28 August, 2015

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Re: Questionnaire for the analysis of viability of Annual Board Statements of Significant Audiences and Materiality- draft Spanish perspective.

This questionnaire is based in the template provided by Professor Eccles and is based solely on the laws and regulations of the Kingdom of Spain effective as of the date hereof.

The information provided is a general overview based solely on the laws of Spain. It is not a legal advice and does not pretend to be a full and comprehensive legal report on the matter.

I. Setting the legal landscape

1. Briefly explain the broader legal landscape regarding the obligations that a company has to its stakeholders or with regard to its impact on stakeholders, and in particular whether its primary duty is or is not to shareholders over all other stakeholders.

Spain has basically got two types of companies: partnerships and capital companies. Partnerships are the “sociedad colectiva” and the “sociedad comanditaria simple”. Capital companies are the “sociedad comanditaria por acciones” (limited company with shares), the “sociedad de responsabilidad limitada” or “sociedad limitada” (private limited company) and the “sociedad anónima” (public limited company). The most frequent and important types are “sociedad limitada” (private limited company) and “sociedad anónima” (public limited company). The legal regulation of the latter contains general provisions applicable for all the public limited companies and specific provisions applicable only to the listed public limited companies.

The Spanish companies Law does not impose any obligation relating to the stakeholders. The primary duty is increasing the company’s economic value, i.e., maximizing the investments of the shareholder (or partners).

Anyway bear in mind: (i) Firstly, in Spain there are a number of provisions (other than companies Law provisions) which are intended to protect some stakeholders such as
employees (the level of protection of the employees’ rights is quite high) or communities (e.g., environment protection regulations). (ii) Secondly, a number of companies (particularly, listed companies) are involved, on a voluntary basis, in social corporate responsibility programs. The corporate social responsibility is implemented directly by the companies or through foundations owned by such companies.

II. Regulatory framework

2. To what legal tradition does the jurisdiction belong, i.e. civil/ common law, mixed?

The Spanish legal regime is primarily based on codified law sharing its civil tradition with most of the European countries (e.g., Italy, France, and Germany etc.). Anyway, as in other civil-law countries, the case-law has a very relevant role in the interpretation of the legal provisions.

3. Are corporate/securities laws regulated federally/ nationally, provincially or both?

Securities Law is nationally regulated. Corporate law is also nationally regulated. There is, however, one exception: the cooperative company, which is provincially regulated.

4. Who are the government corporate/securities regulators and what are their respective powers (in summary only)?

The Securities Market National Commission (Comisión Nacional del Mercado de Valores, hereinafter “CNMV”) is the agency in charge of (i) supervising and (ii) inspecting the Spanish Stock Markets and the activities of all the participants in those markets.

The purpose of the CNMV is to ensure the transparency of the Spanish market and the correct formation of prices in them, and to protect investors. The main beneficiaries of the CNMV’s work are the investors, to whom CNMV must assure adequate protection. To this end, the CNMV focuses particularly on improving the quality of information disclosure to the market, and particular efforts are made in the area of auditing and in developing new disclosure requirements relating to remuneration schemes for directors and executives that are linked to the price of the shares of the company where they work.

The actions of the Commission relate to companies which issue securities for public placement, to the secondary markets in securities, and to investment services
companies. The Commission also exercises prudential supervision over the last two in order to ensure transaction security and the solvency of the system.

The Bank of Spain (“BoS”) is the government agency is charge of (i) supervising and (ii) inspecting the Spanish Stock Markets in respect of the public debt.

5. **Does the jurisdiction have a stock exchange(s)?**

In Spain there is a centralized Spanish Stock Exchange (Bolsas y Mercados Españoles) known as BME. BME is the company managing the principal official Spanish stock exchanges in Spain, inter alia, four stock exchanges markets: (i) one located in Madrid (*Bolsa de Valores de Madrid*), (ii) one located in Barcelona (*Bolsa de Valores de Barcelona*), (iii) one located in Valencia (*Bolas de Valores de Valencia*) and (iv) one located in Bilbao (*Bolsa de Valores de Bilbao*). In addition, there isthe Fixed Income Exchange (Mercado de Renta Fija), known as AIAF, and The Futures and Options Exchange (*Mercado oficial Español de opciones y Futuros Financieros*), known as MEFF.

Additionally in Spain there are others special stock exchanges operating, i.e., the Alternative Stock Exchange (*Mercado Alternativo Bursátil*) and the Latin-American Securities Exchange, (*Mercado para Valores Latinoamericanos*) known as LATIBEX.

### III. Incorporation and listing

6. **Do the concepts of “limited liability” and “separate legal personality” exist?**

The concepts of separate legal personality and limited liability do exist under Spanish companies’ legal regime.

Legal personality implies that the company is allowed to be holder of rights and obligations (all the commercial companies have got legal personality). Limited liability means that the shareholders (or partners) are not liable for the company’s duties. But bear in mind that those two concepts are not synonyms. In the partnerships, the partners are (subsidiary) liable for the company’s debts. In the capital companies, however, they are not.

7. **Did incorporation or listing historically, or does it today, require any recognition by the company or its directors of a duty to society, an obligation to take account of the company’s social or environmental impacts, or to respect its stakeholders?**
No, such a requirement does not exist under the Spanish corporate legal regime, but keep in mind our responses to question # 1.

8. Do any stock exchanges have a responsible investment index, and is participation voluntary? (See e.g. FTSE4Good, Dow Jones Sustainability Index, the Johannesburg Stock Exchange’s Socially Responsible Investment Index.)

