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Shareholders' Rights & Shareholder Activism

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Contents

SCA Legal is an independent Spanish business law firm, established in 2001, with offices in Madrid and representative offices in São Paulo (Brazil) and Buenos Aires (Argentina). The firm counts on a team of lawyers used to working on international transactions involving different sets of laws, with the flexibility to adapt to the clients' needs, a reliable work method underpinned by a solid body of experience, and a cost/benefit approach. Initially, the firm specialised in commercial and corporate law. Now that its practice has expanded into other areas, the commercial and corporate practice continues to thrive, along with the enforcement of shareholders' rights and other company law matters.

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1. Shareholders' Rights

1.1 Types of Company

In Spain, the law (the Restatement of the Spanish Companies' Act approved by Royal Legislative Decree 1/2010, as of July 1st, and amended by, among others, Laws 1/2012, 14/2013, 5/2015 and 11/2018), provides three types of companies that, in contrast to what succeeds with partnerships, rely on capital subscribed and paid by the shareholders:

- Sociedad Anónima;
- Sociedad Limitada; and
- Sociedad Comanditaria por acciones.

All three of these types of company issue capital units, to be subscribed and paid by the shareholders, but the regime of those units and the rights and liabilities of those who own them are different in each of those companies. In addition to these three main types, the Restatement of the Companies Act (SCA) creates a fourth type, that of the so-called Sociedad Nueva Empresa, which is a special type of Sociedad Limitada provided for certain small ventures promoted by physical persons, and develops the regime of the European Company, as provided for in EC Regulation No 2157/2001, of 8 October 2001, on the Statute for a European company (SE). The most important by far of these four types of Spanish companies are those of Sociedad Limitada and Sociedad Anómina, as more than 95% of existing Spanish companies are organised in accordance with one of these two types. Although, in both of these, liability of the shareholders for debts of the company is limited to the amount of share capital subscribed by them, there exist important differences between them in terms of, among others, minimum share capital required, rights of the capital-holders, restrictions to the transmission of capital units, listing of shares in stock exchanges and rules governing general meetings and management.

Whereas the Sociedad Limitada is a type of company provided for small- to mid-size ventures, with a small number of capital-holders whose capital units cannot be traded in a stock exchange and which are subject to several transmission restrictions, the Sociedad Anónima provides for larger ventures and a higher number of shareholders and allows for fewer transmission restrictions than those provided for the former. Actually, the Sociedad Anónima was devised with the business corporation or joint-stock company provided in other jurisdictions in mind, its regime being similar to that of the *Aktiengesellschaft*, in German-speaking countries, and the *Societé Anonyme*, in countries where French is spoken. As for the Sociedad Comanditaria por Acciones, its regime is similar to that of the Sociedad Anónima, except insofar as at least one of the shareholders in the former is fully liable for the company's debts.

Of the four main types of companies provided in the SCA, only the Sociedad Anónima (SA) and the Sociedad Comanditaria por Acciones have their capital divided in shares represented by titles that can be listed in an official stock exchange (securities). In this chapter, unless otherwise expressly mentioned, our analysis will concentrate on the regime of companies organised as SAs.

Only companies organised as an SA or a Sociedad Comanditaria por Acciones can be public, in the sense that only such companies can issue shares (Article 92 (1) SCA) and only share-issuing companies can have their share capital listed on an official stock exchange. Therefore, with the exception of those two types of companies, which can be either public or private, the remaining types – the Sociedad Limitada and the Sociedad Nueva Empresa - are necessarily private.

In accordance with the rules set forth in the Treaty on the Functioning of the European Union (Article 63), Spain imposes no restrictions that prevent any physical person, company or any other type of entities, either Spanish or foreign, including foreign public bodies, from being shareholders of an SA.

Nonetheless, as permitted by Article 65 of the aforementioned treaty (TFEU), Spain had approved the Royal Decree 664/1999, which establishes certain rules applicable to investments made by foreigners, ie, physical persons, companies and other bodies not resident or established in Spain - in Spanish companies and other assets, the most important of which is that of notifying the Spanish authorities of any investments and divestments made in Spain by such persons. Though the rule is that the notification is due after the transaction has been carried out (Article 4.2 b)), if the transaction is performed by a person or company established in a territory qualified by Spanish legislation as a tax haven, the notification needs to be performed ex ante (Article 4.2 a) of Royal Decree 664/1999).

In addition, and also as allowed by Article 65 of the TFEU, Royal Decree 664/1999 excludes investments in the area of defence (manufacturing and commerce of guns, munition, explosives and war equipment) from the EU regime of free movement of capital. Pursuant to its Article 11, investments made by foreigners in this area need to be authorised by the Spanish government, following a request made by the prospective investor before the Ministry of Defence and upon proposal of the corresponding Minister. Nevertheless, in the case of investments in public companies operating in the defence sector, the authorisation is necessary only if the shares to be acquired represent more than 5% of the issued share capital or, where they do not, if they somehow allow the prospective investor to obtain a seat on the board of directors.

