

At a glance: Law 5/2021, of 12 April, amending the consolidated text of the Companies Act and other financial regulations

On 13 April 2021, Law 5/2021, of 12 April, which amends the revised text of the Companies Act, adopted by Royal Legislative Decree 1/2010, of 2 July (the “LSC”), Royal Legislative Decree 4/2015, of 23 October, which adopts the revised text of the Securities Market Act (the “LMV”) and other financial regulations, concerning the promotion of long-term shareholder involvement in listed companies (the “Act”), was published in the Official State Bulletin. Below, we analyse the main new features introduced by the Act. You can access a detailed version of this briefing here.

AMENDMENTS TO THE LSC: UNLISTED COMPANIES

General meeting

- **Remote attendance** at the general meeting is also allowed for limited liability companies (Article 182).
- The holding of a **meeting exclusively by remote means** is allowed in both public and private limited liability companies, subject to the prior provision in the bylaws approved by two-thirds of the capital present or represented (Article 182 bis).

Directors and related-party transactions

- In all cases, directors must subordinate their private interests to the **interests of the company (Article 225)**.
- **Related persons** are considered to be the shareholders represented by the director on the management body, as well as the companies or entities in which the director directly or indirectly holds, even through an intermediary, a shareholding that gives him significant influence or where he holds a position on the management body or in the senior management of the company or its parent company (Article 231).
- **Intra-group transactions** (new Article 231 bis): the general meeting will approve transactions with the parent company or other companies of the group that are subject to conflicts of interest, when by their nature they are legally limited to the authority of the meeting and provided that the value of the transaction or transactions exceeds 10% of the total assets of the company.
- The management body shall approve the remaining transactions with the parent company or other group companies that are subject to conflicts of interest, allowing the directors who are related to and represent the parent company to vote (except for Articles 228.c and 230)¹, to facilitate the financial and strategic planning of internal operations.

¹ It shall be the responsibility of the company and, if applicable, of the directors affected by the conflict of interest, to prove that the resolution is in accordance with the corporate interest in the event that it is challenged and that they used due diligence and loyalty in the event that they are held liable.

² Under the new A.D. 13, the amendments included in this article, as well as the rules contained in Chapter II (Specific features regarding shares) of Title XIV, shall also apply to public limited companies with shares admitted to trading in Multilateral Trading Systems.

³ Under the new A.D. 13, the amendments included in this section, as well as the rules contained in Chapter II (Specific features regarding shares) of Title XIV, shall also apply to public limited companies with shares admitted to trading in Multilateral Trading Systems.

AMENDMENTS TO THE LSC: LISTED COMPANIES

Meaning, shares and shareholders

- Concept of a listed company (Article 495): a new paragraph 3 is added, relating to public limited companies whose shares are admitted to trading on a regulated market of another Member State, of the European Economic Area or on a comparable market of a third State and are not admitted to trading on a Spanish market, which establishes that the general rules shall apply and lists a series of exceptions.
- Representation of shares of listed companies (Article 496)²: the reference to “official secondary market” is changed to “regulated market domiciled or operating in Spain”.
- It recognises³: (a) the right of the company to obtain from the central securities depository the information that allows the identification of its shareholders, establishing a list of minimum information that the latter must provide to the company; and (b) the right to identify the ultimate beneficial owners to (i) the listed company or a third party designated by it; (ii) the associations of shareholders representing at least 1% of the capital; and (iii) the shareholders holding at least 3% of the equity capital (individually or jointly).
- **Special provisions regarding share subscription⁴**
 - (i) **Minimum period for the exercise of the subscription right and announcement of the offer (Article 503)**: reduced from 15 to 14 calendar days as of the publication of the announcement of the subscription offer of the new issue in the BORME.
 - (ii) **Pre-emptive subscription right exclusion regime (Article 504)**: the requirement of the independent expert’s report provided for in Article 308⁵ for issues for an amount of less than 20% of the capital is generally eliminated. However, the listed company may voluntarily obtain such a report.

