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Issues concerning the record date system and shareholders' right to attend general meetings (Art. 179(3) of the Spanish Companies Act)

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It is contended that listed companies should have the freedom in their articles of association to impair the record date system or reduce the 5-day period provided in Art. 179(3) LSC with respect to shareholders' right to attend to and vote at general meetings.

1. Introduction

On the occasion of the current amendment of the Spanish Companies Act (*Ley de Sociedades de Capital* or *LSC*), which is required by the necessary adaptation of our law to Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, the legislator should also consider amending Art.179(3) of the said Act, insofar as this provision, which derives from the Spanish Companies Act of 1951, does not take into account the current state of the art which allows the identity of shareholders entitled to attend the general meeting to be known within a period of less than 5 days from the date on which the general meeting is to be held (*record date*). Pursuant to Art. 179(3) ("Attendance right"), "In a public limited company, the articles of association may make the right to attend the general meeting subject to early shareholder entitlement, but in no case may they prevent the exercise of such right by the holders of registered shares and of shares that take the form of book entries which appear recorded in the relevant registers five days before the date on which the meeting is to be held (...)".

Although the justification of the record date system for bearer shares is traditionally related to *affectio societatis* (Marín de la Bárcena, 2017), the computerization of the transfer of shares that take the form of book entries allows knowing in less than 5 days the identity of the shareholder. Or of the financial intermediary that appears as the formal holder in the registers of book-entry securities kept by the central securities depositary, which would also avoid situations in which the formal holder of the shares does not match the beneficial owner, inasmuch as transferred after the record date, i.e. in the five days prior to holding the meeting.

It should not be forgotten that Directive 2007/36/EC of 11 July 2007 allows Member States to establish a system of shareholders participation and vote different from that of the record date: Art. 7(2) of the 2007 Directive, after referring to this system ("Member States shall provide that the rights of a shareholder to participate in a general meeting and to vote in respect of his shares shall be determined with respect to the shares held by that shareholder on a specified date prior to the general meeting (the record date)", then provides that "Member States need not apply the first subparagraph to companies that are able to identify the names and addresses of their shareholders from a current register of shareholders on the day of the general meeting".

Some listed companies that make up the IBEX 35 index include in their internal regulations for the general meetings the shareholders' right to attend the same after the record date referred to in Art. 179(3) (5 days prior to the holding of the meeting), with clauses that grant the right of attendance to the holders of shares recorded in their name in the book-entry register five days prior to the date on which the General Meeting of Shareholders is to be held, " who keep them until the Meeting is held " (Inditex; see also Art. 11 of Acciona's Shareholders' Meeting Regulation).

The recognition of an alternative mechanism to the one provided for in Art. 179(3), or the lifting of the current ban that in no case it is possible to prevent the right to attend the meeting (and therefore the exercise of the right to vote) of those who appear as holders in the register of book-entry securities five days prior to the holding of the meeting, would solve the problem that arises when shares are transferred after the record date contained in Art. 179.3 (post-record date transfers) if the new shareholder or the shareholder who increases his shareholding would like to exercise the voting rights that, as a shareholder, lie with him, and not the previous holder of those shares who is the one who appears in the company registers five days prior to the holding of the meeting and who is formally entitled to attend the general meeting.

2. Shareholder rights and the 2007 directive

The record date system originates in the United States and Great Britain and is followed by the Member States of the European Union, although the benchmark date varies from one country to another. In France and Italy, the record date refers to 2 working days before the holding of the meeting. Under United Kingdom law, the record date may not be more

than 48 hours or, if less, the date determined in the articles of association with regard to the date the general meeting is to be held, excluding non-working days.

The 2007 Directive adopts a compromise solution taking into account, in cases of cross-border voting, the chain of financial intermediaries acting as agents of the beneficial owner of the shares and the need for the list of shareholders entitled to attend the general meeting to be closed prior to the meeting. However, if there is a possibility of knowing this list in real time, that possibility should be allowed. And this is where paths cross for shareholders' right to attend general meetings, technological advances and listed companies' right to know the identity of their shareholders (Art. 497 LSC), the latter issue detailed in Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017, whose transposition deadline expired on 19 June and in respect of which Commission Implementing Regulation (EU) 2018/1212 of 3 September 2018 lays down minimum implementation requirements as regards shareholder identification, the transmission of information and the facilitation of the exercise of shareholders rights, Implementing Regulation that shall apply from 3 September 2020.

Although the record date system is firmly established in Spanish company law and aims to facilitate shareholders' entitlement to attend and, if necessary, vote at general meetings, so that they cannot be prevented from exercising the right of attendance to those who appear as holders in the register of book-entry securities "five days before the date on which the meeting is to be held", this cannot mean that the record date acts as an insurmountable barrier in those cases in which the company can know the real identity of its shareholders through the register of shares (Art. 497 LSC and Art. 23 of Royal Decree 878/2015) kept by the central securities depositary, an identity that may in any case not match that of the holders registered on the record date. The identification data of the new holder are recorded after clearing and settlement of the transfer in the central depositary registers within a maximum period of two days from the date of execution of the order on the stock market, which may give rise to new shareholders or an increase in the number of shares held by a given shareholder in the period between the five days prior to the holding of the meeting and the start of the general meeting.