1.2 Type or Class of Shares

The SCA devises a basic distinction between ordinary and preferred shares (Article 98). Preferred shares bear the same rights as those of the ordinaries, with the exceptions provided in Articles 98 to 101 and 102 (2) of the SCA (Article 102 (1) of the SCA).

Although Article 94 (1) of the SCA sets the rule whereby all shares give the same rights to all shareholders, this rule does not prevent the articles of association from establishing different types of shares. Where the articles of association provide more than one type of share, this rule would apply only within each of the types of shares provided.

The SCA does not establish any rules on which types of shares can be devised in the articles of association. Therefore, it must be understood that the only limit to the assignment of rights to a certain type of share would be the breach of a mandatory legal provision (eg, no type of share can give shareholders the right to perceive an interest, as this would breach the rule set out in Article 96 (1) of the SCA).

One type of preferred shares specifically provided by the SCA is that of shares with no voting rights (Article 99 of the SCA), which are mandatorily entitled to perceive a minimum annual dividend, fixed or variable, as provided in the company's articles of association (Article 99 (1) of the SCA). In the case of losses or profits insufficient to reach the minimum dividend, the unpaid part of this should be paid in the following five years. For the period during which this dividend lasts unpaid, preferred shares will carry voting rights as if they were ordinary and while keeping their economic advantages (Article 99 (2) and (3) of the SCA).

Any amendments to the articles of association that in any way affect the rights borne by no-voting shares need to be approved by the shareholders controlling the majority of this type of share (Article 103 of the SCA).

In the case of public companies, the SCA allows them to issue callable shares, in an amount of up to 25% of the issued share capital, which can be redeemed either by the issuing company, the corresponding shareholders or by both of them (Article 500 (1) of the SCA). These shares need to be paid in full at the time of their issuance (Article 500 (3) of the SCA).

Redemption of callable shares needs to be covered by non-distributed profits, by reserves or with newly thereto-issued share capital (Article 501 (1) of the SCA). In the event that none of these is available, redemption would be possible only with a share-capital reduction with refund of their value, as provided in Article 329 SCA (Article 501 (3) of the SCA).

1.3 Primary Sources of Law and Regulation

The primary source of law relevant to the SA, and notably to the rights of the shareholders of any company of such type is the Restatement of the Spanish Companies' Act, as approved by Royal Legislative Decree 1/2010, as of July 1st (SCA).

The SAs which are public companies are subject to Articles 495 and following of the SCA, which establish specific rules for those companies (on shares, the shareholders' meeting, management, shareholders' agreements, disclosure of information, etc) that somehow modify the regime applicable to non-public SAs.

For public companies, Royal Decree 1362/2007, as of October 19th, on transparency requirements in relation to information about issuers whose securities are admitted to trading on an organised exchange or other regulated market in the European Union, is also an important source of applicable law, insofar as it sets forth important rules on the disclosure of financial information and the shareholders that have achieved control over certain percentages of share capital.

Moreover, articles of association can be an important source of law for a company, insofar as the SCA leaves ground for the articles of association to devise other rules, provided these do not breach mandatory legal provisions. The same can be said of the regulations of the shareholders' meeting and the board of directors approved by the corresponding organs.

1.4 Main Shareholders' Rights

Pursuant to Article 93 of the SCA, shareholders' rights are essentially the following four:

- a right to participate and vote in general meetings and to defy resolutions adopted by any of these meetings on the ground of breaching the law or the articles of association of the company or any other applicable rules;
- a right to challenge decisions adopted by the directors on the ground of breaching the law or the articles of association of the company or any other applicable rules;
- a right to perceive dividends and, in the case of winding up, to receive the corresponding share of the remaining assets of the company after payment of all debts; and
- a right to subscribe newly issued share capital in proportion to the part already controlled by each shareholder.

In addition to those rights and unless otherwise provided in the articles of association of the company, Article 161 of the SCA gives the general meeting of shareholders a right to:

- give instructions to the directors; or
- subject the adoption by the directors of decisions on certain management issues to a previous authorisation by that organ.

Moreover, Article 27 (1) of the SCA allows for the articles of association of SA companies to provide certain economic rights in favour of the founding shareholders, whose value, whatever its nature, cannot exceed 10% of the annual profits available to all shareholders, for a period of up to ten years. The same rule applies to the promotors of an SA, if this has been set up under the regime of public subscription of shares provided in Articles 41-55 of the SCA.

Shareholders' rights, ie, rights that can be enforced before the company can be varied only by way of an amendment to the company's constitutional documents. Any agreement between shareholders regarding the modification of such rights that does not entail an amendment of the constitutional documents could never be enforced before the company. In any case, the enforceability of the amendment would depend on it being formalised in a public deed made before a public notary, which would then need to be registered with the Companies' Registry. Only thereafter would the amendment be enforceable against the company.

Shareholders' rights granted by the SCA are at a minimum level, that can be amplified by the articles of association, although they can in no way be reduced by them, unless the waiver of those rights is expressly provided in a piece of legislation. Therefore, articles of association can establish rights not provided by the law, provided that they do not breach any mandatory provision of the law. The articles of association can provide rights pertaining to a category of shares but not to a particular shareholder or shareholders, except in the case of the founding shareholders of an SA, as provided in Article 27 of the SCA.

