In this regard, all listed companies and entities issuing listed securities are obliged to prepare an annual corporate governance report – a document to be produced in a format pre-established by the CNMV in which the relevant company or entity must include a substantial amount of information relating to:

a the ownership structure, including shareholders with significant stakes and the existing relationships between them, the stakes held by members of the board, the treasury shares of the company and any shareholders' agreements in place;

b any restrictions on the transfer of securities or on voting rights;

c the structure of the board of directors, including information on its composition, functioning rules, existing committees, remuneration, relationship with significant shareholders, procedures for the selection of directors, and measures in place to seek a balanced representation of women and men on the boards of companies;

d related-party transactions with shareholders, directors and managers, including intra-group transactions;

e risk-control systems, including tax-related risks;

f information on the functioning of the general shareholders' meeting;

g evaluation and assessment of the level of compliance with the Unified Code recommendations or, where applicable, an explanation of any deviations; and

h the main characteristics of the internal control and risk management systems in connection with the process of disclosing financial information.

The Unified Code recommendations, although voluntary, are given within a frame of categories and concepts deemed to be imperative and directed to all listed companies, whatever their size, market capitalisation or nature.

According to the most recent data available, which relate to the 2012 and 2013 fiscal years, the degree of compliance with the recommendations of the Unified Code by listed companies included in the IBEX 35 index is remarkably high: 93.7 per cent of the recommendations were complied with in 2013 (91.6 per cent in 2012), while 3.3 per cent of the recommendations were complied with partially (4.1 per cent in 2012). Although somewhat reduced, this ratio also remains high if all companies listed in Spain (and not only the 35 largest ones included in the IBEX 35) are considered. Of the Unified Code recommendations, 84 per cent were followed by the 142 companies that were listed in Spain in 2012, while there was partial compliance with 7 per cent of the recommendations.

Despite this, it has been noted – particularly in relation to non-IBEX 35 companies – that the quality of the information given to explain the deviations needs to be improved, and that on many occasions compliance with the recommendations is more in form than in essence. In any case, the evaluation of the degree of compliance of the recommendations and the explanations given by the relevant companies is left to the markets and to the CNMV. In this regard, the CNMV has powers to request additional explanations from any issuer regarding its corporate governance practice and the information on its practice included in the annual corporate governance report, including the publication of amendments and the imposition of fines or other sanctions in the case of breaches of applicable law.

Finally, as previously mentioned, a number of prior recommendations are now mandatory legal provisions and therefore all listed companies (and in some cases even non-listed companies) are obligated to comply with them.

II CORPORATE LEADERSHIP

i Board structure and practices

Spanish legislation (namely the Companies Law 2010) provides for a standard one-tier board structure for public companies. Listed companies must have a board of directors, with this structure being mandatory. Very often, however, powers are delegated by the board to an executive committee, or to one or more executive directors or CEOs, that in fact assume the ordinary management of the company. Only European companies incorporated in Spain can opt for a two-tier board, where directors assume the management of the company and the supervisory body controls their performance, but such companies are not at all common in Spain and, currently, none of them are listed.

Composition of the board

The board must have at least three members, which can be individuals or entities. The Unified Code recommends, in the interests of maximum effectiveness and participation, that the board should have no fewer than five and no more than 15 members. It is also recommended that companies should strike a balance between external and internal directors.

External directors can be of two different types: proprietary (those representing or appointed by holders of significant or controlling stakes in the company) and independent (those with no links or relationships with the company, its managers or its significant or controlling shareholders), although a third category may exist consisting of those who are neither proprietary nor independent directors.

Internal directors are the executive directors.

The Companies Law 2010 includes detailed definitions of the various types of directors. The definitions are mandatory.

External directors should account for an ample majority of the board, while executive directors should be the minimum number that is practical while taking into account the complexity of the corporate group and the ownership interests they control. Under the Unified Code, whereas the proprietary members should represent the significant shareholders in a proportion that matches the capital that they represent, the number of independent directors should be at least one-third of all board members.

