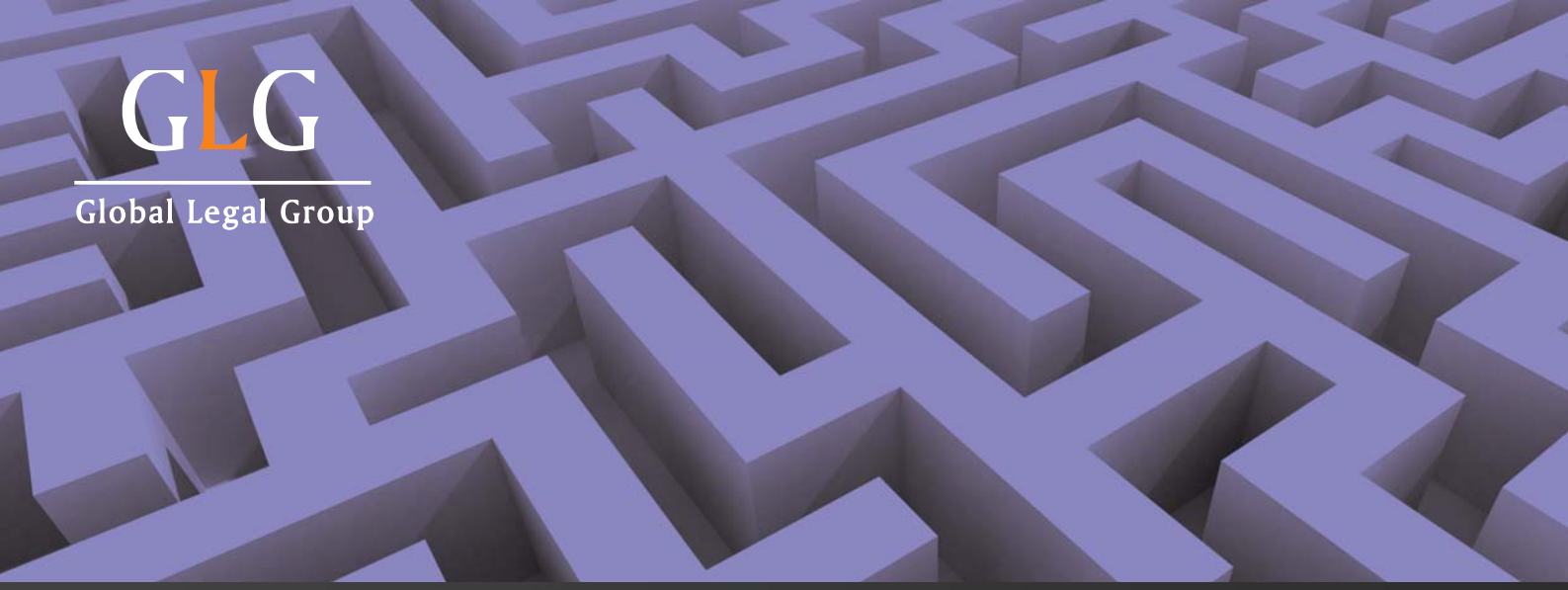

Global Legal Group

The International Comparative Legal Guide to:
Corporate Governance 2010

A practical insight to cross-border Corporate Governance

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1 Setting the Scene - Sources and Overview

1.1 What are the main corporate entities to be discussed?

In our legal system, corporate governance regulations are particularly aimed at listed public limited companies; listed companies of securities admitted for trading on secondary markets and savings banks.