1.5 Shareholders' Agreements / Joint Venture Agreements

Shareholders' agreements are agreements and as such are enforceable up to the point where they breach mandatory legislation. Shareholders' agreements are agreements between two or more shareholders of a certain (issuing) company. As this company is not a party to the agreements, it will not be bound by them.

Basically, shareholders' agreements rule on how certain shareholders of a company will perform their rights, notably their voting rights in the general meeting (eg, vote in certain terms on a certain matter during a certain period of time). In the event that a party breaches its obligations under the shareholders' agreement, eg, by voting B instead of voting A, as was ruled in a shareholders' agreement, this will not be a ground to invalidate the vote, as the company is not a party to the agreement. Nonetheless, any such breach of an obligation will give the other party(ies) to the shareholders' agreement the right to claim damages from the breaching party.

In the case of public companies, Articles 530 and following of the SCA establish certain rules regarding shareholders' agreements entered into by shareholders of companies that rule on voting in the general meeting and/or establish restrictions to the sale and purchase of shares.

The basic rule provided in the provisions of the SCA is the one whereby any of those agreements is subject to immediate notification to the company and the *Comisión Nacional del Mercado de Valores*, the Spanish Securities Exchange Commission (Article 531) (CNMC).

In the case of private companies, although shareholders' agreements are not subject to any sort of disclosure, Royal Decree 171/2007 anticipated the possibility of disclosure, either in the company's website or by means of its registration with the Companies' Registry, of shareholders' agreements entered into by relatives who have a common interest in the company, the so-called *protocolos familiares*. The decision to disclose such shareholders' agreements is in the hands of the directors, who need to evaluate whether or not the disclosure is in the interest of the company, although the shareholders who are affected will need to authorise the disclosure of their data that is included in the agreement.

In Spain, at least since the 80s, it has been quite common for shareholders to enter into shareholders' agreements. Nonetheless, the number and complexity of these agreements has increased substantially in the last few decades, along with the development of the Spanish economy (companies with higher share capital, which tend to demand more providers of equity, etc) and of the companies' legal framework (more complex corporate structures, new rules aimed at improving corporate governance, etc).

1.6 Rights Dependent Upon Percentage of Shares

The SCA provides several types of rights whose exercise by shareholders depends on the percentage of shares controlled by them. Among such rights, it is worth mentioning here the following ones:

- the right to attend a shareholder's meeting: up to 1‰ of the share capital as set in the articles of association (Article 179 (2)), except in the case of listed companies, for which Article 521 bis rules that the articles of association can limit this right to shareholders in control of a minimum number of shares that cannot be higher than 1,000;
- the right to challenge the validity of a decision adopted by the shareholders' meeting: 1% (Article 206 (1));
- the right to submit a draft of resolutions regarding matters included in the agenda of a shareholders' meeting of a listed company: 3% (Article 519 (3));
- the rights for which the control of 5% or 3% of the share capital is required, depending on whether the company is private or public:

a) the right to request the directors to call a shareholders' meeting (Article 168);

b) the right to file, on behalf of the company, a lawsuit against directors for damages caused by them, when, for certain reasons, the company does not file itself such lawsuit (Article 239);

- the right to request the Government to order the resume of a wound-up SA, in case the resume is deemed beneficiary to the Spanish company or the company's interest: 20% (Article 373 (1);
- the right to obtain information regarding an issue included in the agenda of a shareholders' meeting, if the directors have denied such information: 25% (Article 197 (4)).

1.7 Access to Documents and Information

Article 197 of the SCA grants shareholders the right to request the directors' information regarding any matters included in the agenda of a shareholders' meeting. This information needs to be requested at least eight days before the date of the meeting and the directors are requested to answer in writing before the meeting. The same right can be also exercised in the general meeting, in which case the directors will have seven days following that of the meeting to answer in writing.

The directors can deny the information requested by the shareholders when they consider that it is unnecessary for the protection of the rights of the requesting shareholder, or when there are objective reasons to think that such information, in the event of it being provided to the requesting shareholder, would be used with a view contrary to the interest of the company or its disclosure would damage the company's or that of any of its affiliates interest (Article 197 (3)), except if the request is filed by shareholders who control no less than 25% of the share capital, as in that case the disclosure of the information would be always mandatory (Article 197 (4)). The articles of association can lower this threshold to a lower percentage, but not lower than 5% (Article 197 (4)).

In the case of listed companies, Article 520 SCA lowers to five the number of days in advance provided in the stated Article 197 SCA for the request of information regarding any matters included in the agenda of a shareholders' meeting. In addition, it also gives the shareholders the right to request explanations regarding any information disclosed by the company to the CNMV since the previous shareholders' meeting and in relation to the auditing report.

All requests of information filed by the shareholders as well as the answers provided by the directors are to be published in the company's official webpage (Article 520 (2)), the existence of which is mandatory for listed companies (Article 11 bis (1) SCA).

In all other points and issues, the regime set forth in Article 197 of the SCA regarding the right of the shareholders to obtain information on the company applies in full to listed companies.

