

# Legal Briefing | April 2021

Law 5/2021, of 12 April, amending the revised text of the Companies Act, adopted by Royal Legislative Decree 1/2010, of 2 July, and other financial regulations, regarding the promotion of long-term shareholder involvement in listed companies



## INTRODUCTION

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 2010 (the “LSC”), and other financial regulations, regarding the promotion of long-term shareholder involvement in listed companies (the “Act”), was published in the Official State Bulletin (the “BOE”).

The purpose of the Act is the transposition into Spanish law of Directive (EU) 2017/828 of the European Parliament and the Council of 17 May 2017 amending Directive 2007/36/EC regarding the promotion of the long-term involvement of shareholders in listed companies, and it introduces important new features for both listed and unlisted companies. It will enter into effect 20 days after its publication in the BOE.

In addition to amending the LSC, the Act also introduces amendments to the following regulations:

- (i) Royal Legislative Decree 4/2015, of 23 October 2015, approving the revised text of the Securities Market Act (the “LMV”);
- (ii) the Royal Decree of 22 August 1885 publishing the Commercial Code (the “C.Com”);
- (iii) Law 35/2003, of 4 November 2003, on Collective Investment Institutions (the “LIIC”);
- (iv) Law 22/2014, of 12 November, which regulates venture capital entities, other closed-end collective investment entities and management companies of closed-end collective investment entities, and which amends Law 35/2003, of 4 November, on Collective Investment Institutions (the “22/2014 Law”); and
- (v) Law 22/2015, of 20 July, on Account Auditing (the “22/2015 Law”).

In this legal briefing, we analyse the main new features introduced by the Act, among which the following are noteworthy:

- (i) The exclusive holding of meetings by electronic means is permitted (subject to amendment of the bylaws).
- (ii) A new, more flexible system applicable to intra-group related party transactions in non-listed companies is created, and for listed companies, additional procedural and transparency duties are imposed and, in certain cases, the board of directors is allowed to delegate the approval of these transactions.
- (iii) The right of the company to identify its shareholders (the ultimate beneficial owner) is expanded.
- (iv) The system for capital increases and the issuance of convertible bonds is made more flexible for listed companies.
- (v) For the first time, double voting shares based on loyalty are regulated.
- (vi) It is required that the directors of listed companies be natural persons and that more details be provided regarding their remuneration.
- (vii) The position of proxy advisors is regulated.
- (viii) The obligation of issuers whose shares are listed on regulated markets to publish quarterly financial information is eliminated.
- (ix) The threshold above which a securities issue requires the preparation and publication of a prospectus is increased to EUR 8 million.

## SECTION I

### AMENDMENTS TO THE LSC: NON-LISTED COMPANIES

#### 1. General Meeting: electronic attendance and exclusively electronic meetings

Regarding remote attendance at the general meeting, Article 182 of the LSC eliminates the reference to public limited companies, so that it is also permitted in private limited companies.

The amended Article 182 bis of the LSC allows, both in public and private limited companies, the holding of meetings without the physical attendance of the shareholders or their representatives, i.e., exclusively by electronic means. This option must be provided for in the bylaws and the amendment of the bylaws to include this option must be approved by two-thirds of the shareholders present or represented by proxy.

In these cases, the meeting shall be deemed to be held at the registered office, the holding of the meeting exclusively by electronic means being subject to (i) the identity and legitimacy of the shareholders and their representatives being duly guaranteed; and (ii) all attendees being able to effectively participate in the meeting by appropriate means of remote communication media, in accordance with the latest technology.

The notice of the meeting shall provide information on the steps and procedures to be followed for the registration and preparation of the list of attendees, for the exercise of their rights and the proper recording of the meeting's proceedings in the minutes. Under no circumstances may attendance be made conditional upon the registration being carried out in advance of the meeting.

#### 2. Directors and related transactions

**A. Duty of diligence (Article 225 of the LSC):** a reference is added to the requirement that directors must subordinate, in all cases, their private interest to the interest of the company.

**B. Persons related to the directors (Article 231 of the LSC):** a new paragraph e) is added, which considers the shareholders represented by the director in the management body to be individuals related to the director, and the reference to Article 42 of the C.Com in paragraph d) regarding companies related to the director is eliminated. It is established that companies or entities in which the director directly or indirectly holds even through an intermediary, a shareholding that gives him/her significant influence or holds a position in the management

body or senior management in those companies or their parent company, shall be considered persons related to the directors. For these purposes, it is presumed that significant influence is conferred by any holding equal to or greater than 10% of the share capital or of the voting rights or by virtue of which it has been possible to obtain, de jure or de facto, a representation on the management body of the company.

**C. Intragroup transactions (Article 231 bis of the LSC):** the general meeting shall approve transactions with the parent company or other group companies affected by a conflict of interest when by their nature they are legally subject to the authority of the general meeting and provided that the value of the transaction or transactions exceeds 10% of the total assets of the company.

The management body will approve the remaining transactions with the parent company or other companies of the group that are affected by a conflict of interest, allowing the directors who are linked to and represent the parent company to vote (except for Articles 228.c and 230 of the LSC)<sup>1</sup> to facilitate the financial and strategic planning of internal transactions.

The management body is also allowed to delegate to delegated bodies or members of senior management the approval of transactions entered into by the company with its parent company or other group companies subject to a conflict of interest, provided they are transactions entered into in the ordinary course of business, including those resulting from the execution of a framework agreement or contract, and concluded under arm's length conditions. An internal procedure shall be implemented for the periodic evaluation by the Board of Directors of approved transactions.

Transactions carried out with subsidiaries shall not be considered transactions carried out with a group company subject to a conflict of interest, except when a significant shareholder in the subsidiary is a person with whom the company could not carry out the transaction directly without applying the system for transactions with related parties.