1.2 What are the main legislative, regulatory and other corporate governance sources?

Corporate governance regulations in Spain are composed of mandatory regulations and recommendations included in the Code of Corporate Governance of the listed companies ("Code of Corporate Governance"), approved in May 2006 by the National Securities Market Commission ("CNMV"), which set out a series of recommendations under the English principle of "comply or explain". Mandatory provisions through which the principles of Corporate Governance have been included in our legal system are:

- Public Limited Liability Companies Law (*Ley de Sociedades Anónimas*; "LSA").
- Law 24/1988 of 28 July, on the Securities Market (*Ley del Mercado de Valores*; "LMV").
- Royal Decree 1362/2007 of 19 October.
- Royal Decree 1333/2005 of 11 November.
- Order EHA/3050/2004 on Related Parties Transactions.
- Ministerial Order ECO/354/2004 of 17 February, on the Annual Corporate Governance report issued by Saving Banks.
- Ministerial Order ECO/3722/2003 of 26 December, on the Annual Corporate Governance report issued by public limited liability companies.
- CNMV Circular 4/2007 of 27 December, of the CNMV, by virtue of which the sample of Annual Corporate Governance report is modified.
- CNMV Circular 2/2005 of 21 April, on the Annual Corporate Governance report to be issued by Saving Banks.
- CNMV Circular 1/2004 of March 2004 on the Annual Corporate Governance report.

1.3 What are the current topical issues, developments and trends in corporate governance?

The last two years has seen an increase in the percentage of compliance by companies under the Code of Corporate Governance, reaching approximate figures of 85%, mainly in matters referring to the Board of Directors, the creation of Delegated Commission or the increase in transparency in reporting their activities and composition.

With regard to legislative developments, the topic has not experienced many modifications since the approval of the Code of Corporate Governance, although currently the topic of greatest concern in Spain is the remuneration of directors, on which the future law on sustainable economy will apparently contain some provisions.

2 Shareholders

2.1 What rights and powers do shareholders have in the operation and management of the corporate entity/entities?

The shareholders have an important information right which is exercisable both prior to and within the General Meeting (sections 112 and 212 LSA). In addition, the General Meeting has the power to appoint and dismiss the directors (sections 123 and 131 LSA) and to exercise an action for liability against directors.

2.2 Can shareholders be liable for acts or omissions of the corporate entity/entities?

Our legal system does not establish any provisions regarding the direct liability of shareholders for acts or omissions carried out by the company.

2.3 Can shareholders be disenfranchised?

Regarding the right to attend a General Meeting, section 105 LSA provides that the Articles of Association ("AOA") of the company may require the possession of a minimum number of shares for attendance; however, in no event can the required number be more than 1% of the share capital. Similarly, the AOA may generally establish the maximum number of votes which may be issued by the same shareholder or companies belonging to the same group (section 105 LSA).

The LSA imposes disenfranchising the shareholder as a penalty, mainly in cases of arrears in the disbursement of capital stock (section 44 LSA) or in the event of the acquisition by a company of its own shares (section 79 LSA).

Likewise, the right to preferential subscription in an increase of

capital may be excluded, totally or partially, by the General Meeting, when it is in the interest of the company to do so (section 159 LSA).

Finally, section 60 quater LMV has regulated the minority squeeze-out when, as a result of a takeover bid for all the company securities. When the offeror holds securities representing at least 90% of the capital that grants voting rights and the offer has been accepted by holders of securities representing at least 90% of the voting rights (other than those already held by the offeror), the offeror may demand that the remaining holders of securities sell him said securities at a fair price.

2.4 Can shareholders seek enforcement action against members of the management body?

In accordance with the provisions of section 133 LSA, the directors (even shadow directors), will be jointly liable before the company, shareholders and company creditors for any damages which are caused by their actions or omissions which are contrary to law or the AOA, or by breaching the duties inherent to their position.

The LSA distinguishes between the actions for corporate and individual liability regarding direct damage to the assets due to the actions of directors of the company, shareholders or third parties.

The legitimate exercise of the action for liability corresponds to the company through prior resolution of the General Meeting, even when this is not on the agenda. The resolution will be adopted by ordinary majority as referred to in section 93 LSA, without it being possible to reinforce said majority in the AOA, and will determine the immediate dismissal of the affected directors (section 134.2 LSA).