1.8 Shareholder Approval

Article 160 of the SCA provides for the issues that require the approval of shareholders in a shareholders' meeting, which include the approval of the accounts, the appointment of directors, the amendment of the articles of association, the performance of certain transactions with assets deemed essential to the company and the merger, winding-up and the relocation to a different country.

In addition to those specifically provided for by Article 160 of the SCA, any other piece of legislation, including any other SCA provisions, and as well as the company's articles of association, can subject a certain issue to the approval of the general meeting (eg, the sale of assets for which the approval of the general meeting would not be legally mandatory, the carrying out of certain business, the agreement not to engage in certain business activities, the issuance of bonds, etc).

In the case of public companies, in addition to those provided in Article 160 of the SCA, Article 511 bis of the same piece of legislation rules that the shareholders' meeting has also the following powers:

- to authorise that certain activities performed by the company be assigned to a subsidiary;
- the carrying out of any operation the effects of which are similar to those of the winding-up of the company; and
- the remuneration policy to be applied to the directors.

Furthermore, Article 161 of the SCA provides that, unless otherwise ruled by the articles of association, the shareholders' meeting has also the right to give instructions to the directors or to rule that certain management issues cannot be handled by the directors without its approval in advance.

1.9 Calling Shareholders' Meetings

The directors are the officers in charge of calling meetings of shareholders (Article 166 of the SCA), whenever they consider it convenient or mandatory in accordance with the law or the articles of association (Article 167 of the SCA). Nonetheless, shareholders also have a say on this, as, pursuant to Article 168 of the SCA, the directors must call a meeting of shareholders whenever one or more shareholders representing no less than 5% of the share capital request them to call a shareholders' meeting to rule on a certain issue. This percentage is lowered to three in the case of public companies (Article 495 (1) a) of the SCA).

Directors are requested to call a shareholders' meeting within two months following the date when minority shareholders have requested them to do so under Article 168 of the SCA (Article 168 2 of the SCA). If directors fail to comply with this obligation, shareholders can request that either

the Secretary of the Court or the Companies' Registry call a shareholders' meeting.

The call needs to be announced in the company's web page, if it exists and is in good standing in accordance with the rules set forth in Article 11 bis of the SCA; if it is not, the call should be published in the Companies' Registry Official Gazette and in a widely circulated newspaper in the province where the company is registered, unless otherwise provided for in the articles of association (Article 173 of the SCA).

For companies organised as SAs, Article 172 of the SCA allows shareholders controlling no less than 5% of the share capital of the company to request, in the first five days following the publication of the call, the publication of an addendum to the call, with additional points to be discussed and voted in the shareholders' meeting. Failure by the directors to proceed as requested no later than 15 days before the date set for the shareholders' meeting would make this void.

Pursuant to Article 174 of the SCA, the notice of the call for a shareholders' meeting needs to include at least:

- the company's name;
- the date and time of the meeting;
- the agenda of the matters to be discussed at the meeting; and
- the position held in the company by the person or persons calling the meeting.

In the case of public companies, the call of a shareholders' meeting must always be published in the Companies' Registry Official Gazette or in a nationwide widely circulated newspaper and in the webpages of the Spanish Securities Exchange Commission and in that of the company (Article 516 of the SCA). The notice of the call for a shareholders' meeting needs to include more information than the one required for companies in general in Article 174 of the SCA (Article 517 of the SCA) and additional information needs to be disclosed on the company's web page from the day of the announcement of the call (Article 518 of the SCA).

1.10 Voting Requirements and Proposal of Resolutions

In terms of the quorum required for the shareholders' meeting, Article 193 of the SCA rules that, in the first call, the meeting is deemed to be in good standing if no less than 25% of the share capital with voting is present or represented at the meeting, although the articles of association can establish a higher percentage. In the second call, where the attendance in the first call is lower than the requested quorum, no minimum attendance would be required unless otherwise ruled in the articles of association, which could request a lower minimum percentage of attendance for a second call, though in all cases to be lower than 25%.

Nevertheless, in the case of the shareholders' meeting called to discuss and vote upon any matters provided in Article 194 of the SCA (share capital increase or reduction and any other amendments to the articles of association, issuance of bonds, renunciation of the right of shareholders to subscribe to a share capital increase, merger of the company with another company, etc) in the first call, the meeting is deemed to be in good standing if no less than 50% of the share capital with voting is present or represented at the meeting. In the second call, required if the attendance from the first call is lower than the requested quorum, a minimum of 20% would be required. In both cases, the articles of association may request higher percentages of quorum.

Regarding voting requirements at shareholders' meetings, Article 201 (1) of the SCA provides that for a resolution to be deemed approved by the shareholders' meeting the requirement is a simple majority of favourable votes cast by the shareholders present or represented at the meeting. However, to rule on any of the matters stated in Article 194 of the SCA, if the share capital present or represented at the meeting is no less than 50%, the approval of the resolution would require an absolute majority of favourable votes; and if the share capital present or represented at the meeting is less than 50% in the terms provided in the previously mentioned Article 194 (2) of the SCA, the approval of a resolution would require a qualified majority of favourable votes of no less than two thirds of the present or represented share capital at the meeting (Article 201 (2) of the SCA).

