Recent company law developments in Spain

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INTRODUCTION

Recently, Law 5/2021, of April 13, has modified several provisions of the Spanish Company Law (**LSC**) to implement Directive 2017/828, ("Second Shareholders Rights Directive, "II SRD").

However, the implementation has gone much further, incorporating new relevant reforms that either were not required by the II SRD or have gone beyond its basic requirements.

Regarding the former (novelties non based on the II SRD):

- **Pure telematic general meetings** (art. 182 bis LSC)
- **Loyalty shares/**listed companies (articles 527 ter to 527 undecies LSC).

Regarding the latter (based on the II SRD but far beyond its provisions): new regime of related-party transactions ("RPT") and, particiularly, "**intra-group transactions**" (art. 231 bis LSC).

I. PURE TELEMATIC GENERAL MEETINGS

Art. 182 bis LSC provides for the possibility of holding *pure* telematic general meetings ("GM") to all capital companies (hybrid GM were allowed since several years ago)

- This possibility requires that the company modifies its articles of association.
- Fulfillment of some requirements.

- These telematic GM shall be deemed to be held in the statutory address.
- Telematic GM regime is for both public and private limited liability companies.

1. Amendment of articles of association:

- Special qualified majority: at least 2/3 of the capital attending (personally or by representation) the meeting.
  - Controversy (since the same majority is for both public and limited).
- No minority rights (to oppose the holding of a telematic GM).
  - Controversy.

2. Legal requirements (for the protection of shareholders' rights):

2.1. Identity and legitimation of each shareholder must be guaranteed;

2.2. "Live" participation must be guaranteed:

- shareholders must be able to participate "in live", exercising all their rights (to speak, to ask questions and to vote);
- shareholders must be able to hear the oral intervention of the others by means of "appropriate" mechanisms (as "audio or video"), implemented with the possibility to write messages during the meeting.
  - Directors are responsible for the implementation of those means "according to the state of the art and the circumstances of the company (taking into account the number of shareholders)".

2.3. Calling of the telematic GM (content):

- With information on the formalities and procedures to be followed by shareholders for the registration and formation of the list of attendants, and the way to exercise their rights.

2.4. Attendance and pre-registration for the GM:

- Shareholders may be asked to pre-registration in advanced for attendance (no more than one hour before the time of the meeting).
  - This should be limited (though the provision does not say so) to big public companies where, in order to prepare the meeting, pre-registration is justified.

Assessment/doubts on the legal reform:

- Lack of recognition of a minority right to oppose the telematic GM (directors may "escape" from "annoying" shareholders).
- No solution on how to solve eventual technical problems (affecting shareholder's rights) and the (eventual) challenge of the GM resolutions.
  - Currently: "*teoría de la resistencia*" (for those flaws regarding attendance/voting –not relevant enough to change the relevant quorum/majority).
  - However, "teoría de la resistencia" does not apply when the shareholder cannot "participate" (speak, ask questions). Would this be a ground for challenge? How to prove it? (where to allocate the burden of the proof)

II. LOYALTY SHARES

- Recognition of the so-called loyalty shares ("LS") for listed companies (arts. 527 *ter*-527 *undecies* LSC).
- Breach of the "one-share one-vote principle" (arts. 96.2 y 188.2 LSC).

LS can only be introduced by means of articles of association amendment (opt-in):

- GM resolution with qualified quorum and majorities (that can be raised if articles of association provide so):
  - (i) quorum of 50% (capital stock): majority of 60% of the capital (attending personally or by representation, the meeting;
  - (ii) quorum of 25% (capital stock): majority of 75% of the capital.
- Articles of association incorporating loyalty shares must be renewed every 5 years (art. 527 *sexies)*.

General characteristics:

- LS provide with:
  - (i) a double vote to each share owned by the same shareholder
  - (ii) for two consecutive years -counting from the inscription in a special shareholders book- (art. 527 *septies* LSC).
    - This is calculated/applied, if the case, regarding the beneficial owner (art. 527 *undecies*)
    - The two years can be extended (by means of articles of association), but never restricted.