In the case of issues for less than 20% of the capital, the value of the issue must correspond to the fair value. Thus, the expert’s report will only be required: (a) when the market value is not sufficiently representative of the fair value, as explained by the directors; and (b) when the

⁴ Under the new A.D. 13, the amendments included in this section, as well as the rest of the current provisions of Chapter III (Special provisions regarding share subscription) of Title XIV, will also apply to public limited companies with shares admitted to trading in Multilateral Trading Systems. These provisions will also apply (by virtue of the new A.D. 14) to capital increases with a subscription offer prior to the listing of the company on regulated markets or multilateral trading systems, providing that in this case the references to fair value will be interpreted as references to the price set in the subscription offer, unless, due to the small number of subscribers or other circumstances, it is not reasonable to presume that such price corresponds to the market value.

⁵ The independent expert, as distinct from the auditor of the company’s accounts, appointed for this purpose by the Commercial Registry, shall prepare a report on the fair value of the company’s shares, on the theoretical value of the pre-emptive right whose exercise it is proposed to remove or limit, and on the reasonableness of the data contained in the directors’ report.

corporate interest requires not only the exclusion of the pre-emptive subscription right but also the issuance of the new shares at a price lower than the fair value.

- (iii) **Determination of the price and other conditions of the issue in capital increases with the exclusion of preemptive subscription rights (Article 505):** the option is established that the resolution for a capital increase with the exclusion of subscription rights adopted by the general meeting may set the date, price and other conditions of the issue or delegate the setting thereof to the board of directors, which must ensure that the resulting issue price corresponds to the fair value.
- (iv) **Delegation of the power to exclude pre-emptive subscription rights in the event of the issuance of new shares (Article 506):** this is limited to a maximum of 20% of the capital (until now the general rule was 50%) and the figure of authorised capital is clearly distinguished from the mere attribution to the directors of the power to set the date and other conditions of the increase.
- (v) **Incomplete subscription (Article 507):** the rule is reversed for listed companies in cases of incomplete subscription so that unless otherwise provided, the capital increase resolution will be effective in the amount subscribed, even if the subscription has not been completed.
- (vi) **Delivery of shares in capital increases (Article 508):** unless the option of incomplete subscription has been excluded, the registration of the capital increase resolution with the Commercial Registry is permitted prior to its execution. Furthermore, after the registration of the capital increase resolution, the delivery and transfer of the new shares is generally permitted once the deed of execution of the capital increase has been executed and prior to its registration.

Convertible bonds⁶

- **Issuance of convertible bonds (Article 510):** the exemption from the independent expert's reports provided for in section 2 of Article 414⁷ and subparagraph b) of section 2 of Article 417⁸ is included, applicable to the issuance of bonds convertible into shares when such issuance does not reach 20% of the share capital. The listed company may, however, voluntarily obtain such a report.
- In relation to issuances of convertible bonds that are the subject of a **delegation with the power to exclude pre-emptive subscription rights (Article 511)**, the maximum number of shares into which the bonds may be converted (added to the number of shares issued by the directors under the delegation provided for in Article 506) may not exceed 20% of the number of shares comprising the share capital at the time of authorisation, except for convertible debenture issues made by credit institutions under certain conditions.⁹

⁶ Under the new A.D. 13, the amendments included in this section, as well as the rest of the current provisions of Chapter V (Debentures) of Title XIV, will also apply to public limited companies with shares admitted to trading in Multilateral Trading Systems.

⁷ Includes the independent expert's report as a requirement for the issuance of bonds convertible into shares.

⁸ Includes the independent expert's report as a requirement for the adoption of the resolution regarding the suppression of the pre-emptive subscription right in the context of the issuance of bonds convertible into shares.