Regarding the proposal of resolutions, as previously mentioned, in the case of companies organised as SAs, Article 172 of the SCA allows shareholders controlling no less than 5% of the share capital of the company to request, in the first five days following the publication of the call, the publication of an addendum to the call, with additional points to be discussed and voted upon in the shareholders' meeting. Failure by the directors to proceed as requested no later than 15 days before the date set for the shareholders' meeting would make this void.

1.11 Shareholder Participation in Company Management

The SCA does not grant the shareholders any rights to participate in the management of a company, as this right is clearly vested in the directors (Article 209). Nonetheless, as already stated, it provides that, unless differently ruled by the articles of association, the shareholders' meeting has the power to give instructions to the directors or to rule that certain management issues are subject to its approval (Article 161). Although this power is not to manage the company, it clearly conditions how and to what extent management powers are to be performed by the directors.

As for participation in the company's board of directors, although a shareholder does not have a right per se to sit on

the company's board of directors, she or he clearly has the right to vote on the appointment of directors in the general meeting. Therefore, depending on her or his voting power, each shareholder can in some way participate in the decision on who shall be the company's directors.

Based on the above, it is clear that, although shareholders do not actually participate in the management of companies, they clearly have powers to condition it, although those powers are in any case limited by the strength of the voting power of each shareholder.

1.12 Shareholders' Rights to Appoint / Remove / Challenge Directors

Shareholders have the right to appoint the directors in the constitutional deed (Article 22 of the SCA). In the case of SAs, this will be for the term set forth in the articles of association, which in no case can be more than six years, although without any renewal limits (Article 221 (2) of the SCA).

For any term after the initial one, the decision to appoint new directors is in the hands of the shareholders' meeting (Article 160 b) of the SCA), without detriment to the power of the board of directors to co-opt new directors to replace those who renounced their position or died before the end of the term for which they had been appointed (Article 244 of the SCA). In any case, any such appointment by the board of directors needs to be ratified by the shareholders (Article 244 of the SCA). Where the shareholders' meeting ratifies the co-option of a director, the shareholders who voted against the ratification can challenge this decision on the ground of it being illegal, under the general rules on challenging of corporate decisions set forth in Articles 204-207 of the SCA.

Removal of directors is always a power of the shareholders' meeting, even if any such removal has not been included in the agenda of the meeting (Articles 160 b) and 223 (1) of the SCA). In the case of companies organised as an SA, Article 224 of the SCA rules that any shareholder has the right to request the removal of a director if, after her or his appointment, a situation has arisen that makes her or him ineligible to hold the position, or if she or he has an interest opposite to the company's interest.

In addition, the approval, by the shareholders' meeting, of the filing of a lawsuit for damages against a director has ipso facto the effect of removing that director from her or his position (Article 238 (3) of the SCA).

Decisions taken by the board of directors can be challenged by shareholders controlling no less than 1% of the share capital within 30 days from the date those shareholders become aware of the decision, provided that no more than one year has passed since the adoption of the challenged decision (Article 251 (1) of the SCA). The grounds for challenging these decisions are the same as those applicable to the shareholders' meeting decisions and any breach of the rules of the board of directors (Article 251 (2) of the SCA).

1.13 Shareholders' Right to Appoint / Remove Auditors

The appointment of the company's auditors is a right of the shareholders, as provided in Article 264 (1) of the SCA, which provides that it is up to the shareholders' meeting to appoint the auditors before the end of the term which they will be auditing, for an initial period of no less than three and no more than nine years.

Auditors cannot be removed by the shareholders' meeting except in the case of just cause thereto (Article 264 (3) of the SCA). Pursuant to Article 266 of the SCA, where a just cause exists, either (i) the directors of the company or (ii) any person entitled to request the appointment of auditors can request either the court or the Companies' Registry with which the company is registered to remove the appointed auditors and appoint new ones.

In the case of companies deemed of general interest (banks, insurance companies and other companies, as set forth in Law 22/2015, as of July 20th, on accounts auditing) and there exists just cause thereto, shareholders with no less than 5% of the voting rights or of the share capital are also entitled to request the removal of the auditors on the terms provided in the aforementioned Article 266 of the SCA.

1.14 Disclosure of Shareholders' Interests in the Company

In private companies, shareholders are never required to disclose their interests in the company, if it is understood by these the percentage of share capital owned or controlled by them. Nonetheless, the company is subject to provide information to the authorities on who controls more than 5% of its equity, on tax grounds.

In the case of public companies, Article 497 (1) of the SCA allows them to request from *Sociedad de Gestión de los Sistemas de Registro, Compensación y Liquidación de Valores, S.A.* (IBERCLEAR), the company that acts as the depository of all securities traded in the Spanish stock exchanges, information on their own shareholders, including addresses and other data. This right is also attributed to shareholders controlling no less than 3% of the company's share capital, for the purpose of allowing them to have contact with the remaining shareholders with a view to protecting their rights and promoting their interests in common.