<sup>1</sup> It shall be incumbent upon the company and, if applicable, upon 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 exercised due diligence and loyalty in the event that they are held liable.

## SECTION II

**AMENDMENTS MADE TO THE LSC: LISTED COMPANIES****1. Concept, shares and shareholders**

**A.** The concept of a listed company (Article 495 of the LSC): 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 a comparable market of a third State and are not traded on a Spanish stock exchange. In these cases, the general rules will apply with the following provisions:

- (i) analogous rules/requirements of the law of the foreign market will be understood to be: (a) complied with on an equivalent basis; (b) incompatible rules/requirements of the law of the foreign market will be inapplicable, and (c) references to the CNMV will refer to the authority of the foreign market; and
- (ii) the forms of communication and advertising, and the representation and documentation of the shares shall be in accordance with the law of the foreign market.

**B.** Representation of shares of listed companies (Article 496 of the LSC)<sup>2</sup>: the reference to “official secondary market” is changed to “regulated market domiciled or operating in Spain”.

**C. Identity of the shareholders<sup>3</sup>**

- (i) **Right to know the identity of the shareholders (Article 497 of the LSC):** the right of the company to obtain from the central securities depository the information that allows the identification of its shareholders is recognised and detailed, establishing a list of minimum information<sup>4</sup> that the latter must provide to the company. It also states that the processing

<sup>2</sup> 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 of the LSC, shall also apply to public limited companies with shares admitted to trading in Multilateral Trading Systems.

<sup>3</sup> 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 of the LSC, shall also apply to public limited companies with shares admitted to trading in Multilateral Trading Systems.

<sup>4</sup> a) the 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 its Legal Entity Identifier (LEI) code or, if not available, its registration number or tax identification number, b) the number of shares held; and c) if requested by the company, one or more of the following: the classes of such shares and, where available, the date as of which the shareholder holds such shares. Other personal data to be provided shall be provided to the extent that they are necessary to enable the company to fulfil the purpose of identifying and communicating with its shareholders.

of shareholders’ personal data shall comply with the provisions of applicable European legislation on data protection.

- (ii) **Right to identify the ultimate beneficial owners (Article 497 bis of the LSC):** the ultimate beneficial owner is defined as the person on whose behalf the intermediary entity legitimately acts as a shareholder by virtue of the accounting record of the shares, directly or through a chain of intermediaries. The right to identify the ultimate beneficial owners is granted to (a) the listed company or a third party designated by it; (b) associations of shareholders representing at least 1% of the capital; and (c) shareholders holding at least 3% of the equity capital (individually or jointly).

**D. Special provisions regarding the subscription of shares<sup>5</sup>**

- (i) **Minimum period for the exercise of the subscription right and announcement of the offer (Article 503 of the LSC):** The minimum period for the exercise of the pre-emptive subscription right in listed companies is reduced from 15 to 14 calendar days as of the publication of the announcement of the offer of subscription of the new issue in the BORME<sup>6</sup>.
- (ii) **Pre-emptive subscription right exclusion system (Article 504 of the LSC):** the requirement of the independent expert’s report provided for in Article 308 of the LSC<sup>7</sup> for issues for an amount of less than 20% of the capital is generally eliminated. However, the listed company may voluntarily obtain

<sup>5</sup> 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 of the LSC, 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, on the understanding that in this case, the references to fair value will refer to the price set in the subscription offer, unless, due to the small number of subscribers or other circumstances, there is no justification for presuming that such price corresponds to the market value.

<sup>6</sup> This will enable companies that wish to do so to shorten the period between the launching and closing of the corresponding transactions and, therefore, reduce costs, such as underwriting costs, linked to market risk.

<sup>7</sup> The independent expert, other than 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 eliminate or limit and on the reasonableness of the data contained in the directors’ report.

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such a report. For issues for less than 20% of the capital, the value of the issue<sup>8</sup> must correspond to the fair value. In any case, for these issues<sup>9</sup>, and in the absence of supporting reports to the contrary, the fair value will be presumed to be the market value, established by reference to the stock market price, provided that it is not more than 10% lower than the stock market price. Thus, the expert's report will only be necessary in two exceptional cases:

- when, upon explanation by the directors, the market value is not sufficiently representative of the fair value; and
  - when the corporate interest requires not only the exclusion of the pre-emptive subscription right but also the issuance of new shares at a price lower than fair value<sup>10</sup>.
- (iii) **Determination of the price and other issue conditions in capital increases with the exclusion of pre-emptive subscription rights (Article 505 of the LSC):** the wording of the previous Article 505 of the LSC (special regime for the exclusion of pre-emptive subscription rights) relating to the requirements for issues agreed at a price other than fair value is replaced by the current wording which refers to the option that the resolution for a capital increase with 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 fair value.
- (iv) **Delegation of the power to exclude pre-emptive subscription rights in the event of the issue of new shares (Article 506 of the LSC):** following the recommendations of the code of good governance of listed companies, the delegation to the directors of the power to increase capital excluding pre-emptive subscription rights is limited to a maximum of 20% of the capital

<sup>8</sup> In other words, the nominal value of the shares to be issued, plus, if applicable, the amount of the share premium.

<sup>9</sup> Issuances of less than 20% of capital.

(until now the general rule of 50% was applied) 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. Furthermore, the wording of the article is amended to reflect the amendments relating to the generic elimination of the independent expert's report and the issue price, both introduced in the new Article 504 of the LSC.