General Meeting

- **General information prior to the meeting (Article 518):** in the event that the bylaws provide for the attribution of double voting rights for loyalty, and a special register has been created (Article 527 septies), the information regarding the number of voting rights must be updated on the corporate website immediately after the end of the period of advance legitimisation prior to the general meeting.
- **Transfer of information from the company to the shareholders and ultimate beneficial owners (new Article 520 bis):** this includes the information that companies must provide to their shareholders or to the third party named by each shareholder¹⁰ and how this information is to be sent.
- **Transfer of information from the ultimate beneficial owners to the company (new Article 520 ter):** the intermediary entities registered as shareholders will transfer, without delay, to the company or to the third party designated by it, the information related to the exercise of the rights they have received from the ultimate beneficial owners or other intermediary entities.
- **Remote participation (new Article 521.3):** in the event that the general meeting is held exclusively electronically, it will be necessary that: (i) the shareholders can also delegate or exercise in advance the vote on the proposals included in the items on the agenda by any of the means provided for in section 1 of this article; and (ii) the minutes of the meeting are drawn up by a notary public.
- **Facilitation by the intermediary entities of the exercise of the rights of the beneficial owners (new Article 522 bis):** the intermediary entities (i) will facilitate the exercise by the beneficial owners of the rights inherent to the shares held in custody by them; and (ii) will exercise the rights deriving from the shares according to the authorisation and instructions of the beneficial owner and in their interest.
- **Provisions relating to the transfer of information and the exercise of voting rights (new Article 524 bis):** when several intermediary entities hold the shares of the same beneficial owner, they shall promptly transfer to each other the information or confirmation referred to in Articles 520 bis, 520 ter, 522 bis, 524 and 527 bis, until they reach said ultimate beneficial owner or the company unless the information or confirmation can be transferred directly by one of the intermediary entities to the latter.
- **Non-discrimination, proportionality and transparency of costs (new Article 524 ter):** intermediary entities must publish on their websites all applicable fees for certain services rendered, individually for each type of service.
- **Confirmation of votes (new Article 527 bis):** when the vote has been cast electronically, the company will be obliged to send the shareholder casting the vote an electronic confirmation of the receipt of his vote.

⁹ Under the new A.D. 15, the limit of 20% of the number of shares comprising the share capital at the time of authorisation provided for in Article 511 shall not apply to convertible bond issues made by credit institutions, provided that such issues comply with the requirements provided in Part Two, Title I, Chapter 3, Section 1 of EU Regulation 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms, and amending EU Regulation No. 648/2012, so that the issued convertible bonds may be considered additional Tier 1 capital instruments of the issuing credit institution.

¹⁰ a) the information to be provided to them to enable them to exercise the rights deriving from their shares and which is addressed to all shareholders holding shares of that class; or b) where the information provided for in (a) above is available to shareholders on the corporate website, a notice indicating where they can find such information.

Loyalty shares:

A new Subsection 4 (loyalty voting shares) is added to Title XIV, Chapter VI, Section 3, introducing the regulation of loyalty voting shares as a new feature in Spanish law.

- **Provision in the bylaws for additional double voting shares for loyalty (new Article 527 ter):** the bylaws of the listed company may grant double voting rights to those shares that have been held by the same shareholder for a minimum period of two years (which may be extended by the bylaws). Loyalty double voting shares do not constitute a separate class of shares.

Double voting may be extended to shares allocated free of charge in the event of capital increases, in which case the new shares have the same seniority as those which gave rise to the allocation.

- **Majorities required for approval (new Article 527 quater):** the quorum and minimum majorities required for the inclusion of the statutory provision of double voting for loyalty are as follows (the bylaws may raise them):

Quórum	Majorities
Equal to or greater than 50%	60% of the votes (present or represented)
Equal to or greater than 25% but less than 50%	75% of the votes (present or represented)