Sector-specific eligibility requirements apply to directors of certain types of companies, particularly credit institutions and investment firms pursuant to Law 10/2014 of 26 June (the Solvency Legislation) and its implementing regulations, in line with the guidelines of the European Banking Authority of 22 November 2012 (EBA/GL/2012/06). The Solvency Legislation implements the CRD IV/CRR IV[2] package in Spain and the specific rules on corporate governance contained therein (the Solvency Legislation).

Separation of the roles of CEO and chair

The chair of the board of a public company has the power to call meetings, draw up agendas and chair board meetings and, unless the articles of association state otherwise, also shareholders' meetings. The chair must play an active role in promoting directors' participation in board meetings, ensuring that directors receive sufficient information, fostering debate and active involvement in the meetings while safeguarding each director's own judgement (the Companies Law 2010).

According to the law and the Unified Code, companies can decide how to determine the specific powers of the chair, and no specific rule or recommendation is provided on the separation of the chair and CEO positions. Therefore, the chair might also be the CEO of the company. However, when this is the case, such a concentration of powers must be counterbalanced by appointing a senior or lead independent director who will be responsible for requesting the holding of board meetings, including new points on the board agenda, coordinating and convening external directors and supervising the evaluation of the chair by the board. Until the latest reform this was merely a recommendation of the Uniform Code, but it is now a mandatory legal provision.

Unlike boards in other European jurisdictions, Spanish boards have predominantly seen CEOs combining such roles with that of chair. Despite the influence wielded by proxy agencies and the evolution of other European jurisdictions, in recent times the percentage of CEOs also carrying out the chair's tasks has actually increased among Spanish companies,[3] although this has come in many cases with the vesting of additional balancing powers in one of the independent directors, even before this was mandatory.

2 The Directive and Regulation intended to implement the Basel III solvency framework in the European Union: (1) Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (CRD IV); and (2) Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012 (CRR IV).

3 This trend seems, however, to have taken a downward turn. In the period 2009–2011, the overall percentage of listed companies whose CEO was also chair of the board diminished from 58.3 per cent to 52.3 per cent. More recent statistics are not publicly available.

While we anticipate that this evolution will probably change during the coming years and that we will see more companies splitting the roles of chair and CEO, we believe that no standard rules can be formulated in this area.

For instance, there is no clear empirical evidence that the separation of roles positively affects share prices or companies' performance. The separation of roles may increase confusion and duplication of tasks within the board (especially in a system where it has not been the prevailing structure for years). It may also cause some inefficiencies in decision-making processes and generally increase costs. Lastly, depending on the moment at which such a separation occurs, it may disrupt the positive performance of the company, as it may demoralise the existing CEO and create animosities within the board. While we believe that there cannot be any standard rule for companies on whether to combine the roles of chair and CEO, a decision to split the two roles in a board must be made after a careful analysis of the situation of the relevant company. It would be more reasonable to agree such matters at the time of the succession of the CEO or at any other time when change is really needed at the company.

Note, however, that the Solvency Legislation specifically provides that the chairman of the board of directors of a credit institution or investment firm cannot act as CEO unless the institution justifies an exception that is authorised by its institutional supervisor (i.e., the Bank of Spain or the CNMV).

Committees

It is standard that in addition to a managing director holding powers delegated from the board, Spanish listed companies have an executive committee with similar powers that works, in practice, as a reduced board. In some companies, the function of the executive committee is to hold meetings more regularly than the board (weekly or fortnightly), while the board as a whole meets with a reduced frequency (once a month). Notwithstanding this reduced frequency, the Unified Code recommends that the board is kept fully informed of the discussions and decisions adopted by the executive committee and that, in terms of the qualification of directors (independent, proprietary and executive), the structure of this committee replicates that of the board.