- (v) **Incomplete subscription (Article 507 of the LSC):** for listed companies, the need to state in the issue resolution the existence of incomplete subscription as a requirement for the effectiveness of the increase when it is not fully subscribed is eliminated. The rule is reversed for listed companies in cases of incomplete subscription unless otherwise provided, the capital increase resolution will be effective in the amount subscribed, even if the subscription has not been complete.
- (vi) **Delivery of shares in capital increases (Article 508 of the LSC):** unless the possibility 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, 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. This is without prejudice to the obligation to submit the capital increase for registration within five days of the date of granting of the deed of execution, in which the final amount of the capital increase will be fixed without the requirement to provide details of the identity of the subscribers. Finally, the application of Articles 316 and 309.1.f) (relating to the restitution/reimbursement of the capital increase) is excluded. The application of Articles 316 and 309.1.f) (relating to the restitution/reimbursement of the contributions in the event of failure to execute the capital increase within the deadline) is excluded in the event of delivery of the shares.

<sup>10</sup> In this case, the independent expert's report shall specifically state the amount of the expected economic dilution and the reasonableness of the data and considerations contained in the directors' report to justify it.

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- (i) **Issue of convertible bonds (Article 510 of the LSC):** the previous wording (which had previously been blank)<sup>12</sup> is replaced by the new wording which provides, pursuant to the amendments to Article 504 for listed companies, for the exemption from the independent expert's reports provided for in paragraph 2 of Article 414 of the LSC<sup>13</sup> and subparagraph b) of paragraph 2 of Article 417<sup>14</sup> of the LSC, applicable to the issue of bonds convertible into shares when such issue does not reach 20% of the equity capital. The listed company may, however, voluntarily obtain such a report.

The directors' report must justify the reasonableness of the financial terms of the issue and the suitability of the conversion ratio and its adjustment formulas to avoid dilution of the financial stake of the shareholders.

- (ii) **Delegation of the power to exclude pre-emptive subscription rights in the event of the issuance of convertible bonds (Article 511 of the LSC):** in relation to convertible debenture issues that are subject to delegation with the power to exclude pre-emptive subscription rights, 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 of the LSC) may not exceed 20% of the number of shares comprising the equity capital at the time of the authorisation, in accordance with the provisions of the new Article 506 of the LSC.

<sup>11</sup> By virtue of the new A.D. 13, the amendments included in this section, as well as the rest of the current provisions of Chapter V (Obligations) of Title XIV of the LSC, shall also apply to public limited companies with shares admitted to trading in Multilateral Trading Systems.

<sup>12</sup> The wording of Article 510 included the exemption (applicable to listed companies) from the maximum legal limit for the issuance of bonds. This exemption had been rendered void after the approval of Law 5/2015, of 27 April, on the Promotion of Business Financing, which eliminated the maximum limit for the issuance of bonds for public limited companies and limited partnerships by shares provided for in the former Article 405 of the LSC.

<sup>13</sup> Includes the independent expert's report as a requirement for the issuance of bonds convertible into shares.<sup>14</sup> Incluye el informe del experto independiente como requisito para la adopción del acuerdo relativo a la supresión del derecho de suscripción preferente en el marco de la emisión de obligaciones convertibles en acciones.

<sup>14</sup> Includes the independent expert's report as a requirement for the adoption of the resolution relating to the removal of the pre-emptive subscription right in the context of the issue of bonds convertible into shares.

<sup>15</sup> (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.

Pursuant to the new 15th additional provision of the LSC, 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 these issues comply with the requirements provided in Part Two, Title I, Chapter 3, Section 1 of Regulation (EU) 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, so that the convertible bonds issued may be considered additional Tier 1 capital instruments of the issuing credit institution.

Finally, section 3 is amended, establishing the need to accompany the resolution to issue convertible bonds adopted on the basis of the delegation of the shareholders meeting with the directors' supporting report (eliminating the reference to the independent expert's report). It also includes the need for said report and, if applicable, the independent expert's report, to be made available to the shareholders and communicated to the first general meeting to be held after the adoption of the resolution to issue the bonds.

**3. General meeting**

- (i) **General information prior to the meeting (Article 518 of the LSC):** this article is amended to adapt it to the introduction to Spanish corporate law of "loyalty shares", so that 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 of the LSC), the information relating to 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.
- (ii) **Transfer of information from the company to the shareholders and ultimate beneficial owners (new Article 520 bis of the LSC):** this includes the information that companies must deliver to their shareholders or to the third party named by each shareholder<sup>15</sup> and how this information must be sent (directly or indirectly<sup>16</sup>).

<sup>16</sup> Through the third parties appointed by the company, the central securities depository or the intermediary entity, in which case they shall be obliged to forward the information without delay to the shareholders of the company.

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- (iii) **Transfer of information from the ultimate beneficial owners to the company (new Article 520 ter LSC):** establishes that the intermediary entities recognised as shareholders shall transfer, without delay, to the company or to the third party designated by it, the information related to the exercise of the rights that they have received directly from the ultimate beneficial owners or other intermediary entities.
- (iv) **Remote participation (new Article 521.3 LSC):** it is established that in the event that the general meeting is held exclusively by electronic means, it will be necessary that (a) the shareholders may also delegate or vote in advance on the proposals included in the items on the agenda by any of the means provided in paragraph 1 of this article; and (b) the minutes of the meeting be drafted by a notary public.
- (v) **Facilitation by the intermediary entities of the exercise of the rights of the beneficial owners (new Article 522 bis of the LSC):** the intermediary entities (a) shall facilitate the exercise by the beneficial owners of the rights inherent to the shares held by them, and (b) shall exercise the rights derived from the shares according to the authorisation and instructions of the beneficial owner and in his interest.
- (vi) **Provisions applicable to the transfer of information and the exercise of voting rights (new Article 524 bis of the LSC):** when several intermediary entities hold the shares of the same beneficial owner, they shall transfer to each other without delay the information or confirmation referred to in Articles 520 bis, 520 ter, 522 bis, 524 and 527 bis, until they reach the ultimate beneficial owner or the company unless the information or confirmation can be transferred directly by one of the intermediary entities to the latter.
- (vii) **Non-discrimination, proportionality and transparency of costs (new Article 524 ter):** intermediary entities must publish on their websites all applicable fees for certain services provided<sup>17</sup>, individually for each type of service. Paragraphs 2 and 3 of this Article 524 ter of the LSC contain rules on the fees to be applied.
- (viii) **Confirmation of votes (new Article 527 bis of the LSC):** it is provided that when the vote has been cast by electronic means, the company shall be obliged to send the shareholder casting the vote an electronic confirmation of the receipt of his vote. Once the meeting has been held and within one month, the shareholder and the ultimate beneficial owner

