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# Spanish corporate governance and capital markets reform: key points for listed and non-listed companies

Legal flash

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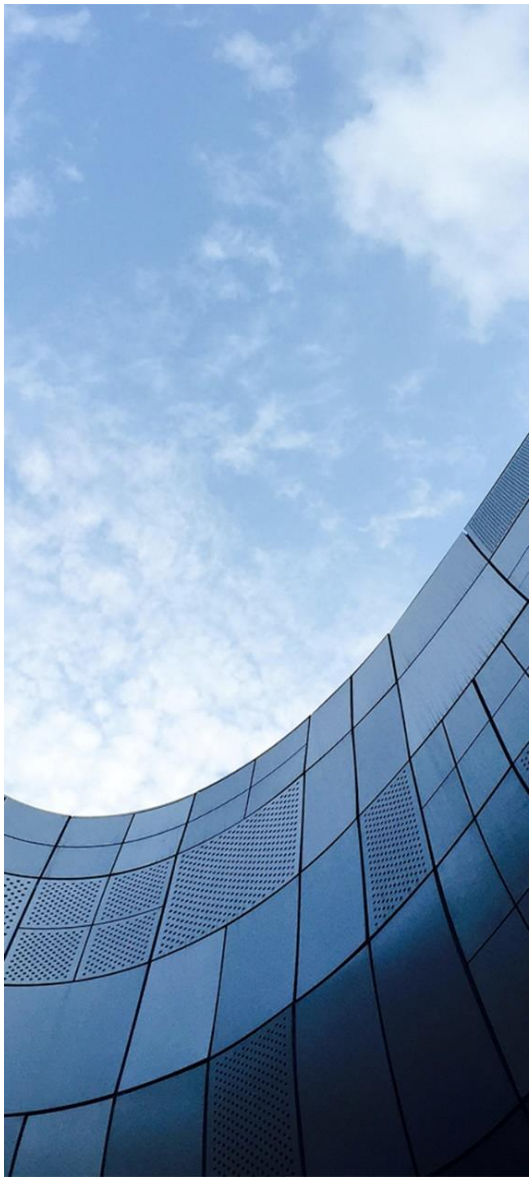

We outline the key practical issues for foreign investors of the recent amendments to the Spanish Companies Act ("**SCA**"), the Securities Markets Act ("**SMA**") and other financial legislation:

- New rules for related-party transactions
- Listed companies' right to know the identity of the "ultimate beneficial owners"
- Amendments relating to directors' remuneration in listed companies
- Listed companies are entitled to issue loyalty shares
- Spanish companies, listed and non-listed, may hold virtual meetings if provided in the by-laws
- Changes to the rules on delisting takeover bids

# Implementation of the amendments to the Shareholders Rights Directive (2017/828/EU) ("SRD II")

Act 5/2021, most of the provisions of which will enter into force on May 3, 2021, (the "**Act**") has transposed SRD II into Spanish law, with the following points of interest for listed and non-listed companies:

## New rules for related-party transactions

Regulating related-party transactions is one of the most important issues of SRD II and of the reform of the SCA. The key developments affect listed companies, although some changes will apply to all limited companies. Specifically:

- special rules are introduced for intragroup related-party transactions subject to a conflict of interest, and

- the **list of parties considered related to the director** is extended to include companies or entities in which the director has a considerable stake (of 10% or more of capital or voting rights) or performs a key role, and shareholders represented by the director in the governing body. In practice, the inclusion of these new related parties resolves any doubt about the mandatory abstention of directors in matters where the related party is the shareholder who proposed their appointment.

For listed companies, rules on related-party transactions have been organized and structured:

- **Definition.** "Related-party transactions" are those that the listed company or its subsidiaries enter into with directors, significant shareholders or other persons considered related parties. This definition refers to IAS 24, with the exception that "significant influence" is set at 10% or more of voting rights or the percentage at which representation on the board of directors can be obtained.

  For the purposes of the regulation, the following will not be considered related-party transactions: (i) the board's approval of the terms and conditions of remuneration of executive directors' contracts; (ii) intragroup transactions between the company and its wholly owned subsidiaries; (iii) transactions carried out by a listed company and its subsidiaries provided that no other party related to the company holds an interest in those subsidiaries; and (iv) transactions entered into by credit institutions based on measures designed to safeguard their stability, adopted by the competent authority.

- **Disclosure and approval**. Listed companies must publicly announce related-party transactions that exceed certain thresholds no later than the date on which they are effected. The announcement must be accompanied by a report prepared by the audit committee (as is required for the board to approve the transaction), which will evaluate whether the operation is fair and reasonable for the company and the shareholders other than the related party.
  The general meeting must approve related-party transactions that are worth 10% or more of the asset value. The affected shareholder cannot participate in the vote, unless the transaction has been approved by the board without the majority of independent directors voting against it.

  All remaining transactions must be approved by the board, subject to a previous report by the audit committee. Exceptionally, the board may delegate to the CEO approval of ordinary intragroup transactions in market conditions and transactions that do not exceed 0.5% of the company's net turnover.

  The director affected by the conflict of interest, or the representative or related party of the shareholder affected by the conflict may not take part in deliberating and voting on the agreement. This does not include directors related to the parent company in intragroup transactions.