In addition, the law requires that an audit committee and a nomination and remuneration committee (or two separate nomination and remuneration committees) be created within the board. Each committee must be formed by members of the board, all of whom must be external directors except for at least two directors who must be independent, and the committee must be presided over by one of the independent directors.

The role of the audit committee is mainly of an advisory nature and concerns the supervision of auditing practices, the relationship with external and internal auditors, devoting special attention to the independence of external auditors, the oversight of risk management policies and the review of the financial information that the company has to make public. At least one of its members must have accounting or auditing knowledge.

The nomination and remuneration committee has advisory powers in matters such as the selection of candidates for the board, the right to formulate proposals (or inform the proposals made by the board) relating to the appointment of directors and the right to propose (or inform the proposals of the board on) remuneration policies.

The creation of a nomination and remuneration committee has only become mandatory following the latest reform of the Companies Law 2010. However, as a recommendation of the Unified Code it was generally followed by most of the larger Spanish listed companies.

Finally, according to the Solvency Legislation, credit institutions and investment firms must create a remuneration committee and a nomination committee, and may be required by the Bank of Spain or the CNMV, as applicable, to set up a risk committee, if appropriate considering the size of the institution, its organisation, and the nature, scale and complexity of its activities.

ii Directors

The involvement of external directors in the board's practice is essential, since they normally account for the majority of the members of the managing body, and, as previously mentioned, there are rules limiting the presence of executive directors (or even proprietary directors) in specific board committees.

According to the law, boards as a whole have the duty of defining company strategy, which includes active and decisive participation by outside directors. Other topics that require approval by the board in full include the investment and financial policy, the structure of the group, the corporate governance policy, the remuneration and evaluation of senior officers, risk management, the tax policy, the dividends policy, decisions on the appointment or removal of senior officers, directors' remuneration, financial information to be disclosed, and strategic and related-party transactions when these are not subject to the shareholders' vote.

External and, particularly, independent directors also play a significant role in the committees of the board, which have the power to approve and submit specific proposals to the board, evaluation reports or opinions on the proposals to be made by the board. In this regard, the nomination and remuneration committee proposes to the board the decisions on the appointment of independent directors, the remuneration for directors and senior officers, the individual remuneration and contractual conditions of executive directors and the standard conditions for senior officer employment contracts.

Appointment and term of office

Directors of Spanish listed companies may be appointed for a term of up to four years. Before the latest reform of the Companies Law 2010, the maximum term was six years and, while there was a growing trend to amend the articles of association to reduce the term to five, four or even three years, many companies appointed directors for six years. New appointments will have to comply with the four-year limitation, but directors already in office can complete their current tenure.

Director rotation has traditionally been low in Spanish companies. However, this is likely to change in the near future given that the Unified Code recommendation that independent directors should not hold office for more than 12 years became a mandatory provision in 2013; currently no director can qualify as an independent director if he or she has held office in the same company for more than 12 years. The recommendations and voting policies of the major proxy advisers, which support shorter term limits – such as three and even one year – than those provided by law may also contribute towards increasing the rotation levels of all types of directors.

Liability of directors

The liability of directors stems directly from the fiduciary duties imposed on them by law and, if applicable, by the articles of association. Specifically, the law states that directors have two basic duties: to act diligently, with the standard of diligence befitting an orderly businessperson (duty of care); and to act loyally, in the company's best interest (duty of loyalty). If either duty is breached, directors may be held liable for any harm caused to the company, its shareholders or third parties, provided that they have acted wilfully or negligently.

The recent reform of the Companies Law 2010 has brought about significant changes to the liability regime. Most importantly, it has enacted the so-called business judgement rule, well-known in several US states and other jurisdictions but until now alien to the Spanish legal system. The law now states that the duty of care is fulfilled when a strategic or business decision is made by directors acting in good faith, with sufficient information and following an appropriate decision-making process – provided, however, that no company director has a personal interest in the relevant decision. When these requirements are met, the decision will not be second-guessed by a reviewing court.