may request confirmation that the corresponding votes have been duly recorded and counted by the company.

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

- (i) **Provision in the bylaws for shares with additional double voting for loyalty (new Article 527 ter):** the possibility is provided for the bylaws of the listed company to grant double voting rights to those shares that have been held by the same shareholder for a minimum period of two years (extendable by the bylaws) from the registration of the shares in the special register referred to in Article 527 septies of the LSC<sup>18</sup>.

Double voting may be extended to shares allocated free of charge in the event of capital increases, in which case the new shares shall have the same seniority as those which gave rise to the right to such allocation. It is also established that loyalty voting shares do not constitute a separate class of shares within the meaning of Article 94 of the LSC (diversity of rights).

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

- (iii) **Calculation of loyalty votes (new Article 527 quinquies of the LSC):** unless otherwise provided in the bylaws, double loyalty votes shall be calculated for the purposes of the quorum and majorities required for the adoption

<sup>17</sup> Under Articles 497, 497 bis, 520 bis, 520 ter, 522 bis, 524, 524 bis and 527 bis.

<sup>18</sup> Se permite de este modo, modificar la proporción entre el valor nominal de la acción y el derecho de voto como excepción a lo previsto en los artículos 96.2 y 188.2.

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of resolutions.<sup>19</sup> The statutory limitations on the maximum number of votes per shareholder shall also apply, if applicable, to shareholders holding shares with loyalty votes. Loyalty votes will also be taken into account for the purposes of calculating significant shareholdings (both in the securities market and in the specific framework applicable to credit institutions<sup>20</sup>) and voting rights with regard to the rules governing takeover bids.

**(iv) Extinction clause and elimination of the bylaw provision for loyalty voting (new Article 527 sexies of the LSC):** the bylaw provision for double loyalty voting:

- it must be renewed, five years after its approval, complying with the same requirements of Article 527 quater; and
- may be eliminated, at any time, by the general meeting with the quorums and majorities provided for in Article 201.2 of the LSC<sup>21</sup> (without counting double votes in the event that more than 10 years have elapsed since the approval by the meeting of the statutory provision relating to the double vote for loyalty).

**(v) Special register of shares with double voting rights (new Article 527 septies of the LSC)<sup>22</sup>:** the special register of shares with double voting rights will include the shareholder information provided for in Article 497.1 of the LSC<sup>23</sup>, which the company must promptly provide to any

<sup>19</sup> For this purpose, the list of attendees shall specifically state the number of shares held by the shareholders (present or represented) and the number of votes corresponding to such shares.

<sup>20</sup> Specifically, for the purposes of the provisions of Chapter III of Title I of Law 10/2014, of 26 June, on the regulation, supervision and solvency of credit institutions.

<sup>21</sup> Quorum and qualified majorities applicable to amendments to the bylaws.

<sup>22</sup> An express legislative delegation is included to specify other technical and formal aspects related to this special register of shares with double voting. Specifically, through an Order of the Minister of Economic Affairs and Digital Transformation or, with his express authorisation, through a Circular of the National Securities Market Commission.

<sup>23</sup> The shareholder information provided for in Article 497.1 includes: (i) the shareholder's name and contact details; including the full address and, if available, email address of the shareholder and, where the shareholder is 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 held; 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 the shareholder holds such shares.

shareholder requesting it. The applicable data protection regulations under the terms of Article 497.3 of the LSC shall apply to such information.

Shareholders wishing to obtain double voting rights must request registration in the register, indicating the number of shares they wish to hold and must prove their uninterrupted ownership for a minimum of two years from the date of registration. Furthermore, these shareholders may, at any time, communicate their total or partial waiver of the double vote to which they may be entitled. This communication and the manner in which the uninterrupted ownership of the number of shares must be accredited to the company may be established in the bylaws.

**(vi) Double voting for loyalty in companies requesting admission to trading on a regulated market (new Article 527 octies of the LSC):** for companies requesting admission to trading of their shares on a regulated market, the possibility is established, with effect from the date of admission to trading of the shares, of: (a) including the statutory provision relating to double voting for loyalty (by resolution adopted pursuant to Article 527 quater of the LSC); and (b) creating a special register of shares with double voting. It also establishes the possibility of registration and accreditation of uninterrupted ownership of the shares<sup>24</sup> prior to the admission to trading of the company's shares, in which case the double vote is attributed to the shares registered as of the date of admission.

**(vii) Calculation and accreditation of the loyalty period (new Article 527 nonies of the LSC):** the certificate issued for this purpose by the entity in charge of the book-entry register shall 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 from the date of registration.<sup>25</sup>

**(viii) Loyalty voting share disclosure system:** the CNMV<sup>26</sup> must be notified and information<sup>27</sup> must be published on the company's website on the number of double voting shares existing at any given time and those registered shares pending compliance with the loyalty period established in the bylaws.

<sup>24</sup> Durante el período mínimo de dos años o el plazo superior que se establezca en estatutos.