The Spanish Central Securities Depository's (Iberclear) Regulation expressly include in Art. 26(2) the possibility for listed companies to request from the depositary the identity of their shareholders. Although Spanish law will incorporate the latest advances in the right of the company to know the identity of its shareholders, the same does not happen with a more accurate system of shareholder rights for the purpose of attending general meetings. The listed company may then have two lists of shareholders: the one brought about by Art. 179(3) LSC, drawn up five days before the date on which the meeting is to be held and which it is very likely not to be updated, and the one which the company has obtained from Iberclear after the record date, which will reflect a list of shareholders that is closer to reality if there have been further transfers of shares.

3. The legal exception to Art. 179(3) LSC

For the specific case of credit institutions and investment firms that find themselves in any of the situations envisaged in the Recovery and Resolution of Credit Institutions Act 11/2015 of 18 June (tenth additional provision LSC introduced by the aforementioned Act 11/2015 and which will not be the subject of alteration in view of the Draft Bill of 24 May 2019), the legislator allows these institutions to amend their articles of association, indicating that the general meeting at which a capital increase is decided will be convened within a shorter period than that established in article 176 LSC, provided that such meeting is not held within a period of less than ten days from the call and the capital increase is necessary to avoid the resolution event set out in Arts. 19 to 21 of Act 11/2015. In this case, the time limits provided in Art. 179(3) LSC will not apply. The aim is to speed up the holding of general meetings and avoid any possible actions to contest for breach of the minimum period granted by the provision for the purposes of early entitlement of the shareholder of the entity in financial distress that seeks to take advantage of the early intervention provided in Arts. 8 et seq. of Act 11/2015.

4. Granting of the right to attend the general meeting to the holder of shares acquired after the record date

Having set out the foregoing, several hypotheses can be made regarding the possible post-record date entitlement of shareholders to attend the meeting. A first case would be that in which the chairperson of the meeting admits the right to attend of the shareholder who has acquired the shares with the certainty that the previous owner will not attend the general meeting: it will be the new acquirer (who will appear as such in the records of book-entry securities, although after the record date) who will attend the meeting (take into account in this regard Art. 102(2)(1)(2) and (3) of the Register of Companies' Rules and the legal doctrine of the Directorate-General for Registries and Notaries regarding the powers of the chairperson of the meeting, contained, inter alia, in the Decision of 3 April 2017 published in the Official Journal of Spain of 19 April).

On this subject, although for non-listed companies, judgment no. 94/2006 of the Burgos Provincial Court of 17 March analyses the validity of an article of the articles of association of a public limited company whose shares were registered and took the form of certificates. The aforementioned article provided as follows: "The Meeting may be attended, in any case, by the holders of shares recorded in the register of interests in shares five days prior to the date on which the Meeting is to be held, and by the holders of shares who prove, by means of a public document, their regular acquisition from whoever appears in the register as the holder. With said proof, the directors shall be deemed to have been requested entry to the register". The Court states in the first point of law of its ruling that "Likewise, it must be considered that the article of the articles of association is not contrary to Art. 104 LSA [current 179(3) LSC], since in this case the new shareholders' right to attend the meeting is not restricted, but, on the contrary, extended, since the request for entry to the register is understood to have been made by the

mere fact of proving the acquisition without a time limit prior to the meeting, and without affecting the stability of the company, or the rights of shareholders, or of third parties, since the acquirers were offspring of an owner recorded in the register of shareholders". The Court considers that the chairperson of the meeting did not correctly interpret the aforementioned provision of the articles of association when depriving the new shareholders of the family business of their right to participate and therefore holds the contested meeting void, reversing the trial judgment.

Although this judgment refers to shareholders of a non-listed company, the reasoning could well be applied to shares that take the form of book entries, from the moment the company can receive from Iberclear, if so requested, an updated list of shareholders after the record date envisaged in Art. 179(3) LSC (Articles 497 LSC and 23(2) RD 878/2015).

A second hypothesis is that wherein the chairperson of the meeting denies entitlement to the new post-record date shareholder despite being the owner of the shares that appears as such in the register of book-entry securities. In view of the silence of the articles of association of the majority of the listed companies that make up Ibex 35, the refusal of the chairperson of the meeting would find its legal basis in Art. 179(3) LSC. The shareholder, in practice, will resort to proxy voting as granted by the transferor or will respect the intention of the transferor to attend the general meeting in the terms agreed (which could lead to situations similar to the sale of votes, prohibited in our law). Although organisational reasons regarding the exercise of the right to attend and vote at a general meeting justify the record date system (which in most of the surrounding countries has been reduced to two days prior to that on which the general meeting is to be held), as Directive 2007/36/EC prevents the blocking of shares, the divergence between real ownership (beneficial owner) and formal ownership (exercise of the right to vote) can be significant in listed companies.

Therefore, it is advisable that listed companies' articles of association and the internal regulations for general meetings regulate shareholders' right to attend the same, establishing, under the aegis of party autonomy (Art. 28 LSC), the granting of the right to attend meetings to those who appear on the list of shareholders that Iberclear sends to the listed company, even in that sent on the same day the meeting is held. The legislator should expressly incorporate the provision of Art. 7(2) of Directive 2007/36/EC into Spanish company law and allow the listed company to reduce the five-day period or even abolish the record date system.