20 April 2021

Information Alert

Commercial Department

Amendment to the consolidated text of the Capital Companies Act and other financial regulations, regarding the promotion of shareholders' long-term involvement in listed companies.

Law 5/2021 of 12 April, which modifies the consolidated text of the Capital Companies Act, approved by Royal Legislative Decree 1/2010 of 2 July, and other financial regulations, regarding the promotion of shareholders' long-term involvement in listed companies. ("Law 5/2021").

Law 5/2021 was published on 13 April 2021 in the BOE [Boletín Official del Estado (Official State Bulletin)], with the intention of transposing to the Spanish legal system Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017, which amends Directive 2007/36/EC with respect to the promotion of shareholders' long-term involvement in listed companies. However, other aspects relevant to the functioning of capital companies have been amended in this.

Below is a summary of the amendments included in Law 5/2021 pertaining to capital companies, whether anonymous or limited, and then to listed companies.

I. Modification to the Consolidated Text of the Capital Companies Act (hereinafter, the "CCA"):

The CCA is amended as follows:

A. Amendments affecting all capital companies:

i. **Telematic attendance at meetings: general meetings may be held telematically in all capital companies if the by-laws provide for this possibility. In this case, the identity of those attending must be duly guaranteed and, in addition, the convening order must specify the deadlines, forms and methods of exercising the partners' rights as provided for by the management in order to allow the meeting to be conducted properly. Likewise, any responses to partners or their representatives who, when attending telematically, exercise their right to information during the meeting, must be given during the meeting itself or in writing within seven days following the end of the meeting (*amendment to Article 182*);**

ii. companies' by-laws may authorise the administrators to convene meetings to be held without the physical attendance of the partners or their representatives (*new Article 182 bis*);

iii. the particular interest of the administrators is especially subordinate to the interest of the company, in all cases (*amendment to Article 225.1*);

iv. it is specified who will be considered as persons linked to the administrators, both as individuals and as legal entities (*this amends Article 231*);

v. it is established who, within intra-group operations, is responsible for approving those transactions that the company enters into with its parent company or other companies of the group that are subject to conflicts of interest (*new Article 231 bis*); and

vi. **all companies shall at any time have the right to obtain information that allows them to determine the identity of their shareholders, so that they may communicate directly with them in order to facilitate the exercise of their rights and their involvement in the company (*amendment Article 497*).**

B. <u>Amendments that affect listed corporations, among others</u>:

i. **the right is introduced of listed companies to identify the final beneficiaries in the event that the entity or someone legitimised as a shareholder according to the accounting register of shares is an intermediary entity (*new Article 497 bis*);**

ii. the minimum term for the exercise of the right to subscribe new shares, counting from the corresponding publication in the BORME [Boletín Oficial del Registro Mercantil (Official Bulletin of the Commercial Register)], is reduced to 14 days (*amendment Article 503*);

iii. the regime of exclusion of the right of preferential subscription is amended, requiring the preparation of a report from an independent expert in the event that the shares or securities object of said exclusion represent more than 20% of the share capital. This is voluntary in the remaining cases. Shares may be issued at a value lower than their fair value provided that the corporate interest is justified by a report from the administrators. In addition, it will be necessary to have a report prepared by an independent expert who will specifically rule on the expected economic dilution and the reasonableness of the justifications. In addition, particularities are established in the process of determining the price determination (*amendment to articles 504 and 505*);

iv. any order to increase the share capital while excluding the right of preferential subscription is limited to 20% of the share capital. (*amendment to Article 506)*;

v. the possibility is simplified of registering capital increases in the Commercial Register even before they are completed or despite an incomplete subscription, unless it has been expressly excluded (*amendment to Article 507*);

vi. as regards the issuance of debentures convertible into shares, no independent expert report shall be required as long as the issuance does not reach twenty percent of the capital, although this may be done voluntarily; and with regard to the mandatory nature of the regulations of the general board meeting, the general shareholders' meeting of the publicly traded company, constituted with the quorum required under Article 193 or with the higher number provided for this purpose in the by-laws, a specific regulation will be approved for the general meeting (*amendments to articles 510 to 512*);