The law establishes a system of subsidiary or cascading liability. Thus, shareholders who are holders of at least 5% of the share capital may request the directors to call a General Meeting to decide on the exercise of an action for liability. Said action may also be exercised jointly and in the interests of the company in three cases:

a) when the directors do not call the requested meeting;

b) when the company does not engage the action within a term of one month from the date of the adoption of the corresponding resolution; or

c) when the resolution of the Board has been contrary to the exercise of the corporate action for liability (section 134.4 LSA).

In the event that neither the company nor its shareholders have exercised the corporate action for liability against the directors, the creditors of the same company may carry out the action provided that the company assets are insufficient for the settlement of its debts.

The individual action for liability is a claim for compensation which corresponds to the shareholders (independent of their stake in the company) and third parties, against any actions of company directors that have directly damaged their interests (section 135 LSA). This may be exercised in addition to the corporate action or separate from it.

2.5 Are there any limitations on, and disclosures required, in relation to interests in securities held by shareholders in the corporate entity/entities?

A shareholder which directly or indirectly acquires or transfers shares or financial instruments which confer voting rights of a listed company, and as a consequence of this its holding in the company reaches, exceeds or diminishes from the thresholds of 3%, 5%, 10%, 15%, 20%, 25%, 30%, 35%, 40%, 45%, 50%, 60%, 70%, 75%, 80% and 90% of voting rights, must inform the company and the CNMV of such circumstance within four stock market days from the day following that on which it became aware of the transaction.

2.6 What shareholder meetings are commonly held and what rights do shareholders have as regards them?

General Meetings may be ordinary or extraordinary (section 94 LSA). The ordinary General Meeting must be held within the six first months of each financial year, to grant discharge to the board, approve, where appropriate, the accounts from the previous fiscal year and resolve on the application of the result (section 95 LSA). The remaining meetings will be considered as extraordinary meetings (section 96 LSA).

The call for the General Meeting is the competence of the directors. However, the shareholders holding a stake of at least 5% of the share capital are entitled to ask the directors to call a General Meeting (section 100 LSA). Section 101 LSA also provides for the possibility of a legal calling for a meeting.

In order to call a General Meeting a formal procedure must be followed which includes the advertising of same in the Official Bulletin of the Commercial Registry and one of the daily newspapers with a high circulation in the province (section 97.1 LSA), which must include the date of the meeting and the agenda. The shareholders, who represent, at least, 5% of the share capital, may request that it publishes a supplement to the calling of a General Meeting including one or more items on the agenda (section 97.2 and 3 LSA).

The General Meeting of shareholders will be validly constituted on the first call when the relevant shareholders who possess at least 25% of the subscribed capital with voting rights are in attendance, though the AOA may establish a larger quorum. On the second call, any meeting will be validly constituted irrespective of the capital concurring with same, apart from where the AOA establishes a determined quorum, which by necessity must be less than that which is established or required by law for the first call (section102 LSA).

Shareholders have the right to attend the General Meeting. However, in accordance with section 105 LSA, the AOA may require the possession of a minimum number of shares in order to attend the General Meeting but in no case may the required number be more than 1% of the share capital. Section 97.5 LSA provides the possibility of attendance at the meeting by telegraphic methods.

Similarly, the shareholders have the right to vote in the General Meeting with this right being proportional to the nominal value of their shares (section 50.2 LSA). The AOA may, however, generally establish the maximum number of votes which may be issued to the shareholder or companies belonging to the same group (section 105.2 LSA).

The exercise of the right to vote may be made by means of postal or electronic correspondence, or any other method of distance communication, provided that it duly guarantees the identity of the subject which exercises its right to vote (section 105.4 LSA). The vote may also be delegated.

In accordance with section 106 LSA, apart from a contrary provision in the AOA, each shareholder which has the right to attendance may be represented in the General Meeting by means of another person, although they are not a shareholder, admitting the public request for proxy (art. 107 LSA).