<sup>25</sup> Said accreditation will take place prior to the end of the period of anticipated certification prior to a new general meeting.

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- (ix) **Transfers of shares by the shareholder with double voting rights (new Article 527 decies of the LSC):** as a general rule, the transfer of the affected shares will cause the extinction of the double voting rights. Specifically, such extinction will occur as a result of the direct or indirect transfer or transfer by the shareholder of the number of shares, or part thereof, to which the double vote is associated, even free of charge, and from the date of the assignment or transfer.

However, unless otherwise provided in the bylaws, the aforementioned extinction of the double vote shall not apply to transfers occurring for any of the following reasons: (a) transfers between family members<sup>28</sup>; (b) any structural modification affecting the shareholder company or the issuing company<sup>29</sup>; or (c) transfer between companies of the same group.

In accordance with the provisions of Article 527 ter of the LSC, the additional loyalty vote will automatically benefit the shares allocated free of charge on the occasion of capital increases in relation to shares with loyalty vote already held.

- (x) **The ultimate beneficial owner of the shares other than the shareholder (new Article 527 undecies of the LSC):** in the event that there is an ultimate beneficial owner of the shares (in the terms of Article 497 bis of the LSC)<sup>30</sup>, the obligation to prove compliance with the loyalty period established in the bylaws must be complied with respect to the ultimate beneficial owner. The extinction of the double loyalty vote is established by the change of the ultimate beneficial owner of the shares unless this change occurs as a consequence of one of the transfers exempted in Article 527 decies of the LSC.

**5. Board of Directors**

- (i) **Necessary nature of the board of directors (Article 529 bis):** it is established that the directors may only be natural persons and paragraph

<sup>27</sup> The information to be included on the company's website on loyalty voting shares must always be up to date.

<sup>28</sup> Succession mortis causa, attribution of shares to the spouse in the event of dissolution and liquidation of the community of property, dissolution of community of property or other forms of marital community, such as gifts between spouses, persons bound by analogous personal relationship or between ascendants and descendants, except in the case of controlling shareholders, in which case the status of shareholder with double voting rights shall be submitted to a vote under the terms determined in the bylaws.

2 relating to the procedures for the selection of directors is removed. In this regard, the reference to natural persons representing a director in Article 529 decies of the LSC is also removed.

In accordance with the first transitory provision, the requirement that the directors of listed companies be natural persons will only be applicable to appointments, including renewals, occurring from the month following their publication in the BOE. As long as there are still directors who are legal persons, the provisions of Article 529 decies, section 7 of the LSC, deleted by virtue of section 23 of Article 3 of the Act, shall apply to the natural persons who represent them.

- (ii) **Non-delegable powers (Article 529 ter of the LSC):** the approval of related-party transactions is referred to the provisions of the new Chapter VII bis of Title XIV (Articles 529 vicies and following of the LSC).
- (iii) **Audit Committee (Article 529 quaterdecies of the LSC):** a new function is added to the Audit Committee, that is contained in section g), and the previous section g) is reworded and expanded to become h), which is as follows: (a) to report on related-party transactions to be approved by the general meeting or the board of directors and to supervise the internal procedure for those whose approval has been delegated; and (b) to report to the board of directors, in advance, on the matters provided for in the law, the bylaws and the board regulations and in particular on financial information and the management report (which shall include, where appropriate, the mandatory non-financial information that the company must periodically make public) and the creation or acquisition of holdings in special purpose entities or entities domiciled in tax havens.
- (iv) **Remuneration of directors in their capacity as such (Article 529 septdecies of the LSC):** this article is reworded without amending its substance so that the remuneration of directors in their capacity as such shall: (a) comply with the content of the bylaws (Article 217); (b) be in accordance with the remuneration policy, which shall establish

<sup>29</sup> Provided that, in the latter case, the company resulting from the structural amendment provides for double voting shares in its bylaws.

<sup>30</sup> The person on whose behalf the intermediary entity acts as a shareholder by virtue of the accounting record, directly or through a chain of intermediaries.

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the maximum annual amount for all directors in their capacity as such and the criteria for setting it (Article 529); and (c) be set individually by the board of directors (following a report from the appointments and remuneration committee).

- (v) **Remuneration of directors for the performance of executive duties (Article 529 octodecies of the LSC):** the regulation of the remuneration of executive directors is substantially amended, so that it must (a) conform to the content of the bylaws (Article 217 of the LSC) and to the contracts approved under Article 249 of the LSC (the express provision that the remuneration of executive directors is 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).
- (vi) **Approval of the directors' remuneration policy (Article 529 novodecies of the LSC):** it adds that proposals for new remuneration policies must be submitted to the general meeting before the end of the last year of application of the previous policy, and the application of the new policy may be determined from the moment of its approval. Furthermore, section 3 establishes a series of requirements that the remuneration policy must comply with, in order to align the interests of the directors with those of the company and to strengthen transparency by establishing the remuneration items clearly and precisely

Companies are permitted 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 components that may be subject to the exception are specified in the policy; 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.

Finally, as an exception to the maximum duration of three financial years, the temporary extension of the remuneration policy is regulated: (a) if the proposal for a new remuneration policy is rejected by the general meeting, and a new remuneration policy proposal must be submitted for approval at the next ordinary general meeting; and (b) if the annual report on remuneration is rejected by the annual general meeting, the company may only continue to apply the remuneration policy in effect until the next annual general meeting.

According to the first transitory provision, the amendments introduced in this article will enter into effect six months after their publication in the BOE. Companies must submit the remuneration policy adapted to these amendments for approval at the first general meeting held after that date.

**6. Related transactions**

A new Chapter VII bis is introduced in Title XIV of the LSC, devoted entirely to related-party transactions, the obligations of which will not apply until two months after the entry into force of the Act.