Double loyalty vote: meaning

- Unless otherwise provided by articles of association: double votes are taken into account for (i) quorum (attendance) and (ii) majorities (voting).
- What happens with "minority rights" ? (usually 5% -to ask for a GM, to ask for a notary at the GM, etc-, although 1% to challenge GM resolutions):
  - LSC does not provide for a solution: it seems appropriate to understand that the double vote does not apply

Legal nature of LS:

- LS are not a "new class" of shares.
- Whenever the share is transferred, the double vote is extinguished. Double vote is linked to the shareholder, not to the share.
  - Although…some exceptions in art. 527 *decies:* mortis causa, structural modification of transfer within the same group.
  - When the beneficial owner changes the double vote is extinguished as well (art. 527.2 *undecies*).

Publicity:

- Internal publicity:
  - company must provide (upon request by any shareholder) the special book where the information on loyalty shares is incorporated.
- External publicity:
  - corporate web site (art. 527 nonies 3) with updated information on the number of shares with double voting.
  - communication to the CNMV of any change.

Assessment/doubts on the reform:

- LS recognition has leaded to amend the public tender offers regime:
  - new art. 131.3º LMV: if double voting leads to exceed 30%, the shareholder shall not use those voting rights exceeding (within 3 months) until the launching of a public tender offer for the 100% of the capital stock
- Doubts about how articles of association ("AA") can "shape" the LS:
  - Might AA introduce some limitations as, for instance, to admit them for some special transactions only?
  - Might AA require other conditions (apart from timing of 2 years)?
  - Might AA subordinate double voting to some threshold of benefits?
  - Might AA subordinate double voting to those shareholders with some relevant level of shares (for instance, 5% of shares, 10%, etc.)?

III. INTRA-GROUP TRANSACTIONS

- New regime of related-party transactions ("RPT") and, particularly, that of the so-called "intra-group transactions" (art. 231 bis) incorporating some specialties for RPT within groups of companies
- All these rules shall not apply when the controlled company is 100% participated by the parent, since there is no conflict of interest.
  - This is also applied for listed companies (art. 529 vicies.2.a) .

RPT approved by the controlled company:

1. **Competent body for intragroup transactions**:
   - (i) GM when the transaction with the parent or any other member of the group excedes 10% of its net assets (calculated on an individual basis);
     - Different way of calculation among non-listed and listed companies (difficulties)
       - RPT with the same counterparty during last 12 months must be added to calculate the 10%
     - Controlling shareholder can vote (however, reversal of the burden of proof: art. 190.3 when minority shareholders challenge the resolution);

(ii) the **managing organ** for the rest of them:

- **no abstention duties** [art. 228.c)] for directors appointed/representing the parent company; although they are "related parties" [art. 231.1.e)] they can attend and vote;
- **change of the burden of proof** in order to protect minority shareholders of the controlled company if they challenge/or ask for liability (similar to art. 190.3); protective rule *a posteriori*.

- **Possibility to delegate some intragroup transactions into executive directors o executive officers** (art. 231 bis 3º LSC) upon some conditions:
  - adopted within the "ordinary course of business –which shall include those resulting from the execution of a framework contract- and adopted on an arms' length basis".
  - internal procedure to assess periodically whether the transactions fulfilled with those requirements.
- These rules are intendend to be **applied at the level of the parent company's** (managing organ) in order to protect its minority shareholders (art. 231 bis 4º LSC). whether:
  - the controlled company is beneficiary of the intra-group transaction, and
  - there is a "significant shareholder" qualified as a related party

Assesment on the new regime:

Possitive:

- it changes the old regime, where abstention duties on directors (art. 228 LSC) leaded those representing minority shareholders or independents to adopt decisions on intragroup transactions (and the responsability) whilst directors of the parent company where refrained to do so (refrained to participate in the board meeting and vote, which was *contra legem* art. 42 Ccom: control).

Negative:

- controversias in order to calculate 10% (especially on listed companies) and not very clear solution for RPTs at the level of parent companies