- **Calculation of the loyalty vote (new Article 527 quinquies):** unless otherwise provided in the bylaws, double loyalty votes shall be computed for the quorum and majorities required for the adoption of resolutions. The statutory limitations on the maximum number of votes per shareholder shall apply to shareholders holding shares with loyalty votes. Loyalty votes will be taken into account to calculate significant shareholdings and voting rights regarding the rules governing takeover bids.
- **Extinction and elimination clause of the bylaw provision for loyalty voting (new Article 527 sexies):** the bylaw provision for double loyalty voting: (a) must be renewed, five years after its approval, complying with the same requirements of Article 527 quater; and (b) may be eliminated, at any time, by the general meeting with the quorums and majorities provided for in Article 201.2¹¹ (without counting double votes in the event that more than 10 years have elapsed since the approval by the general meeting of the statutory provision relating to double voting for loyalty).
- **Special register of shares with double voting (new Article 527 septies):** this will include the shareholder information provided for in Article 497.1¹², which the company must provide without delay to any shareholder requesting it. Furthermore, these registered shareholders may, at any time, give notice of their total or partial waiver of any double voting rights to which they may be entitled.
- **Double loyalty voting in companies requesting admission to trading on a regulated market (new Article 527 octies):** for companies requesting admission to trading of their shares on a regulated market, the option is established, with effect from the date of admission to trading of the shares, to include the statutory provision

relating to double loyalty voting; and create a special register of shares with double voting. In this regard, double voting may be attributed, as of the date of admission to trading of the shares, to previously registered shares for which compliance with the loyalty period established in the bylaws has been evidenced.

- **Calculation and accreditation of the loyalty period (new article 527 nonies):** the certificate issued for this purpose by the entity in charge of the book-entry register will serve to accredit the ownership of the shares: at the time of submitting the application for registration in the special register and for a minimum uninterrupted period of two years computed from the date of registration.
- **System for the disclosure of shares with loyalty voting rights:** the CNMV must be notified and information must be published on the company's website regarding the number of shares with double voting rights existing at any given time and those registered shares pending the completion of the loyalty period established in the bylaws.
- **Transfers of shares by the shareholder with double voting rights (new Article 527 decies):** as a rule, the direct or indirect assignment or transfer of the shares in question or part of them, even for no consideration, shall be grounds for the termination of the double voting rights. However, unless otherwise provided for in the bylaws, the extinction of the double vote shall not apply to transfers occurring as a result of: (a) transfers between family members; (b) any structural modification affecting the shareholder company or the issuing company; or (c) a transfer between companies of the same group.

The additional loyalty vote will automatically benefit the shares allocated free of charge on the occasion of capital increases in connection with the loyalty voting shares already held.

- **Ultimate beneficial owner of the shares other than the shareholder (new Article 527 undecies):** the obligation to prove compliance with the loyalty period established in the bylaws must be fulfilled with respect to the ultimate beneficial owner, whose shares will lose, if applicable, the double vote assigned when the beneficial owner changes, unless such change occurs as a result of any of the transfers exempted in Article 527 decies.

Board of directors

- **Necessary nature of the board of directors (Article 529 bis):** it establishes that the directors may only be natural persons. This requirement that the directors of listed companies must be natural persons will only apply to appointments, including renewals, that take place from the month following their publication in the Official State Bulletin (BOE).
- **Non-delegable powers (Article 529 ter):** the approval of related-party transactions is remitted to the provisions of the new Chapter VII bis of Title XIV.
- **Audit Committee (Article 529 quaterdecies):** it must report on the related-party transactions to be approved by the general meeting or the board of directors and supervise the internal procedure for those whose approval has been delegated; and (b) report to the board of directors, in advance, on the matters provided for in the legislation, the bylaws and the regulations of the board and, in particular, on financial information and the management report and regarding the creation (a) or acquisition of shares in special purpose vehicles or entities domiciled in tax havens.

¹¹ Quorum and qualified majorities applicable to amendments to the bylaws.

¹² The shareholder information provided for in Article 497.1 includes: (i) name and contact details; including the full address and, if available, the e-mail address of the shareholder and, in the case of a legal entity, its unique identifier, such as the legal entity identification (LEI) code or, if these are not available, its registration number or tax identification number; (ii) the number of shares it holds; and (iii) if requested by the company, one or more of the following: the classes of such shares and, where this information is available, the date as of which he/she holds them.