- (i) **Definition of related party transactions (new Article 529 vicies of the LSC):** related party transactions are understood to be 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 in accordance with International Accounting Standards. Paragraphs 2<sup>31</sup> and 3<sup>32</sup> of this article list several exceptions to the provisions of paragraph 1.

<sup>31</sup> As an exception to the provisions of the preceding paragraph, the following shall not be considered related-party transactions: a) Transactions carried out between the Company and its wholly-owned subsidiaries, whether directly or indirectly, without prejudice to the provisions of Article 231 bis. b) The approval by the board of the terms and conditions of the contract to be entered into between the company and any director who is to perform executive functions, including the chief executive officer, or senior officers, as well as the determination by the board of the specific amounts or remuneration to be paid under such contracts, without prejudice to the duty of abstention of the director concerned provided for in Article 249.3. c) Transactions entered into by credit institutions based on measures intended to safeguard their stability, adopted by the relevant authority responsible for prudential supervision within the meaning of European Union Law.

<sup>32</sup> Transactions carried out by a company with its related party subsidiaries or investees shall also not be considered related-party transactions, provided that no other party related to the company has an interest in such subsidiaries or investees.

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**AMENDMENTS MADE TO THE LSC: LISTED COMPANIES**

- (ii) **Publication of information on related transactions (new Article 529 novodicies of the LSC):** this new article regulates the system of disclosure of this type of transaction, obliging companies to publicly announce, at the latest at the time of their execution, the related transactions carried out by the company or companies of its group and which reach or exceed 5% of the total assets or 2.5% of the annual amount of the annual turnover.

The announcement must: (a) be published in an easily accessible place on the corporate website; (b) be communicated to the CNMV for public dissemination; and (c) be accompanied by the report of the audit committee referred to in section 3 of Article 529 novodicies of the LSC, assessing whether the transaction is fair and reasonable for the company and the shareholders other than the related party.

- (iii) **Approval of related-party transactions (new Article 529 novodicies of the LSC):** 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 most recent annual balance sheet approved by the company<sup>33</sup>, while the board of directors will be authorised to approve all other related-party transactions<sup>34</sup>. As an exception, the board of directors may delegate to the chief executive officer the approval of ordinary intragroup transactions under market conditions and transactions not exceeding 0.5% of the company's net turnover.

As a general rule, when a related-party transaction must be approved by the shareholders' meeting or by the board, it must be subject to a prior report from the audit committee.

- (iv) **Calculation rules (new Article 529 novodicies of the LSC):** it is established that related-party transactions entered into with the same counterparty in the previous 12 months shall be aggregated to calculate the total value of the transactions. Also, it clarifies that, in the case of groups of companies, the references in Chapter VII bis to assets or annual turnover are understood to refer to the consolidated accounts.

<sup>33</sup> 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.

<sup>34</sup> At the board meeting, the director in question, or the director representing or related to the shareholder in question, must abstain from participating in the deliberation and voting on the resolution. Directors related to the parent company in intra-group transactions are exempt from the above.

**7. Corporate governance obligations**

- (i) **Inclusion of the corporate governance and remuneration report in the directors' report (Article 538 of the LSC):** this introduces the obligation for listed companies to include the annual report on directors' remuneration as part of the contents of the directors' report.
- (ii) **Annual corporate governance report (Article 540 of the LSC):** two new sections are added to Article 540.4. c) of the LSC, such that the minimum content of the corporate governance report must include, with respect to the structure of the company's administration, in addition to (a) details of the positions of director, administrator or manager, or representative thereof, held by 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, other than those provided in the preceding section.
- (iii) **Annual report on directors' remuneration (Article 541 of the LSC)<sup>35</sup>:** the obligation to make the annual report on directors' remuneration available on the website of the company and the CNMV free of charge for a minimum period of 10 years is added. Section 5 includes detailed information on the remuneration of each director that will form part of the contents of the annual report on directors' remuneration.<sup>36</sup> This section reinforces the legal coverage of Ministerial Order ECC/461/2013, of 20 March<sup>37</sup>.

<sup>35</sup> The amendments introduced in Article 541 of the LSC, will enter into effect for the annual reports on directors' remuneration corresponding to financial years ending on or after 1 December 2020;

<sup>36</sup> a) the total remuneration earned in the financial year broken down into its components, the relative proportion of fixed and variable remuneration, an explanation of how the total remuneration earned complies with the applicable and previously adopted remuneration policy, in particular how it contributes to the long-term and sustainable performance of the company, and information on how the performance criteria have been applied, b) the total annual amount earned and the change in the year in the following categories: the director's remuneration, the company's performance and the average remuneration on a full-time equivalent basis of the company's employees other than the directors during at least the five most recent financial years, presented together in such a way as to allow comparisons to be made, c) any remuneration from any company belonging to the same group, d) the number of shares and stock options or any other financial instruments whose value is linked to the value of the shares granted or offered and the main conditions for the exercise of the rights, including the price and the date of exercise, as well as any changes thereto, e) information on the use of the option to demand the return of the variable remuneration; f) information on any deviation from the procedure for the implementation of the remuneration policy referred to in Article 529. 2 and any exceptions applied in accordance with Article 529 novodicies.5, including an explanation of the nature of the exceptional circumstances and an indication of the specific components that are the subject of the exception.

<sup>37</sup> Order ECC/461/2013, of 20 March, which determines the content and structure of the annual corporate governance report, the annual report on remuneration and other information instruments of public limited companies, savings banks and other entities that issue securities admitted to trading on official securities markets.