  Where, exceptionally, partners and directors are allowed to take part in voting, an entire fairness test applies.

Listed companies' rules on related-party transactions will enter into force on July 3, 2021.

## Listed companies' right to know the identity of the "ultimate beneficial owners"

When the book entry of the shares is in the name of a financial intermediary, acting as a trustee in its own right but on behalf of a third party, the listed company is entitled to know the identity of this third party (the "ultimate beneficial owner"). Companies can request this information directly from the financial intermediary whose name appears on the shares, or indirectly through the central securities depository (Iberclear in Spain). Associations of shareholders and significant shareholders also have the right to know the identity of the ultimate beneficial owners, but they must request this information through the central securities depositary.

The recognition of the right to know the identity of the ultimate beneficial owner does not affect the ownership of the economic and voting rights, which will continue to belong to the party identified as the owner of the shares in the book entry.

### Amendments relating to directors' remuneration in listed companies

Most of SRD II provisions on directors' remuneration have been covered since 2014 by the SCA. However, the contents of remuneration policy that the shareholders meeting must approve at least every three years are now described in detail. In practice, this enhances shareholders' say-on-pay rights.

These new remuneration policy rules will enter into force on October 13, 2021 and listed companies will have to submit a new remuneration policy for shareholder approval on the first general meeting held after that date.

Largely as a reflection of this "redefinition" of the remuneration policy, the contents of the annual directors' remuneration report that is put to a vote of the meeting each year have been extended.

## Listed companies are entitled to issue loyalty shares

- **Incorporation.** Listed companies can grant, through their bylaws, double voting rights to shares held by the same shareholder or ultimate beneficial owner for at least two years. The bylaws may extend (but not shorten) this minimum period.

  As a rule, the two-year term to assign double voting rights will be calculated from the date they are registered in the record book created by the company to monitor the assignment and withdrawal of double voting rights. Exceptionally, a special system has been set up for companies that have applied for admission to listing of their shares.

  The inclusion of the additional loyalty vote in the bylaws requires an extraordinary meeting quorum and voting majorities, which may be increased in the bylaws: (i) if the quorum is of 50% or more of the voting rights, a majority of 60% of the capital present or represented at the meeting; and (ii) if the quorum is between 25% and 50% of the voting rights, a majority of 75% of the capital present or represented at the meeting.

  The statutory provision on loyalty double voting rights must be renewed, following the same quorum and majority rules, five years after the meeting initially approves it.

- **Removal.** Removal of this type of shares does not require such an extraordinary quorum or voting majorities and, once the system on loyalty shares has been included in the bylaws for 10 years, it becomes even easier to remove them, as double voting rights will not count for the purposes of quorums and majorities.

- **Transfer**. As a rule, additional voting will no longer exist if there is a transfer of shares or, in the case of an ultimate beneficial owner, a transfer of the investment. There are some

exceptions to this rule including (i) intragroup transfers, (ii) structural modifications and (iii) transfers owing to mortis causa succession, wind-up or liquidation of a conjugal partnership or donations within the family circle, except in the case of controlling shareholders, whose double voting shareholder status will be put to a vote according to the terms set out in the bylaws.

- **Calculations**. Double voting rights will be considered for the purposes of (i) determining the quorum and voting majorities in the general shareholders meeting (unless the bylaws provide otherwise); (ii) disclosing major holdings; (iii) reporting significant stakes in credit institutions; and (iv) calculating takeover thresholds. Consequential acquisition of control (i.e., 30% of the listed company's voting rights) resulting from a change in the total number of voting rights because of double voting rights triggers the obligation to launch a mandatory bid within three months unless the shareholder transfers a sufficient number of shares or waives the necessary voting rights to bring its "holding" below the 30% threshold.

## Spanish companies, both listed and non-listed, can hold virtual meetings

Public and private limited companies are allowed to hold remote-only general meetings if so provided in their bylaws. Directors must adopt measures to ensure the identity and rights to attend of the shareholders and their representatives, and that attendees are able to participate through remote means (audio or video and written messages) so that they can exercise their rights (to speak, receive information, propose and vote).

## Changes to the rules on delisting takeover bids

When a listed company agrees to delist its shares from regulated markets, it must make a delisting takeover bid to ensure that investors are protected from the share's loss of liquidity. To date, an exception applied to offerors making a previous total takeover bid for a listed company (whether mandatory or voluntary), allowing them to delist the company subsequently without having to make a delisting takeover bid through the so-called "intermediate procedure." Specifically, this was facilitated through a permanent purchase order allowing shareholders to divest from the listed company at the same price as the initial offer for at least one month during the six months following the total takeover bid.

The SMA has been amended to tighten the conditions required to delist a company through the "intermediate procedure," as the offeror is required to have reached at least 75% of the listed company's voting rights in the preceding takeover bid.

## Other developments of interest for listed companies

- New rules have been introduced to make capital increases and the issue of convertible bonds more flexible.
- The appointment or renewal of legal entities as directors is banned from May 13, 2021.
- The quarterly financial reporting requirement has been removed.
- The SMA has been adapted to the Prospectus Regulation.

For additional information, please contact Cuatrecasas.