vii. an obligation is established to transfer certain information from the company to the shareholders and final beneficiaries (*new articles 520 bis and 520 ter*);

viii. remote participation is permitted in the event that the general meeting of the listed company is only held telematically, and in this regard, shareholders may also delegate or exercise in advance the vote of the proposals on points included in the agenda by any of the means provided and the minutes of the meeting are issued by a notary (*amendment Article 521*);

ix. intermediary entities that are authorized as shareholders may divide the vote and exercise it in a different manner as voting instructions require, if they have received these (*amendment to Article 524*);

x. when voting has been done electronically, the company must send an electronic confirmation of receipt to the shareholder who have voted (*new Article 527 bis*);

xi. **the necessary majorities are established for the approval, calculation, cancellation and elimination of the statutory provision clause relating to double voting, and, among other amendments, the transfer of shares by the shareholder with a double vote. The necessary majority, which will be established in the Corporate By-laws of each listed company, must be greater than 60% (*amendment to Article 527 ter et seq.*);**

xii. **listed companies must be administered by a board of directors that will be composed exclusively of individuals (amendment *Article 529 bis, section 1*);**

xiii. there is an amendment to the nature of the remunerated of board members of quoted companies for the performance of their functions, as well as the approval of their remuneration policy (*amendment to Articles 529(o) et seq.*);

xiv. the new concept of related transactions, their advertising and approval, and rules of calculation is defined(*amendment 529(s) et seq.*);

xv. included is information on corporate governance and remuneration in the management report of listed companies that have issued securities admitted for quotation in the regulated market of any Member State of the European Union (*amendment to Article 538*); and

xvi. the content of the annual report on the remuneration of the directors is amended (*amendment to Article 541*).

II. Amendment to Law 22/2014, of 12 November, which regulates venture capital entities, other closed-type collective investment entities and companies managing closed-type collective investment entities and which amends Law 35/2003 of 4 November on Collective Investment Institutions (hereinafter Collective Investment Institutions "Law 22/2014"):

As regards the amendments introduced in Law 22/2014, Law 5/2021 adds two new articles, 67 bis and 67 ter. In this regard, and with respect to Article 67 bis, the obligation is established of managing companies ("SGEIC" [Sociedades gestoras de entidades de inversión colectiva (collective investment institution management companies)]) to develop and make known to the public a policy of involvement that describes how they integrate the involvement of shareholders in their investment policy in the case of investments on behalf of the ECRs and EICCs managed in shares admitted for negotiation in a regulated market that is located or operates in a Member State and the characteristics of this policy.

For its part, Article 67 ter establishes the reporting obligations of SGEICs when they provide the services of asset management for insurance entities or pension plans and funds.

III. Other laws that have been amended by Law 5/2021:

- Law 35/2003, of 4 November, on Collective Investment Institutions;
- Commercial Code;
- Law 22/2015 of 20 July on the Auditing of Accounts;
- Revised Text of the Securities Market Law; and
- Law 22/2014 of 12 November, which regulates venture capital entities, other closed-type collective investment entities and companies managing closed-type collective investment entities and which amends Law 35/2003 of 4 November, on Collective Investment Institutions.

IV. Entry into force:

In accordance with the fifth final Provision, Law 5/2021 will enter into force twenty days after its publication in the BOE, i.e. on 11 May 2021.

However, the amendments introduced by this Law 5/2021 in Article 529(r) of the CCA will enter into force six months after its publication in the BOE. In this regard, companies must submit for approval the remuneration policy adapted to such amendments at the first general meeting held after that date.

The amendments introduced by this Law in Article 541 of the CCA, will enter into force for the annual reports on the remunerations of the directors for the tax years ending on 1 December as from 2020.

For its part, the obligations established in the new Chapter VII bis of Title XIV of the CCA will not apply until two (2) months after the entry into force of Law 5/2021.

Finally, the requirement for the board members of listed companies to be individuals shall only apply to appointments, including renewals, occurring from the month following their publication in the BOE. As long as legal entities remain, it shall apply to the natural persons representing them as provided for prior to said statutory amendment.