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#### 8. Additional provisions

- (i) **Seventh additional provision, supervisory powers of the CNMV:** the seventh additional provision is amended to update the list of precepts that are considered rules for the regulation and discipline of the securities market and, therefore, are under the supervision of the CNMV.
- (ii) **Ninth additional provision, board of directors' committees:** the ninth additional provision is amended to add that the system of the appointments and remuneration committee provided for in Article 529 quinquies will also apply to companies issuing securities other than shares admitted to trading on regulated markets (as well as the system of the board of directors and audit committee provided for until now).

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.

## SECCIÓN III

**MODIFICACIONES INTRODUCIDAS EN LA LMV****1. Delisting tender offer**

Article 82 of the LMV 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 shares 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.

**2. Quarterly financial information**

Article 120 of the LMV is deleted to eliminate the obligation of issuers whose shares are listed on regulated markets to publish quarterly financial information (interim management statement).

Article 234.2 of the LMV, relating to the CNMV's powers of intervention, is also amended to allow the CNMV to require the publication of quarterly information.

**3. Loyalty shares**

It establishes that in the event that a shareholder reaches a number of voting rights equal to or greater than 30%, due to the variation in the total number of voting rights of the company arising from the existence of shares with loyalty voting rights, such shareholder may not exercise the voting rights in excess of such percentage without making a tender offer for the entire share capital, within 3 months of the date on which such threshold was exceeded, and the rules relating to the determination of the equitable price shall apply. It shall not be mandatory to make a bid when:

- (i) the number of shares necessary to reduce the excess voting rights is disposed of by the person obliged to make the bid; or
- (ii) the voting rights are waived within 3 months of the date on which such threshold was exceeded, provided that, in the meantime, the voting rights in excess of such percentage are not exercised; or
- (iii) a waiver is obtained from the CNMV.

**4. Proxy advisors (new section X of the revised text of the LMV)**

The concept of proxy advisors is regulated. Proxy advisors are defined as legal persons who professionally and commercially analyse the information that listed companies are legally obliged to publish and, where appropriate, other types of information, in order to advise investors on the exercise of their voting rights by means of analysis, advice or voting recommendations.

Several obligations are thus imposed on proxy advisors who provide their services in relation to companies that have their registered office in an EU Member State and whose shares are listed on a regulated market or multilateral trading facility that is located or operates in an EU Member State, provided that the proxy advisor:

- (i) has its registered office in Spain;
- (ii) does not have its registered office in an EU Member State and has its principal place of business in Spain; or
- (iii) has neither its registered office nor its principal place of business in an EU Member State and has an office in Spain.

Proxy advisors shall comply with the following obligations:

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

## SECCIÓN III

**MODIFICACIONES INTRODUCIDAS EN LA LMV**

- (ii) Annually publish a report which shall contain detailed information on their research, advice and voting recommendations so that their clients are duly informed of the accuracy and reliability of their activities. In particular, they shall report on:
  - methods and models applied;
  - sources of information used;
  - procedures implemented to ensure the quality of its services and the qualifications of its personnel;
  - degree and manner of taking into account the conditions of the market environment and the listed company in question;
  - voting policies applied to each market;
  - channels of communication with the companies that are the subject of their work;
  - prevention and management of potential conflicts of interest; and
  - limitations or conditions on the recommendations issued.
- (iii) Identify and promptly disclose to their clients any conflict of interest or business relationship that may influence the provision of their services, and the measures adopted to eliminate, mitigate or manage such conflicts.

Also, amendments are introduced to the system of offences and penalties regulated in the LMV, these include breaches of these obligations by proxy advisors.

**5. Prospectuses**

- A.** Obligation to publish a prospectus (Article 34 of the LMV): The threshold above which a securities issue requires the preparation and publication of an informative 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 considers it appropriate due to the characteristics of the issue, thus maintaining investor protection.
- B.** Obligations relating to the placement of issues without a prospectus (Article 35 of the LMV): Article 35 of the LMV is amended, which until now referred to the concept of a public offering and the exceptions to the publication of a prospectus (and which are now included in the Prospectus Regulation) so that it now regulates (in accordance with the provisions of paragraph 3 of Article 35 of the

LMV in its previous wording) the cases of mandatory intervention of an entity authorised to provide investment services, which will have to (i) validate the information to be delivered to investors and (ii) generally supervise the marketing process in the placement of the following issues, which are addressed to the general public using any form of advertising communication, not subject to the obligation to publish a prospectus:

- (i) issues of promissory notes with a term to maturity of less than 365 days;
- (ii) issues addressed to less than one hundred and fifty investors per Member State excluding qualified investors; or
- (iii) issues requiring a minimum investment of EUR 100 thousand or more or for a total amount in the European Union of less than EUR 8 million, calculated over twelve months.

This shall not apply to the exercise of the activity of participatory financing platforms. In any case, the CNMV may require that these placements comply with the obligation to publish a prospectus, depending on the complexity of the issuer or the financial instrument in question.

**6. Syndicate of bondholders (Article 42 of the LMV)**

Article 42 of the LMV 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. We consider that the reference to this second paragraph should be interpreted as a reference to the third paragraph of Article 34 of the LMV<sup>38</sup>.

<sup>38</sup> “Under Article 3(2) of Regulation (EU) No 2017/1129 of the European Parliament and of the Council of 14 June 2017, there shall be no obligation to publish a prospectus where offers of securities are not subject to notification under Article 25 of that Regulation, and the aggregate amount of each such offer in the Union is less than EUR eight million, such limit to be calculated over twelve months.”