Moreover, the aforementioned Royal Decree 1362/2007, on transparency requirements in relation to information about issuers whose securities are admitted to trading on an organised exchange or other regulated market in the European Union, imposes on shareholders who acquire or dispose of shares of a Spanish listed company, to which voting rights are

attached, an obligation to notify the issuer and the CNMC of the proportion of voting rights of the issuer held by the shareholder as a result of the acquisition or disposal where that proportion reaches, exceeds or falls below the thresholds of 3%, 5%, 10%, 15%, 20%, 25% 30%, 35%, 40%, 45%, 50%, 60%, 70%, 75%, 80% and 90% (Article 23). This obligation also applies, among others, to any physical or legal person that, though not a shareholder, acquires or is entitled to perform voting rights corresponding to the shares, provided that the proportion of voting rights reaches, exceeds or falls below the stated thresholds and is a consequence of one or more of the acts set forth in Article 24 (1) of the same piece of legislation.

The aforementioned notification shall include the following information:

- the identity of the issuer with whom the holding is concerned;
- the event that, in accordance with this Royal Decree, gives rise to the obligation to give a notification;
- the resulting situation in terms of voting rights;
- the chain of controlled undertakings through which voting rights are effectively held, if applicable (including the names of the entities, the number of voting rights and the percentage held by each entity, provided that, considered individually, they hold 3% or more);
- the date on which the threshold was reached or crossed;
- the identity of the shareholder, even if that shareholder is not entitled to exercise voting rights under the conditions laid down in Article 24, and of the natural person or legal entity entitled to exercise voting rights on behalf of that shareholder (Article 34 (1) Royal Decree 1362/2007).

The notification to the issuer and to the Spanish Securities Market Commission shall be effected no later than four trading days after the date on which the person subject to the obligation does or ought to become aware of the circumstances giving rise to the obligation to notify in accordance with the applicable rules under Article 35 (Royal Decree 1362/2007).

1.15 Shareholders' Rights to Grant Security over / Dispose of Shares

As a rule, shareholders have the right to grant security interests over their shares (Article 121 (1) of the SCA). Nonetheless, in the event that the shares have been seized in court proceedings against the shareholder, the court will notify the company of this, which would allow it to waive the sale of the shares in auction to a third party, if the company either came up with an acquirer of the seized shares or acquired them for itself for a reasonable price fixed by an independent expert (Article 124 ex vi Article 125 of the SCA).

Unless otherwise provided for by the company's articles of association – which can impose restrictions on the disposal of nominative shares, including the agreement of the issuing company - the disposal of shares is not subject to any requirements or restrictions (Article 123 of the SCA).

Agreements are a means to create requirements or restrictions on disposal of shares. However, if they do not lead to an amendment of the articles of association, those agreements would not bind the (issuing) company and, as such, their breach would not affect the validity of a disposal of shares made in breach of the same agreements. Nonetheless, the breach of an agreement, for example, not to sell certain shares or not to sell them to a certain person or entity would allow the innocent party (the creditor of such an obligation) to claim damages for the breach of its right from the breaching party, under the general contract rules and contractual liability.

1.16 Shareholders' Rights in the Event of Liquidation / Insolvency

A company can be put into liquidation only if there exists a legal ground that ipso facto leads to it being wound up (Article 360 of the SCA) or if its winding-up has been ordered, either by the general meeting, on the ground of a legal ground thereto (Articles 363-364 of the SCA) or voluntarily (Article 368 of the SCA) or, in the event that the company has been declared insolvent by the court that is hearing the corresponding bankruptcy/insolvency case and a restructuring plan could not be approved by its creditors (Article 361 of the SCA).

In the period during which the company is in liquidation, it keeps its legal personality until liquidation has come to an end (Articles 371 of the SCA and 145 of Law 22/2003, as of July 9th, on insolvency).

Once a company has been declared insolvent and put into liquidation, the only right held by each shareholder is that of receiving the proportional part of the company's remaining proceeds from the sale of the company's assets, if any, after payment of all debts acknowledged in the proceedings. However, as a company put into liquidation is not only bankrupt but also insolvent, the proceeds from the sale of its assets should not be enough to pay all credits acknowledged in the proceedings and, as such, there should be no remaining proceeds available to the shareholders.

2. Shareholder Activism

2.1 Legal and Regulatory Provisions

Shareholder activism as such is not provided for by any Spanish legal or regulatory provisions. However, if shareholder activism is interpreted to mean an active exercise by the shareholders of their rights to rule on the matters provided in Article 160 of the SCA, it is clear that this matter is governed by the law, notably by the provisions in this

piece of legislation that cover the rights of shareholders and their general meetings. The fact is that, in recent years, the number and contents of shareholders' rights have been on the increase in Spain, with amendments to the SCA, on corporate governance matters, passed by Laws 3/2011 (which transposed the EC Directive 2007/36) and 31/2014.

With the approval of EU Directive 2017/828, amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, a reform of the SCA and of the mentioned Royal Decree 1362/2007 on corporate governance matters should be expected soon, notably on the ground that the deadline for the transposition of this new directive (19 June 2019) has already passed.