In relation to the right to information, the shareholders may request

same in writing prior to the General Meeting or verbally within the scope of this information concerning the matters comprising the agenda. If the company is listed for trading, the shareholders may request information concerning the information accessible to the public which has been provided by the company to the CNMV from the holding of the most recent General Meeting (section 112 LSA). Similarly, from the call for the General Meeting, any shareholder has the immediate and free right to receive the documents which have been submitted for approval in same, in addition to, where appropriate, the management report and the account auditors report.

In addition, the Shareholders' Meeting of listed companies shall approve a specific Regulation for the Shareholders' Meeting, which may address any matter relating to the Shareholders' Meeting in connection with the matters treated in the laws or in its AOA.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

Listed corporate entities are managed by a Board of Directors, which must be composed of a minimum of three members. In cases where the AOA only establish a minimum and a maximum number of members, the Shareholders Meeting will determine the specific number of members which will compose the Board of Directors (section 123 LSA).

The Board of Directors is responsible for representing and managing the company, and may approve internal regulations setting out all the necessary measures for the adequate management of the company and it completes its tasks as managing body by passing resolutions in meetings or through the bodies in which it has delegated its powers (i.e. Managing Director/Executive Committees). It is also responsible for appointing its members, a Chairman, and a Secretary (who does not have to necessarily be a member of the Board). In addition, it may also appoint a vice-chairman and a vice-secretary (the latter does not necessarily have to be a member of the Board either).

Both natural individuals and corporate entities can be appointed as members of the Board of Directors; unless they fall under any of the reasons for incompatibility set out in section 124 LSA.

The Board of Directors may delegate part of its management and representation powers to one or more Managing Directors and/or to the Executive Committee and may also form committees within its members such as Executive Committee, Committees for Member Appointments and Remunerations, etc.; although it is obliged to create an Audit Committee.

The Code of Corporate Governance sets out that the ideal size for the Board of Directors of listed companies would be of 5 to 15 members, and also recommends the number of each type of members that it should be composed of. With reference to the members of the Board, the Code of Corporate Governance establishes the following categories:

a) *Executive Directors:* Directors who are senior officers or employees of the company or its group.

b) *Proprietary Directors:* Directors who: (i) own an equity stake above or equal to the legally determined threshold for significant holdings, or otherwise appointed due to their status as shareholders; or who (ii) represent the shareholders stated above.

c) *Independent Directors:* Directors appointed for their personal or professional qualities, who are in a position to perform their duties without being influenced by any connection with the company, its shareholders, or its management.

3.2 How are members of the management body appointed and removed?

Members of the Board of Directors must be appointed by the Shareholders Meeting. The Shareholders Meeting may also designate "substitute directors" in order to cover any vacancies that may eventually take place within the Board of Directors until new directors are appointed. The LSA also provides for subsidiary procedures for the appointment of Directors, which alter such general "appointment" rule:

a) *Proportional Representation* (section 137 LSA): Shareholders in the Shareholders Meeting may voluntarily form groups and appoint a number of members, correspondent to the share capital represented by such group.

b) *"Co-optation"* (section 138 LSA): The Board of Directors may designate a shareholder as Director in order to cover a vacancy that may eventually take place until the following Shareholders Meeting.

Members of the Board of Directors can be removed by a resolution passed by the General Shareholders' Meeting (section 131 LSA), which is entitled to remove any director from its post without specifying the reasons or without previously including such removal in the Agenda. Moreover, the General Shareholders Meeting shall be obliged to remove any member of the Board of Directors who (i) falls within any of the prohibitions set out in section 124 LSA from being a director or who (ii) is also director of a competitor or has personal interests contrary to those of the company (article 132 LSA), in this latest case, it shall do so under the petition of any shareholder.

3.3 What are the main legislative, regulatory and other sources impacting on contracts and remuneration of members of the management body?