- **Remuneration of directors for the performance of executive duties (Article 529 octodecies) must:** (a) conform to the content of the bylaws (Article 217) and to the contracts approved under Article 249 (the express provision that the remuneration of executive directors be regulated in the bylaws in listed companies is the main change introduced in this article); (b) be in accordance with the remuneration policy, which will establish the fixed annual remuneration of all directors for the performance of executive duties; and (c) be set individually by the board of directors (following a report from the appointments and remuneration committee).
- **Approval of the directors' remuneration policy (Article 529 novodecies):** proposals for new remuneration policies must be submitted to the general meeting before the end of the final year of the previous policy, and the implementation of the new policy may be established from the time of its approval.
- **Temporary exceptions: companies are allowed to apply temporary exceptions to the remuneration policy, provided that:** (a) the policy sets out the procedure to be used and the conditions under which such exceptions may be used; (b) the policy specifies the parts that may be subject to exceptions; and (c) the application of the exceptions is necessary to serve the long-term interests and sustainability of the company as a whole or to ensure its viability.

The amendments introduced in this article shall enter into effect six months after their publication in the Official State Bulletin (BOE), and therefore the companies must submit this remuneration policy for approval at the first general meeting held after that date.

- **Board of Directors' Committees:** the ninth additional provision is amended to add that the regime of the appointments and remuneration committee provided for in Article 529 quidecies will also apply to companies issuing securities other than shares admitted to trading on regulated markets. Also, it adds that companies issuing securities that are exempt from setting up an audit committee will not be obliged to set up an appointments and remuneration committee.

Related transactions

A new Chapter VII bis is introduced in Title XIV, devoted entirely to related-party transactions, the obligations of which will not be applicable until two months after the entry into effect of the Law.

- **Definition of related-party transactions (new Article 529 vicies):** related-party transactions are those carried out by the company or its subsidiaries with (a) directors; (b) shareholders holding 10% or more of the voting rights or represented on the board of directors; or (c) any other persons who must be considered related-parties under International Accounting Standards. Paragraphs 2 and 3 of this article list several exceptions to the provisions of paragraph 1.
- **Publication of information on related-party transactions (new Article 529 unvicies):** companies must announce, at the latest at the time of their execution, the related-party transactions carried out by it or by its group companies and which reach or exceed 5% of the total assets; or 2.5% of the annual amount of the annual turnover.
- **Approval of related-party transactions (new Article 529 duovicies):** the general meeting will be authorised to approve related-party transactions whose amount or value is equal to or exceeds 10% of the total assets according to the last annual balance sheet approved by the company¹³, while the board of directors will be authorised to approve all other related-party transactions¹⁴. As an exception, the board of directors may delegate to the chief executive officer the approval of ordinary intra-group transactions on an arm's length basis and transactions not exceeding 0.5% of net sales. As a general rule, when a related-party transaction must be approved by the board, it must be subject to a prior report from the audit committee.

- **Calculation rules (new Article 529 tervicies):** it establishes that related-party transactions entered into with the same counterparty in the last 12 months shall be aggregated to calculate the total value of the transactions.

Corporate governance obligations

- **Inclusion of the corporate governance and remuneration report in the directors' report (Article 538):** listed companies must include the annual report on directors' remuneration as part of the contents of the directors' report.
- **Annual corporate governance report (Article 540):** it must include, concerning the structure of the company's management: (a) details of the positions of director, administrator or manager, or representative thereof, held by the directors or representatives of directors who are members of the board of directors of the company in other entities (whether listed or not); and (b) information on the other remunerated activities of the directors or representatives of directors who are members of the board of directors of the company, whatever their nature.
- **Annual report on directors' remuneration (Article 541)¹⁵:** it adds the obligation to make the annual report on directors' remuneration available on the websites of the company and the CNMV free of charge for a minimum period of 10 years.

AMENDMENTS MADE TO THE LMV

Delisting tender offer

Article 82 is amended to include an **exception to the obligation to make a delisting tender offer** when an offer has been previously made for all the securities at a price equal to or higher than the price required in the delisting tender offer, provided that, as a result of the previous tender offer, the offeror has reached at least 75% of the voting share capital of the target company.

Quarterly financial information

The obligation for issuers whose shares are listed on regulated markets to publish **quarterly financial information** (interim management statement) is eliminated. Article 234.2, relating to the CNMV's powers of intervention, is also amended to allow the CNMV to require the publication of quarterly information.