In accordance with the draft of the piece of legislation that will transpose the EU Directive 2017/828, as recently disclosed by the Ministry of the Economy, this reform, although in line with the reinforcement of shareholders' rights, would allow listed companies to adopt loyalty shares, something that could reduce the power of shareholders that have been so for less than two years, which is the most common scenario in the case of activist shareholders. Under this draft, the provision on loyalty shares allows the articles of association of listed companies to attribute more voting power to the shares owned for more than two years by the same person or entity, with a view to curbing short-termism in the management of listed companies, something usually associated with shareholder activism.

2.2 Level of Shareholder Activism

Shareholder activism has been on the rise in recent years, although it is still, by all accounts, less prevalent than in other jurisdictions such as the UK or the USA.

This increase is due both to the previously mentioned corporate governance changes in the legal environment, which have strengthened the powers of minority shareholders, and to the fact that, in recent years, the volume of share capital controlled by activist shareholders has grown substantially.

A prominent recent example of shareholder activism in Spain is that of LetterOne (a vehicle used by Mikhail Fridman, a Russian billionaire), which, with 29% of the share capital of DIA, a Spanish retail chain listed in the Madrid's Stock Exchange, in early 2019 launched a successful voluntary tender offer to acquire the remaining share capital of the company, notwithstanding having faced strong opposition from the board of directors and the then-controlling shareholders.

2.3 Shareholder Activist Strategies

In order to build their stake in a company, activist shareholders usually buy shares in the market and/or acquire other financial instruments that award them indirect voting power in the companies. In addition, with a view to strengthening their voting power, they seek to convince other shareholders to align themselves with their views on the company at the time of voting in the shareholders' meetings.

The typical agenda of an activist shareholder tends to be focused on the idea of increasing the value of the company and, as a consequence, increasing the value generated to the shareholders, either in terms of an increased share value and/or dividends distributed. With this idea in mind, activist shareholders typically come up with a proposal of measures that, in their view, would increase the value of the company. Examples of these proposed measures, the approval of which is actively pursued in the shareholders' meetings, are:

- the appointment and dismissal of directors;
- the challenge of the appointment of unfriendly directors and the denial of ratification of directors co-opted by the board;
- the denial of approval of certain investment measures proposed by the board of directors;
- the issuing of instructions to the board of directors on several management issues (divestments in no profitable areas of business, etc); and
- the payment of dividends and/or the purchase of its own shares by the company.

2.4 Targeted Industries / Sectors / Sizes of Companies

As in other countries, finance, services, retail, health and technology are the industries where more shareholder activism has been seen in recent years. However, it has been seen in many other sectors, notably in matters related to the approval of the boards' compensation.

2.5 Most Active Shareholder Groups

Professional investors (hedge funds, etc) tend to be more active than others, notably on the ground of being accountable before their clients in terms of the returns generated by the invested monies.

As a matter of fact, in their position of managers of their clients' money, professional investors are under pressure to generate returns and to generate them in very short periods of time. The need to generate returns in the short run is one of the reasons, probably the main one, why hedge funds and other professional investors are usually very active at the time of exercising their rights as shareholders. Being active as shareholders is the tool used by professional investors to improve management of the participated companies, with a view to generating value to them as shareholders of such companies.

2.6 Proportion of Activist Demands Met in Full / Part

In Spain, the information disclosed by the courts on the cases ruled each year, though organised in accordance with the

types of matters decided, does not include any data regarding the number of lawsuits filed by shareholders. Therefore, there is no information available regarding the number of activist demands upheld by the courts.

2.7 Company Response to Activist Shareholders

In the past, companies, and the shareholders in control of them, tended to react in a negative way to any approaches made by activist shareholders, which from the outset gave ground in the conflict with such shareholders to be solved in legal battles. For such battles, they counted on articles of association with provisions drafted with the intention of limiting the voting power of certain shares. Such limitation usually left the activist shareholders with less voting power than they would otherwise have had and, as such, caused them to end up with less than the required power for the approval of the measures they had in mind.

In recent times, however, the scenario has begun to change, and now companies tend to react, at least at the outset, in more friendly terms to the intentions of activist shareholders to change the company's landscapes, with a view to avoiding legal conflicts that, at the outset, no one can be sure of winning. This leads boards to be much more open to listening to what activist shareholders have to say on management issues, and, to a certain extent, to adapting management to their views.

In addition, with these ideas in mind, and backed by the controlling shareholders, boards are now much more oriented towards the generation of value to the shareholders than in the past. The more value is generated to the shareholders, the fewer the opportunities for activist shareholders to deploy any strategies aimed at increasing that value, as the "margin for improvement" is smaller than that which it could otherwise have been.

Nonetheless, tensions have not disappeared, notably on issues such as board control, where with the increase of share capital controlled by activist shareholders, conflicts are certainly on the rise. In particular, companies with poor performance, whose share price is depressed and/or that do not pay dividends, are at risk of suffering pressure from activist shareholders.

3. Remedies Available to Shareholders

3.1 Separate Legal Personality of a Company

All companies organised under the rules of the SCA have their own legal personality, which is completely distinct from that of its shareholders. A company acquires its own legal personality once it is registered with the Companies' Registry (Article 33 of the SCA).