## SECCIÓN III

### MODIFICACIONES INTRODUCIDAS EN LA LMV

#### 7. Adjustments in relation to Regulation (EU) No. 2017/1129 of the European Parliament and of the Council of 14 June 2017 (Prospectus Regulation)

Adjustments are made to ensure consistency between the LMV and the Prospectus Regulation:

- (i) Articles 37 and 40 of the LMV, which until now regulated the content of the prospectus and the preventive measures to be applied in the event of possible irregularities in the public offering, respectively, are deleted.
- (ii) Cross-references to national regulations are amended, which are now updated to the respective references to the Prospectus Regulation, or new references to this regulation are included.
- (iii) The regime of offences and sanctions is updated to include references to the Prospectus Regulation.
- (iv) The Prospectus Regulation is included among the matters whose non-compliance may be reported to the CNMV through the reporting channel for offences.
- (v) (v) The CNMV is designated as the competent authority for the application of the Prospectus Regulation, and its responsibility for the authorisation of the prospectus is explicitly recognised (new Article 234.15 and Article 39 of the LMV).

#### 8. Other amendments

- (i) Given that Regulation (EU) 596/2014 of the European Parliament and the Council of 16 April 2014 on market abuse already regulates the obligations of directors to disclose significant shareholdings, Article 125.5 LMV is deleted, thus avoiding the duplication of reporting obligations on the part of the directors.
- (ii) The seventh additional provision of the LMV is amended to exempt from the obligation to prepare the annual corporate governance report those issuers of securities that do not have to disclose their annual financial report, as well as the ICO and any other public law entities, and those entities for which Spain is not their home Member State.
- (iii) Under the amendments introduced in the LSC, references to “official secondary market” are updated to “regulated market”.
- (iv) A new Article 224 bis of the LMV is introduced, relating to the policy of involvement of investment services companies and credit institutions that provide discretionary and bespoke portfolio management services, and to the obligation to publish on their website said policy and the manner of their vote in the general meetings of the companies in which they hold shares.

## SECTION IV

### OTHER RELEVANT ISSUES

#### 9. Other amended regulations

The Act amends, in addition to the LSC and the LMV, the following provisions:

- (i) The LIIC and Law 22/2014, in order to oblige the management companies of these institutions and entities to prepare and publish an involvement policy, which must explain, among other issues, how they integrate the involvement of the shareholders in their investment policy and how they have exercised, if applicable, the voting rights in the general shareholders meetings of the companies in which they invest, in particular, in the most important decisions and, if applicable, the use of the services of voting advisors.
- (ii) The C.Com, to expand on the section of the statement of non-financial information corresponding to information on corporate and personnel-related matters, and to detail the mechanisms and procedures available to the company to promote the involvement of employees in the management of the company, in terms of information, consultation and participation.
- (iii) Law 22/2015, to, among other issues, include the annual report on directors' remuneration among the information whose existence must be checked by the auditor when analysing the management report of listed companies, and adjust the requirement to establish an audit committee to public interest entities when they are dependent entities in group structures.

#### 10. Errors

The following discrepancies have been identified, which have not been corrected in the version of the Act published in the BOE:

- (i) Fifteenth additional provision: it refers to 25% of the number of shares comprising the equity capital at the time of the authorisation provided for in Article 511 when Articles 504 and 511 refer to 20%.
- (ii) First transitory provision: Paragraph 2 refers to financial years ending on 1 December when it should read 31 December.

- (iii) Article 6, paragraph 11: Article 42 of the LMV 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. We understand that the reference to this paragraph should be interpreted as referring to the third paragraph of Article 34 of the LMV.

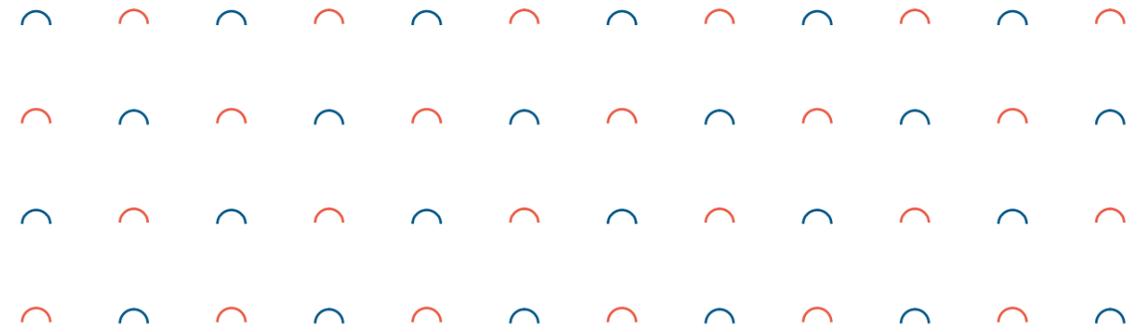
We understand that these are errors that will be corrected using a regulatory amendment included in a Royal Decree-law to be approved shortly.

#### 11. Entry into effect and transitional regime

The Act will enter into effect twenty days after its publication in the BOE. However, as stated in the different sections of this document:

- (i) the amendments introduced in Article 529 novodecies of the LSC (Approval of the directors' remuneration policy) will come into effect six months after their publication in the BOE. Companies must submit the remuneration policy adapted to these amendments for approval at the first general meeting held after that date;
- (ii) the amendments introduced in Article 541 of the LSC (annual report on directors' remuneration), will enter into effect for the annual reports on directors' remuneration corresponding to the financial years ending on or after 1 December 2020;
- (iii) the obligations established in the new Chapter VII bis of Title XIV of the LSC (related-party transactions) will not apply until two months after the entry into effect of this Act;
- (iv) the requirement that directors of listed companies must be natural persons shall only apply to appointments, including renewals, occurring one month after publication in the BOE; and
- (v) the reporting obligations provided for in the amendment to Article 49, paragraph 6 of the C.Com (procedures to encourage the involvement of employees in the management of the company) will enter into effect twelve months after their publication in the BOE.

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