Currently, the main sources which are having an impact on contracts and the remuneration of Directors are set out in LSA, the LMV, and the Code of Corporate Governance. With a view to the future, however, there is a new proposal for a Law on Sustainable Economy, which provides for an increase in the transparency and communication obligations for listed entities with respect to the remuneration of their directors. Such proposal, if executed, will modify the current legislation in this sense.

3.4 What are the limitations on, and what disclosure is required in relation to, interests in securities held by members of the management body in the corporate entity/entities?

Members of the Board of Directors are obliged to inform the CNMV of:

a) the shares that they hold in the company at the time of their appointment and removal;

b) any shares that they may purchase or dispose of during their term as directors; and

c) any stock option plans or other retributive systems related to the Company shares of which they may be beneficiaries.

In addition, Directors of listed companies are obliged to communicate all transactions that they, or any other person related to them, may make with regard to the shares of the company or any derivatives or financial instruments linked to such shares.

3.5 What is the process for meetings of members of the management body?

Although the LSA establishes a certain foundation regarding Board of Directors meetings, the company's AOA and the internal Regulations of the Board establish the specific regulation.

Generally, the meeting must be called by the Chairman under his own initiative or by a request of one of the Directors. In order for the meeting to be held validly, at least one more than half of the members of the Board of Directors must attend either in person or through representation. The Board may also pass resolutions without holding a meeting, provided that they are adopted by means of a written vote and none of the Directors are in opposition.

The general rule is that proposed resolutions must be approved by, at least, the absolute majority of the members present. The AOA can also provide for the Chairman to have a casting vote in the event of a tie. In cases where resolutions concern the permanent delegation of any of the Board's powers to one or more Directors, a 2/3 majority shall be required.

3.6 What are the principal general legal duties and liabilities of members of the management body?

The members of the Board of Directors must comply with the duties imposed by sections 127, 127 *bis*, 127 *ter* and 127 *quater* LSA, the specific obligations and duties for directors set out in the LMV and further complemented by the general rules of conduct established in Title VII of LMV. They also should follow the recommendations set out in the Code of Corporate Governance.

The following duties are imposed on all directors of a company, in accordance with the LSA:

a) *Information:* Each director must diligently inform himself concerning the running of business of the company.

b) *Faithfulness:* Directors must act in the interest of the company and neither in their own personal interest nor that of third parties.

c) *Loyalty:* This duty applies to any conflicts of interest that may eventually arise between the company and its directors or people otherwise related to them. Directors must inform the Board of Directors of any such situations as well as of any relationship that they may have to competitors in the market. Such information must be further published in the Annual Report on Corporate Governance.

d) *Secrecy:* Except for certain cases set out by Law, directors must keep all the confidential information made known to them secret.

The LMV sets out the following specific duties for directors of listed companies:

a) *Duty to abstain from voting on certain agreements:* In the event that the directors of a listed company, or any other person, has formulated a public request for proxy, the director who obtains it may not exercise the proxies in those items on the agenda in which a conflict of interests arises and, in any case, regarding the following resolutions:

   (i) His appointment or ratification as director.

   (ii) His dismissal, removal or cessation as director.

   (iii) The exercise of the action of liability directed against him.

   (iv) The approval or ratification, as appropriate, of the company's transactions with the director, companies controlled by him, and companies that he represents or persons who act on his behalf.

b) *Duty to inform on certain transactions:* The Company's annual report must disclose the transactions performed by directors with the listed company or a company belonging to the same group, when they fall outside of the company's ordinary activities or are not conducted on an arm's-length basis.

c) *Duty to refrain from certain transactions:* Directors must refrain from performing, or from suggesting that any other persons perform a transaction with securities of the company or of subsidiaries or associated or related companies in which the directors hold restricted or reserved information due to their office, until such time as this information becomes public knowledge.

d) *Duties extended to European PLCs:* The provisions stated in this article will be applied to the members of the Internal Board of Control of the European public limited companies based in Spain which have chosen the dual system.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body?