3.2 Legal Remedies Against the Company

The SCA provides a right of shareholders to file a lawsuit against the company for any decisions adopted either by the directors or the shareholders' meeting in breach of the law, the articles of association, the rules of the shareholders' meeting of any other of the company's rules, or that somehow harms the interest of the company in favour of one or more shareholders or of any third parties (Article 204 (1)). In accordance with this provision, the interest of the company is deemed to be harmed by a corporate resolution in all cases where such a decision is adopted for the benefit of the majority shareholders, even if it does not actually result in damage to the company's assets.

The remedy provided with this lawsuit is the declaration by the courts that a certain decision adopted is illegal and, as such, void. The lawsuit can be filed by any shareholders, no matter how many shares they own and/or the percentage of share capital controlled by them.

3.3 Legal Remedies Against the Company's Directors

The SCA provides that the company's directors are liable before the company, the shareholders and the creditors for damages caused by any acts or omissions that breach:

- any rules provided by the law or the articles of association; or
- the duties inherent to their condition as directors (Article 236 (1) of the SCA).

The lawsuit for damages against directors is to be filed by the company, upon its approval by the shareholders' meeting, at the request of any shareholder. The filing of the claim is deemed approved if the majority of the votes cast in the shareholders' meeting approves it, as the articles of association are not allowed to request a higher majority for such an approval (Article 238 (1) of the SCA). As previously mentioned, this approval has ipso facto the effect of ending the appointment of the director against whom legal action has been approved by the shareholders' meeting (Article 238 (3) of the SCA).

Pursuant to Article 239 (1) of the SCA, minority shareholders controlling a percentage of the share capital that allows them to request the call of a shareholders' meeting under Article 168 of that piece of legislation, can file their claim, on behalf of the company (derivate action), when:

- the directors fail to call the requested shareholders' meeting;
- the filing of the claim, although approved by the shareholders' meeting, does not happen within one month following that approval; or
- if the shareholders' meeting denies the approval.

In cases in which the lawsuit against a director is based on the breach by these actions of her or his duty of loyalty before the company, the approval by the shareholders' meeting is waived by the aforementioned Article 239 (1) of the SCA, in such a way that the minority shareholders can file the lawsuit from the day when the damaging breach of the director's duty of loyalty has been committed, without the need to call a shareholders' meeting thereto.

In addition to the lawsuits filed by the company against its directors, Article 241 of the SCA sets forth that the existence of those lawsuits does not exclude the right of a shareholder, under the general rules, to file, in her or his own name, a claim against a director whose actions have damaged her or his own rights and interests as a shareholder.

Any lawsuits against a director, filed either by the company or one of its shareholders, needs to be initiated within four years counted from the date when they could have been filed (Article 241 bis of the SCA).

3.4 Legal Remedies Against Other Shareholders

Neither the SCA nor any other piece of Spanish legislation provides specific remedies against other shareholders. This is understandable, if it is borne in mind that a shareholder per se cannot act in terms that bind the company and as such cannot harm the rights of any shareholder in relation to the company.

Nevertheless, under the general rules on civil liability, a shareholder can claim damages from another shareholder if she or he can provide evidence that such shareholder acted in terms that somehow breached her or his shareholder rights and, in so doing, caused her or him damages.

This sort of remedy is available to any shareholder, no matter how many shares or what percentage of share capital are controlled by that shareholder.

3.5 Legal Remedies Against Auditors

Auditors are liable before the company for damages caused in the performance of their auditing duties set forth in the SCA (Articles 268-270) and/or in Law 22/2015, as of July 20th, on the auditing of accounts.

Pursuant to Article 271 of the SCA, lawsuits filed against auditors by minority shareholders on behalf of the company are subject to the rules provided for lawsuits against directors (Articles 236-241 bis of the SCA). However, as the auditors do not have a duty of loyalty to the company for which they have audited accounts, the rule provided in Article 239 of the SCA, which allows shareholders to sue directors directly on behalf of the company for the breach of that duty, without the need to call a shareholders' meeting thereto, would not apply to directors. Therefore, the filing of any claim against an auditor would always require a shareholders' meeting to be called in advance.

3.6 Derivative Actions

The only derivative action provided by the SCA is the one set forth in its Article 239, which allows minority shareholders (controlling a percentage of the share capital that allows them to request the call of a shareholders' meeting under Articles 179 (2) or, in the case of listed companies, 521 bis of the SCA) to file legal suits, on behalf of the company, for breaches of the duty of loyalty by any director, or to file any other legal suits against directors that, for whatever reason, were not filed by the company in spite of the request of those shareholders for it to be done.

3.7 Strategic Factors in Shareholder Litigation

The main factors usually considered by shareholders at the time of deciding whether or not to litigate to obtain a remedy in Spain are the estimated probability of success, the estimated time for obtaining an enforceable ruling and the estimated costs to be incurred in the process.

Another factor that is usually taken into consideration by defiant shareholders at the time of filing a lawsuit can be the way other minority shareholders and the market in general see the move. If the move could damage the reputation of the shareholder - in terms of being seen as a reliable investor who has the long-term interest of the company in mind – she or he may consider discarding a lawsuit, particularly if the estimated proceeds from the lawsuit appear to be lower than the reputation costs that may be incurred.

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