All directors, whether executive or external, face the same liability regime. This regime is based on a presumption that all members of the management body are jointly and severally liable. However, the applicable standard of diligence is qualified by the nature of their position and the specific responsibilities entrusted to them. For example, a CEO is likely to be judged more strictly than an external director who has no presence in any committee and no specific role on the board.

All directors are vested with equal and complete information rights regarding the company. Frequently, company executives are invited to join board meetings to explain specific issues and reinforce directors' knowledge and awareness of business and company structures.

Directors' remuneration

Directors' remuneration is no doubt one of the trending topics of corporate governance and has been the subject of much debate and legal change in recent years.

Law 2/2011 of 4 March on sustainable economy (the SE Law) first made the pre-existing recommendations on the 'say on pay' practice mandatory. Since 2012, boards of directors of listed companies have been obligated to prepare and submit annual reports on the remuneration of their members to the advisory vote of the general shareholders' meetings, as a separate item on the agenda. Currently, the report must include, in the standard format established by the CNMV:

a complete, clear and comprehensible information about the remuneration policy approved by the board for the current year;

b an overall summary on how the remuneration policy was applied during the financial year; and

c detail on individual remuneration accrued by directors.

The reform of the Companies Law 2010 brought about further changes. In addition to the remuneration report, company boards are now required to approve and submit a policy on directors' remuneration for approval by the general shareholders' meeting, at least every three years. Each company policy will set out for each year at least: (1) the aggregate compensation awarded to the board as a whole for the performance of non-executive duties; and (2) with respect to executive directors, the amount of fixed remuneration, the parameters for variable remuneration and the main terms and conditions of their executive contracts, including duration, severance payments, exclusivity and post-employment obligations, including non-compete and paid leave arrangements. The board will then be entitled to decide on each director's remuneration pursuant to the policy as approved by the general shareholders' meeting. The shareholders' vote on the policy is no longer advisory but binding. In addition, if, in any given year, the remuneration report is rejected by the shareholders on the advisory vote, the remuneration policy for the following year will need to be put to a vote prior to its implementation even if the approved policy currently in place is less than three years old or otherwise in force. In practice, although a remuneration policy is valid for up to three years, the shareholders may shorten its duration by voting against the remuneration report at any subsequent meeting.

The Solvency Legislation also provides for specific rules intended to increase transparency on the remuneration policies of financial institutions and investment firms and the consistency thereof with the promotion of sound and effective risk management. For this purpose, the Solvency Legislation has reinforced the Bank of Spain's and the CNMV's role in the implementation and supervision of remuneration policies and the corporate governance rules of the entities subject to their respective supervisory authority. In particular, the Bank of Spain is vested with powers to require financial institutions to limit variable components of their remuneration system to preserve a solid capital basis. Both the requirements affecting the design and approval of remuneration policies and the supervisory powers of the Bank of Spain in respect thereof are regulated in detail by Royal Decree 771/2011 of 3 June, which amended specific regulations on capital requirements for financial institutions. The Solvency Legislation further establishes limitations on variable remuneration that apply to all credit institutions (state-supported or otherwise) in line with the Guidelines on Remuneration Policies published by the Committee of European Banking Supervisors as of 10 December 2010. Pursuant to these provisions, the variable component of the remuneration of staff whose activities have a material impact on the institution's risk profile cannot exceed 100 per cent of the fixed component. Exceptionally, and subject to a stringent procedure, the shareholders' meeting can decide to extend such a limit to 200 per cent with a two-thirds majority vote. Furthermore, Royal Decree-Law 2/2012 of 3 February on the recapitalisation of the financial sector sets out specific restrictions for financial institutions that benefit from state aid. These restrictions affect both the amount of the remuneration and its variable components, as well as the pension benefits associated with them, the latter two items being reduced to zero in certain cases.