Loyalty shares

A shareholder who reaches a certain number of voting rights equal to or greater than 30%, due to the variation in the total number of voting rights of the company resulting from the existence of shares with loyalty voting, may not exercise the voting rights exceeding this percentage without making a **public tender offer for the entire share capital**, within 3 months of the date on which this threshold was exceeded, and the rules relating to the determination of the equitable price shall apply.

¹³ At the meeting, the shareholder concerned is prohibited from voting, unless the transaction subject to the decision has been approved by the board without the majority of the independent directors voting against it.

¹⁴ At the board meeting, the director concerned, or the director representing or related to the shareholder concerned, must abstain from participating in the deliberation and voting on the resolution. Directors who are related to the parent company in intra-group transactions are exempted from the above.

¹⁵ The amendments introduced in Article 541, will come into effect for the annual directors' remuneration reports corresponding to the financial years ending on or after 1 December 2020.

It will not be mandatory to make the offer when (i) the number of shares necessary to reduce the excess voting rights is divested by the person obliged to make the offer; (ii) the voting rights are waived within 3 months of the date on which said threshold was exceeded, provided that, in the meantime, the voting rights in excess of said percentage are not exercised; or (iii) a waiver is obtained from the CNMV.

Voting advisors or proxy advisors (new chapter X)

The position of proxy advisors is regulated, whereby proxy advisors are defined as legal persons who provide professional and commercial analysis of the information that listed companies are legally obliged to publish and, where appropriate, other types of information, in order to advise investors in the exercise of their voting rights through analysis, advice or voting recommendations. Proxy advisors must comply with the following **obligations**:

Publish free of charge on their website (updating this information annually) the reference of the code of conduct they apply and, in the event that they deviate from any of its recommendations, the reasons for doing so. In the event of not applying any code of conduct, they must also explain the reason.

- Publish an annual report to ensure that their clients are duly informed about the accuracy and reliability of their activities. The report should contain detailed information on their research, advice and voting recommendations.
- Identify and promptly disclose to their clients any conflicts of interest or business relationships that may influence the provision of their services, and the measures taken to eliminate, mitigate or manage them.

Prospectuses

- **Obligation to publish a prospectus (Article 34)**: The threshold above which a securities issue requires the preparation and publication of a prospectus is amended to EUR 8 million, except for issues by credit institutions, which remains at EUR 5 million (limit to be calculated over twelve months). In any case, the CNMV may require the publication of a prospectus if it deems it appropriate.

- **Obligations relating to the placement of issues without a prospectus (Article 35)**: Article 35 is amended, which now regulates (in accordance with the provisions of paragraph 3 of Article 35 in its previous wording) the cases of mandatory intervention by an entity authorised to provide investment services, which will have to (i) validate the information to be provided to investors and (ii) generally supervise the marketing process in the placement of issues that are intended for the general public using any form of advertising communication and which are not subject to the obligation to publish a prospectus. In any case, the CNMV may require that these placements comply with the obligation to publish a prospectus.

Syndicate of bondholders (Article 42)

Article 42 is amended to include a paragraph requiring the creation of a syndicate when the issue is exempt from the obligation to publish a prospectus only by virtue of the provisions of the second paragraph of Article 34. The reference to this second paragraph is a mistake in the drafting of the rule, which should refer to the third paragraph of Article 34.

Other amendments

- Adjustments are made to ensure consistency between the LMV and the Regulation (EU) No. 2017/1129 of the European Parliament and the Council of 14 June 2017 (Prospectus Regulation)
- Given that Regulation (EU) 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse already regulates the obligations of directors to report significant shareholdings, Article 125.5 is deleted, thus avoiding duplicity of reporting obligations on the part of directors.
- The seventh additional provision of the LMV is amended to exempt issuers of securities that do not have to publish their annual financial report from the obligation to prepare the annual corporate governance report, as well as the ICO and any other public law entities, and entities for which Spain is not their home Member State.

[See extended version of this note here](#)

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