

June, 2012

Law 1/2012 of June 22, 2012 (“**Law 1/2012**”) was published in the Official State Gazette on June 23, 2012.

The new law came into force on June 24, 2012 repeals Royal Decree-Law 9/2012, and amends Legislative Royal Decree 1/2010 of July 2, 2010, approving the revised Corporate Enterprises Law, and Law 3/2009 of April 3, 2009, on structural modifications to capital companies, as well as Securities Market Law 24/1988, of July 28, 1988.

Although the bulk of the amendments originate from Royal Decree-Law 9/2012 of March 16, 2012, with one or two technical improvements or precisions, in this newsletter we focus on the most important amendments, which are to the Corporate Enterprises Law and the Securities Market Law:

1. TEMPORARY REMOVAL OF SHAREHOLDER’S EXIT RIGHT WHERE NO DISTRIBUTION OF EARNINGS

A new transitional provision has been added to the Corporate Enterprises Law which temporarily disallows the application of article 348 bis until December 31, 2014. This article gave the shareholders of unlisted corporations who had voted for a resolution to distribute earnings, an exit right if the shareholders’ meeting failed to resolve to distribute a dividend equal to at least one-third of the earnings obtained from operations in the company’s corporate purpose in the preceding year. This right, which could be exercised from the fifth fiscal year after the company was registered at the Commercial Registry, did not apply to listed companies.

The temporary removal of this article seems appropriate against the backdrop of Spain’s current economic climate, although the delay in its appearance could be criticised in that it does not seem to apply to companies that have already held their annual shareholders’ meeting between the entry into force of article 348 bis (October 2011) and that of Law 1/2012 (June 24, 2012).

2. REFORM OF THE CORPORATE ENTERPRISES LAW AND SECURITIES MARKET LAW AS REGARDS VOTING RIGHTS RESTRICTIONS AND TENDER OFFER PRICES

Justified mainly by the current economic downturn and other recent events, Law 1/2012 has also added two changes relating to safeguards (restriction on voting rights) at listed companies and other elements of tender offers.

(i) Restriction on the right to vote

Law 12/2010 of June 30, 2010 (which, in this specific area, was supposed to enter into force on July 1, 2011) amended article 105 of the Corporations Law, by rendering null and void clauses in the bylaws of listed companies that placed restrictions on the maximum number of votes that a single shareholder was allowed to cast. This rule was subsequently introduced into article 515 (then renumbered to 527) of the Corporate Enterprises Law which repealed the Corporations Law. The new wording of articles 188.3 and 527 of the Corporate Enterprises Law, introduced by Law 1/2012 once again allows the bylaws of listed corporations to keep restrictions on the maximum number of votes that can be cast by a single shareholder, companies belonging to the same group or persons acting in concert with them.

Article 527 of the Corporate Enterprises Law now provides, however, that, if after a tender offer, 70% of the shares with voting rights have been tendered, any restrictive bylaw clauses will be rendered null and void, unless the offeror was not subject to equivalent breakthrough measures.

This measure to break through restrictions on voting rights also appears in article 60.2 of the Securities Market Law, although there are some differences between the two articles, in that, whereas article 527 of the Corporate Enterprises Law lays down for the bylaw restriction not to apply (after a tender offer in which 70% of the shares with voting rights have been tendered) that the offeror must be subject to equivalent breakthrough measures, article 60 ter of the Securities Market Law allows (or requires) the offeror, its group, or persons acting in concert with them, to be the ones subject to the breakthrough measures (it is not clear whether it has to be all of them, or whether if only one of them – i.e. the offeror, its group (possibly meaning the parent company of the group), or persons acting in concert – is not subject to the breakthrough measures, then the exception might not apply and the voting restrictions would therefore remain in force).

Doubts arise as to whether these exceptions should only apply to offerors that are listed companies or subsidiaries of listed companies, since it is only at these entities that the potential breakthrough measures seem to make sense. It might perhaps have been preferable if the exception had referred to cases where the offeror or its controlling shareholder were listed companies with voting right restrictions and did not have similar breakthrough measures in place (that is, where 70% of the shares with voting rights have been tendered in a tender offer, the restrictions do not apply to the offeror). Extending the scope to persons acting in concert seems excessive.

(ii) Amendments to the legislation on tender offers

(a) Breakthrough measures

In addition to the above comments on voting right restrictions in the bylaws, article 60 ter of the Securities Market Law has been amended to allow listed

companies to approve certain measures to break through some restrictions that could hinder the success of a tender offer (restrictions on share transfers or on voting rights, placed in the bylaws or in side agreements).