Pursuant to Law 24/1988 of 28 July on securities markets, as amended by the Solvency Legislation, similar limitations to those established therein for credit institutions apply to investment firms. In addition, in 2014 the CNMV adopted the guidelines on remuneration policies and practices approved by the European Securities and Markets Authority (ESMA/2013/606), mainly intended to ensure compliance with the Markets in Financial Instruments Directive conduct of business and conflicts of interest requirements.

III DISCLOSURE

As indicated in Section I, *supra*, all listed companies and entities issuing listed securities are obliged to prepare an annual corporate governance report – a document to be produced in a format pre-established by the CNMV. The annual corporate governance report is prepared and approved by the board of directors and must be delivered to the CNMV and published on the company's website no later than the date on which the annual general shareholders' meeting is called. In addition, the corporate governance report must also be included as a separate section in the directors' report relating to the annual accounts. Required among the contents of the corporate governance report is an evaluation and assessment of the level of compliance with the Unified Code recommendations or, where this is the case, an explanation for any deviations from such recommendations.

Listed companies must also disclose an annual report on directors' remuneration (see Section II, *supra*) and submit it to the advisory vote of the general shareholders' meeting.

Furthermore, directors of listed companies must present a liability statement together with the annual accounts and the mid-year accounts. This statement must generally confirm that the relevant accounts being made public have been prepared in accordance with applicable accounting principles, and reflect a fair view of the financial situation of the company and its consolidated group, its net worth and results.

Finally, whenever a one-on-one or selective meeting takes place between directors and shareholders, the information provided to shareholders must be disclosed to the public in the same manner as price-sensitive information. Regularly conducting these meetings is not standard practice in Spain, except for larger companies in the IBEX 35 index, in which foreign shareholders are predominant and for which corporate governance is, in certain respects, more in line with international market standards.

IV CORPORATE RESPONSIBILITY

Following international and European developments, the impact of the financial crisis has led, in Spain, to a review of corporate governance practices in the fields of risk management and control, an area where companies should anticipate a more precise regulatory framework in the future.

A working group created by the CNMV delivered in June 2010 a report on internal control of the financial information of listed companies, providing guidelines for the preparation of the description of the internal control system on financial information and for the tasks that should be carried out by the audit committee to supervise the system's performance. In particular, one of the recommendations among those set out by the working group was that the limited review by the external auditor of the system governing internal control over financial reporting should aim to ensure that the information included in the corporate governance report is both accurate and consistent with the findings of the external auditor during its auditing and limited review work.

In its report, the working group defines a body of general principles and good practices for internal control, with the aim of helping listed companies to design, implement, run and monitor their systems of internal control over financial reporting. In addition, the report also includes guidance for companies regarding disclosures on internal control over financial reporting. Accordingly, the form for the annual corporate governance report, as updated by the CNMV in 2013[4], requires entities to disclose detailed information on their systems for risk management and internal control over financial reporting. The entities must further state whether such information has been reviewed by the external auditor and, if so, must also disclose the auditor's report.

Furthermore, legislation has been enacted in the past, through modification of the Audit Law, to reinforce the powers of audit committees and the role of external directors within them, and to foster the efficacy of the systems of internal control and management of risk, as well as of the process of elaboration and disclosure of financial information of companies. In particular, the committee must produce an annual report on the independence of the external auditors, taking into account the provision of any services other than auditing services. The composition of the audit committee is dealt with above in Section II, *supra*.

As regards corporate responsibility, in the previous decade an increasingly significant number of Spanish listed companies undertook to approve internal policies on the matter and issue annual reports on their implementation. These reports, which were voluntary in all respects and – until recently – were not the subject matter of any specific legal provisions, have become common practice in listed companies and show an upward trend in the undertaking of commitments with stakeholders. Since 2011, corporate responsibility has been dealt with in the SE Law. Pursuant to this law, public companies may (but are under no obligation to) issue an annual report on corporate responsibility based on certain international standards, such as transparency of management, good corporate governance and commitment to the environment. Any such report must state whether it has been verified by third parties. Reports issued by companies employing over 1,000 individuals must be submitted to the National Council for Corporate Responsibility for monitoring purposes. Under the SE Law, any company may also request acknowledgment as a socially responsible company.