The Code of Corporate Governance sets out the following specific duties for the members of the Board of Directors:

a) *Chairman:* They will ensure that the Board members receive adequate information in advance, stimulate the debate and active participation of the Board members, in addition to organising and coordinating the periodic evaluation of the Board with the chairmen of the relevant Commissions, and where appropriate the Delegated Board Member or senior executive.

b) *Secretary:* To ensure that the proceedings of the Board respect the laws and regulations, they are in accordance with the Articles and Regulations of the Meeting and Board and the recommendations on corporate governance contained in the Unified Code which the company has adopted.

c) *Directors:* They are jointly liable together with the listed company of the content and the delivery of information which the listed company performs in fulfilment of his duties to send periodical information.

3.8 What public disclosures concerning management body practices are required?

Apart from the disclosures contained in the Annual Report on Corporate Governance on this matter, section 115 LMV imposes to the Board of Directors of listed companies the obligation of approving its own regulations governing the internal system and the functioning of the Board; such regulations have to be previously informed by the General Meeting and communicated to the CNMV.

In addition, the Code of Corporate Governance recommends:

a) Establishing some mechanism to scrutinise its performance and that of its committees with certain regularity, using its own resources or seeking the help of an external expert. There is no express reference to an appraisal of each director individually but it is recommended to extend such evaluation at least to the Chairman and the Chief Executive.

b) Laying down rules for the selection and appointment of directors, and disclosure of them. Likewise, it is recommended disclosing and keeping updated the key personal and professional particulars of all Board members.

3.9 Are indemnities, or insurance, permitted in relation to members of the management body and others?

Insurance policies for Directors are permitted under Spanish law. The common practice is that they take the form of "D&O Insurance

Policies" which are specifically designed to cover the civil liability of Directors and Officers.

4 Corporate Social Responsibility

4.1 What, if any, is the law, regulation and practice concerning corporate social responsibility?

There is no express regulation in the Spanish legal system regarding corporate social responsibility with the sole exceptions of the Code of Corporate governance which contains a series of recommendations concerning corporate social responsibility and the Law 3/2009 of 3 April on Structural Modifications which requires that the report which legally and economically brings about the structural modification of a company and its implication for the members, same includes mention of the impact which said transaction may have on corporate social responsibility.

4.2 What, if any, is the role of employees in corporate governance?

The Spanish legal system does not provide for any system of participation of the employees within corporate governance apart from the granting of the information right similar to that of the shareholders in the structural modification processes of the company and those in which their employment situation may be altered.

5 Transparency

5.1 Who is responsible for disclosure and transparency?

Listed companies must comply with the disclosure requirements imposed on them by the LSA by any technical, computerised or telematic means, without prejudice to shareholders' rights to request the information in print. Finally, listed companies must have a website for shareholders to exercise the right to information, and to disseminate the significant information.

In accordance with section 35 *ter*. LMV and 117 LMV, the responsibility for drafting and publishing the information must at least lie with the listed company and its directors, and same will be liable for any damages arising to the holders of the securities as a result of information that fails to provide a true and fair view of the listed company.

5.2 What corporate governance related disclosures are required?

In accordance with the regulations on corporate governance, the listed companies are responsible for the sending and distribution of financial and other information on a periodical and occasional basis. The information which should be sent to the market is the following:

a) An annual financial report, which should comprise of the annual accounts (composed by the balance sheet, the profit and loses account, statement about changes in, the cash-flow statement and the annual report) and the management report revised by the auditor in addition to the declarations of liability for its content:

   (i) The annual report must disclose the transactions performed by directors, or persons acting on their behalf, with the listed company or a company belonging to the same group throughout the year covered by the annual report, when they fall outside the company's ordinary or are not conducted on an arm's-length basis (article 114.2 LMV).