On the one hand, a special rule has been laid down for bylaw restrictions on voting rights, on the terms described in the above section and, on the other, the requirements for breaking through the other restrictive measures have been amended. In this last case, the breakthrough will require a resolution by the shareholders' meeting, with a qualified majority, which has been reduced from 75% to 70% of the shares with voting rights.

(b) Price of tender offers

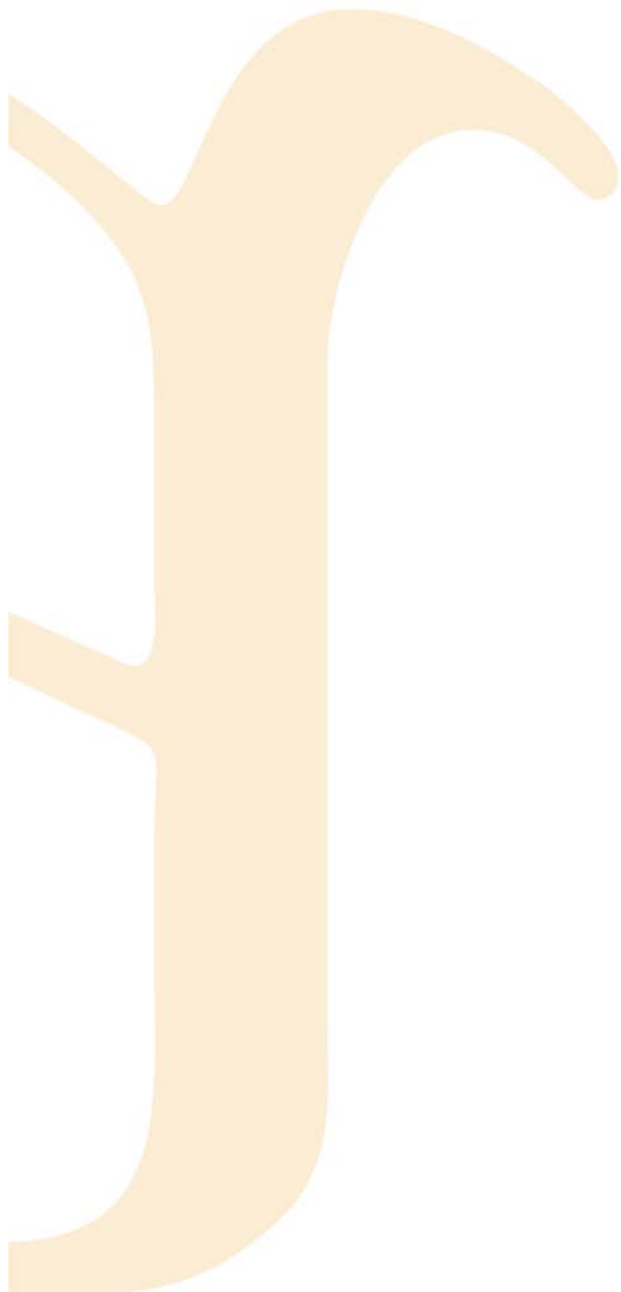
A very important amendment has been introduced regarding the price at which both voluntary and mandatory tender offers can be made where, in the 2 years preceding the announcement of the tender offer, any of the following circumstances has occurred:

- The market prices of the shares targeted in the tender offer show signs of manipulation which has led the CNMV to initiate an enforcement proceeding. It appears to be irrelevant whether that offeror has absolutely no connection with the manipulation.
- The market prices (whether of the offeree company, or in general) have been affected by exceptional events, such as natural disasters, situations of war or calamity or other force majeure events. It appears unlikely that the current economic downturn would fall within this scenario.
- The offeree company has been subject to condemnation proceedings, confiscations or other similar circumstances that may entail a material change in the actual value of its assets.

The consequences for a possible tender offer for an offeree company affected by any of these circumstances would be as follows:

- The price of the tender offer may not be lower than the higher of the equitable price (usually the highest price that the offeror has paid for the same shares within the last 12 months) and the price calculated, with justification of the relevance of each, by reference to the various valuation methods (including the average market price in a period to be determined, the break-up value of the company, the value of the consideration paid by the offeror for the same securities in the 12 months prior to the offer, the underlying book value and other generally accepted valuation methods) which are set out in an independent expert's valuation report submitted by the offeror and ensure that shareholders' rights are safeguarded.

- It is also provided that in these cases, even if the offer is made as an exchange of securities, consideration in cash that is financially equivalent to the exchange must be offered at least as an alternative.



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