V SHAREHOLDERS

The shareholding structure of Spanish listed companies is somewhat concentrated. In 2013, 28.2 per cent (26.7 per cent in 2012) of listed companies reported that one person owned the majority of voting rights or exercised, or could exercise, control over the company. The average free float percentage increased to 41.5 per cent (38.5 per cent in 2012). In 103 out of 142 listed companies, free float exceeded 25 per cent, in eight companies (nine in 2012) it was less than 5 per cent. The concentration level is only slightly lower among companies in the IBEX 35 index (e.g., in 17.1 per cent of

4 The form for the annual corporate governance report will be updated following the review of the Unified Code.

those companies (20 per cent in 2012), one person owned the majority of voting rights or exercised, or could exercise, control over the company). There are, however, a few exceptions among Spanish listed companies where there are no major shareholders.

This shareholding structure partly explains why the shareholder activism movement that has swept through the American and European markets during the past decade has not been so active in Spain. To date, the Spanish market has not seen significant shareholder action (and certainly not action driven by hedge funds), except in very specific cases linked to disputes over the control of target companies, normally in the context of tender offers or minority shareholders fighting against the management of specific companies.

Shareholder communication is gaining increasing importance, especially among the largest Spanish companies, which are also those with the lower shareholding concentration level and where foreign shareholders are predominant. These companies have normally been among the first to observe 'say on pay' practices (prior to their being mandatory) and regularly conduct one-on-one and selective meetings with shareholders.

A review of shareholders' rights in Spain would not be complete without reference to the shareholders' electronic forum and shareholders' associations. The Companies Law 2010 provides for: (1) the obligation of listed companies to include a duly protected shareholders' electronic forum on their website, accessible by individual shareholders and any voluntary associations established thereby, designed to furnish information prior to general meetings; and (2) the admissibility of incorporation of associations of shareholders for any given listed company aimed at the exercise of their rights and the defence of their common interests.

The forum may include motions to be incorporated on the agenda announced in the meeting notice (provided that the requesting party holds at least three per cent of the share capital), requests for support for such motions, initiatives to gain a sufficient percentage to exercise any minority right established by law (normally restricted to holders of a three per cent interest or more), as well as offers or requests for proxy voting. As to the shareholders' associations, these must be registered at a special registry yet to be created with the CNMV. To date, no such associations have been created. The rules establishing the general regulations, originally enacted in July 2010, were further detailed by the latest reform of the Companies Law 2010, but are yet to be implemented.

VI OUTLOOK

In general terms, the recommendations of the Unified Code are increasingly being followed by listed companies, as shown by the annual corporate governance reports published by the CNMV every year. Traditionally, the least-followed recommendations have been those relating to the approval and disclosure of directors' remuneration. Nevertheless, pursuant to the Companies Law 2010, since 2011 listed companies have had to comply with increasingly demanding provisions on the matter, including former recommendations that have become binding legislation. The review of the Unified Code, which will probably be made public before this publication goes to press, will certainly add more pressure on listed companies to abide by more stringent corporate governance practices. At the same time, these companies will face stricter scrutiny on remuneration practices through the submission of the remuneration policy to a shareholder vote either in 2015 or 2016, pursuant to the transitional provisions of the Companies Law 2010 reform.

Appendix 1

ABOUT THE AUTHORS

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His practice focuses on commercial and company law, mergers and acquisitions, corporate governance, banking and securities law, corporate restructuring transactions, and issues of equity and debt. He regularly advises private and listed companies, financial entities and venture capital firms.

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