   (ii) The management report must include information about (section 116*bis* i) LMV) the capital structure, any restriction on the transfer of securities, major holdings in capital, both direct and indirect, any restriction on voting rights, non-statutory shareholders' agreements, the rules governing the appointment and replacement of members of the governing body and the amendment of the AOA, the powers of the members of the Board of Directors, significant agreements entered into by the company and agreements between the company and its officers, executives and employees that provide indemnities for the event of unfair dismissal or of termination as a result of a takeover bid.

b) A biannual report which contains the resumed annual accounts, an intermediate management report and the declarations of responsibility for its content.

c) A quarterly intermediate management report during the first and second six-month period of the fiscal year which contains at least: an explanation of the significant events and transactions which have taken place during the corresponding period and its impact on the financial situation of the listed company and its controlled companies, and a general description of the financial situation and the results of the listed company and its controlled companies during the corresponding period.

d) All changes in the rights attached to said securities and information on the new listed companies of debt.

e) Information relating to significant holdings and the transactions of listed companies concerning their own shares.

f) Regarding the total number of voting rights and capital at the end of each calendar month during which an increase or decrease as occurred.

g) Significant information or that to which knowledge of may reasonably affect an investor for acquiring or transferring securities or financial instruments and therefore may have a sensitive influence on its listing in a secondary market (*hechos relevantes*).

h) Changes to the accounting policy or criteria, or correction of material errors committed in the financial reports.

i) Disclosure of non-statuary shareholder agreements (agreements which include regulating the exercise of voting rights in Shareholders' Meetings, or which restrict or condition the free transferability of listed companies' shares) and other agreements that affect a listed company (section 112 LMV).

j) Disclosure of the regulations of the Board of Directors of listed companies (art. 115 LMV).

k) Disclosure of the regulations of the General Meeting of listed companies (art. 113 LMV).

l) The Annual Report on Corporate Governance which contains the information on the company existing at the date of closure of the financial year and any changes occurring during same, including a detailed explanation of the structure of the company's system of governance and how it functions in practice, and verifying by means of same. The report must be communicated to the CNMV and must be published as a significant information (*hecho relevante*) and it must at least contain:

   (i) The company's ownership structure.

   (ii) The company's administrative structure.

   (iii) Related-party transactions between company and its shareholders and directors and executives and intra-

group transactions.

(iv) Risk control systems.

(v) Functioning of the Shareholders' Meeting.

(vi) The extent to which corporate governance recommendations are followed and, where appropriate, an explanation of why they have not been followed.

5.3 What is the role of audit and auditors in such disclosures?

The role of the auditors is the revision and verification of accounting documents, provided that it purports the issue of a report which may have effects before third parties. Therefore, it will consist of verifying and deciding if said accounts express a true and faithful image of the assets and the financial situation of the company.

There is an obligation imposed on the accounts auditors to be independent in the exercise of their function, of the audited companies or entities, duly abstaining from acting when the purpose in relation to the verification of the corresponding accounting documents may be compromised.

The auditors will be hired for an initial period which may be no less than three years nor greater than nine counting from the date of the beginning of the first fiscal year to be audited, and may be hired for maximum periods of three years once the initial period has terminated.

Regarding companies subject to public supervision, companies whose securities are admitted to trading in official secondary securities markets, or companies whose net turnover is more than EUR 30m, when seven years have elapsed from the initial contract, rotation of the accounts auditor responsible for the tasks and all the members of the audit team will be mandatory, and in any case a period of three years must have elapsed before said persons may return to audit the corresponding entity.

5.4 What corporate governance information should be published on websites?

The listed company is obliged to publish and divulge the following information in its web page:

a) General information on the Company (channels of communication, takeover bids, investor agenda, dividends, issues…etc.).

b) Economic/financial information (periodical public information, audit report, annual audited accounts, annual report…etc.).

c) Corporate Governance (Regulation of the Meeting, Regulation of the Board, delegation of voting, distance voting, para-company agreements, Annual Corporate Governance Report, etc.).

Listed companies may publish other documents voluntarily, such as the Corporate Social Responsibility Report.

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