Report from Spain

By Francisco Marcos,
Instituto de Empresa Business School,
Madrid, Spain

Legislation

European Companies with seat in Spain

1.1 In 2005 the major change in Spanish Company Law has been the adoption of a new Act which introduces European Companies in Spanish Law and adds some relevant reforms in Spanish company law. On November 14th, 2005 the Spanish Parliament passed Act 19/2005, on the European companies with seat in Spain. The Act went into effect on November 16th, 2005. This Act adds a new chapter to the Spanish Company Act (chapter 12 or new articles 312 to 338) to fulfill the requirements imposed by Regulation (EC) 2157/2001 (“the SE regulation”). Act 19/2005 introduces some relevant reforms in the Public Company Act and in the Limited Liability Company Act.

The Act seeks to permit this new form of company in Spanish Law carrying out the pertinent amendments in the 1989 Public Company Act Law and in the Securities Exchange Act. However, it should be emphasized that European Companies cannot be put in effective practice in Spain until the Act implementing Directive (EC) 2001/86/EC of October 8, 2001, regarding workers’ participation in the European Company is finally adopted. Until that moment and subject to fulfillment of the conditions there established, it will not be possible to register any European company in Spain. Following the model established by the SE Regulation, European Companies with seat in Spain will be governed by a mixed legal regime, which combines rules from the SE Regulation and the Public Spanish Company Act, included the new provisions introduced by the reform. There has not been an intent of providing a set of uniform rules for European Companies across the EU.

Spanish public companies may convert themselves into European Companies following the procedure set in the SE Regulation and in a new article 326 of the Spanish Company Act.

European Companies with seat in Spain can list their shares in the stock and in such a case the Securities Exchange Act 24/1988 will be applicable, minor changes are made in order to adapt the later to the peculiarities of European Companies (Additional Disposition 4th of Act 19/2005).

Act 19/2005 introduces in Spanish company law the option of organizing the board of directors as a two-tier board: a management board and a supervisory board.


1.2 Act 19/2005 introduced several major reforms in the regulation of Spanish public companies contained in Royal Legislative Decree 1564/1989, of 22 of December, solving some of the problems and questions that had lately led to discussion and contradictory court opinions.

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3 Available (in Spanish) at http://www.cnmv.es/legislacion/legislacion/leyes/indirefun.htm
(i) In Kind Contributions (article 38.2 of 1989 SCA)
A certification of the Stock Exchange at which securities are traded will have the same legal force as the independent expert report normally required by the Act for contributions in kind or in the event of increase of share capital when securities are used as the in-kind contribution.

(ii) Shareholders’ Ordinary Meeting out of time (article 95.2 of 1989 SCA)
Spanish Company Law distinguishes the Ordinary Meeting and the Extraordinary Meeting of the shareholders based on the matters being included in the agenda. The Ordinary Meeting is aimed at the approval of the financial statements. Extraordinary Meetings are called for any other purpose.
The Ordinary Meeting has to be held within the six months following the financial year’s closing date. Some problems have arisen in the courts on what to do in case the meeting did not take place or was not even called in that time period. The opinions were split between those considering that nothing happened and those that required a shareholders’ meeting to be called by the Court. This latter solution made things harder for companies but was held by some court opinions, and even by the Supreme Court. New paragraph 2 of article 95 puts an end to the discussion as it asserts the validity of the Ordinary Meeting whether it was called or held after those six months. In sum, any Ordinary Meeting called as such will be valid even if it is held after that time.

(iii) Call of the Shareholders’ Meeting (article 97 of 1989 SCA)
The regulation of the call procedure is largely overhauled. Now the meeting needs to be called ultimately one month in advance instead of the fifteen days required before. Besides, a new provision is introduced to protect the rights of minority shareholders in this setting. Within five days following the publication of the calling announcements in press and in the Commercial Register Official Gazette, any shareholders representing 5% of the share capital may be able to request by means of any reliable communication directed to the company the publication of a complement to the calling of the shareholders’ meeting including one or more new issues in the agenda. If the directors receive that communication in proper time and form, they shall publish a complement to the call at least fifteen days before the appointed date of the meeting. Breach of this obligation to publish such complement will cause the nullity of the meeting.
Additionally, when attendance to the meeting through “telematic means” is admitted by the By-laws, the call should establish the time limit, forms and ways to exercise the rights by the shareholders in order to further an orderly course of events during meeting. The call should also include information regarding the possibility that the interventions and proposals of agreements made by those shareholders attending through “telematic means” are sent to the company before the meeting begins. Likewise, the answers to the questions posed by these shareholders during the meeting exercising their right of information could be obtained in writing in the next seven days. Although the new act does not explain what are “telematic means”, apparently it is referring to any information or computer system that allows attending the meeting in real time from a distance, but it would not cover those cases in which proxies have been cast and votes have been exercised in advance.

(iv) Duration of the Directors’ Appointment (article 126 1989 SCA)
The maximum time limit for directors’ appointments is extended from five to six years. Companies may be able to lower that limit, but in that case, the limit should be identical for all directors. No changes are introduced in the re-election regime, which is possible for the same legal period.

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5 Supreme Court Judgment of April, 3rd 2003.
(v) Reduction of share capital (articles 165 and 170.2 SCA)
In order to save costs for the company, the share capital reduction agreement and the offer to purchase in case of share capital reduction by means of acquisition of own shares have to be published in the Commercial Register Official Gazette and in only one business newspaper of the province in which the company has its seat (instead of in two, as it was required up to now).

(vi) Simplified Mergers (article 250 SCA).
A special legal regime is designed for those takeover mergers of companies fully owned (direct or indirectly). As it had already been admitted in practice in some cases, it will not be necessary for the directors to issue a report neither that of the independent experts. The same procedure can be used in inverse mergers and in mergers among sister companies (wholly owned, directly or indirectly by a same holding company).

(vii) Directors Liability for company’s debts (art. 262.5 1989 SCA)
This article imposes strict liability of directors to company’s debts if they breach their duty to call the shareholders’ meeting to dissolve the company and/or request the declaration of insolvency of the company.
That duty is imposed in case a mandatory cause of dissolution occurs. Mandatory causes of dissolution are those listed in article 260.1 of 1989 SCA and, apart from deadlock in corporate organs, corporate objectives’ achievement or those established in the By-laws, are mainly related to company’s financial difficulties (if its assets are less than half of the share capital, unless the latter is increased or reduced sufficiently or if the share capital is reduced under the legal minimum of 60.101,21€). The duty has to be fulfilled in two months, otherwise liability arises (262.2).
As a consequence of the reform directors liability for company’s debts will now onwards be limited to those debts occurred subsequent to the occurrence of the legal cause of dissolution. However, all then existing company’s debts will be deemed to have arisen after that date. Consequently, to be exonered the directors need to prove that the debt in question occurred on a date before the cause of dissolution.

Reforms of the 1995 Spanish Limited Liability Companies Act (1995 SLLCA)

1.3 Act 19/2005 introduced also a reform in the regulation of limited liability companies, contained in Act 2/1995, of March 23\(^6\). It drafted a new article 105.5 1995 SLLCA, which replicates the above-mentioned reform of the Companies Act regarding directors liability for company’s debts. The new regime imposes directors’ liability in case they did not call for a shareholders’ meeting to dissolve the limited liability company when there was a legal cause or they did not ask for the declaration of insolvency. The new article clarifies that the debts would be presumed to have occurred after the legal cause of dissolution and directors will have to prove the opposite in case they want to be exonered.