Yes, in Spain the degree of compliance with the responsible investment criteria can be measured through the FTSE4GoodIBEX, an index that was created jointly by the FTSE Group and Bolsas y Mercados Españoles (BME) taking into account securities belonging to the BME IBEX35 Index and the FTSE Spain all Cap., which comply with the good practice criteria in the responsible investment field (e.g., environmental sustainability, universal human rights conservation and support, etc.). In this link further information can be found: http://www.bolsamadrid.es/esp/Indices/Ibex/FTSE4Good.aspx

IV. Director’s duties

9. To who are director’s duties generally owed?

The director’s duties are owed directly to the company and indirectly to the shareholders (or partners). We could say that the diligence duty is owned to the shareholders as a whole (i.e., the company) and the loyalty duty is owned to each shareholder.

10. What are the duties owed by directors- please state briefly. Please indicate if there are express or implied duties to avoid damage to the company’s reputation.

The Spanish Capital Companies Act states several duties for the directors. These are:

- General diligence duty: Contained in Section 225 of the Spanish Capital Companies Act (LSC). This duty implies that the directors will perform their duties with the diligence of a responsible businessman and they must keep diligently informed on the progress of the company.

- Duty of loyalty: Contained in Section 227 of the Spanish Capital Companies Act (LSC). This duty implies that directors must act in good faith in the company’s best interests. Specifically this duty means that directors must:
(a) Refrain from using their powers for any purposes other than those for which they were granted,

(b) Maintain secrecy regarding matters to which they have had access in the performance of their duties, even when they have left office, except in those cases in which the law otherwise permits or requires,

(c) Refrain from participating in deliberation and voting on resolutions or decisions in which the director or a related person has a conflict of interest, direct or indirect,

(d) Adopt the necessary measures to avoid situations in which their interests, on their own behalf or on behalf of another, can be in conflict with the company’s interests and their duties to it.

- **Duty to avoid situations of conflict of interests**: Section 229 LSC, according to this section the directors are to refrain from:

  (a) Engaging in transactions with the company, unless they are ordinary transactions, on terms that are standard for customers and of little importance,

  (b) Using the name of the company, its assets or confidential information for private transactions,

  (c) Appropriating the business opportunities of the company,

  (d) Obtaining benefits or compensation from third parties, except in the case of mere courtesies,

  (e) Engaging in activities on its own behalf or on behalf of others that involve effective competition, whether actual or potential, with the company or that in any other way place it in permanent conflict with the interests of the company.

There is no specific duty to avoid damage to the company’s reputation; nevertheless, at our understanding, such duty might arise from the general duty of loyalty.

11. **More generally**, are directors required or permitted to consider the company’s impacts on non-shareholders, including impacts on the individuals and communities affected by the company’s operations? Is the answer the same where the impacts occur outside the jurisdiction? Can or must directors consider such impacts by subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction? (See e.g. s. 172 UK Companies Act 2006, and in particular, ss.( 1 ))?
There is no such a specific provision as 172 UK Companies Act 2006 under the Spanish law.

Nevertheless, as a consequence of the provisions stated in other laws (e.g., labor, environment, or bankruptcy laws), the directors may be forced to consider other stakes when adopting the company’s management resolutions. Also, the directors of a parent company must bear in mind the subsidiaries.

With respect to the impacts occurring outside Spanish jurisdiction, there is no legal provision in this sense.

Anyway, specific regulations apart, the good economic performance or, in general, the performance of a company in the market will oblige that the directors bear in mind the impact of their decisions on stakeholders. For instance, if due to very bad relationship with the suppliers the reputation of the company decreases, the value of the company will also decrease. And therefore the directors must avoid such harm.

12. If directors are required or permitted to consider impacts on non-shareholders to what extent do they have discretion in determining how to balance different factors including such impacts? What additional liabilities, if any, do the board or individual directors assume in exercising such discretion?

Please see our responses to questions #1 and 11 above.

13. What are the legal consequences for failing to fulfill any duties described above; and who may take action to initiate them? What defenses are available? Can these issues given rise to other causes of action or regulatory routes whereby a stakeholder can exert pressure on a company with regard to its actions?

Where the duties of diligence and/or loyalty of the directors are in breach, Spanish Law provides important remedies.

In case the directors are in breach of their duties, The Spanish Capital Companies Act Section 236 states that Directors will be held for any damage they cause through acts or omissions contrary to the law or the bylaws, or carried out in violation of the duties inherent in their office, provided that there has been intentional misconduct or negligence. So as legal consequences the directors shall compensate the company for any damages or losses; furthermore, directors could be removed from their positions.

The legal standing to initiate the legal actions against the company’s directors corresponds to several parties: (i) The company; an action for liability of directors will be filed by the company, after a resolution of the general meeting, which may be
adopted upon request of any member even when it is not included on the agenda. (ii) The minority shareholders; shareholders that individually or collectively hold interests permitting them to request call of the general meeting, may bring the action for liability in defence of the corporate interest when the directors do not call a general meeting requested for that purpose, when the company does not bring it within a term of one month, counted from the date of adoption of the corresponding resolution, or when it is against demanding liability. Such minority shareholders may directly exercise the corporate action for liability when it is based on breach of the duty of loyalty, without need of submitting the decision to the general meeting. (iii) The company’s creditors; The company’s creditors may bring the company action against the administrators when it has not been brought by the company or its shareholders, whenever the company's assets are insufficient to pay their claims, and (iv) Individually, any shareholder or third party in the case certain directors’ acts have directly harmed their interests.

14. Are there any other director’s duties which are relevant to the interests of stakeholders?

There are not any other director’s duties. The duty of acting as a diligent director is a wide duty that may cover the protection of the interest of any stakeholder of the company.

15. For all the above, if these exist in your jurisdiction, does the law provide guidance about the role of supervisory boards in cases of two tier board structures? What obligations are owed by senior management who are not board directors? Is this determined by law if no specific contractual provision applies?

Spanish management structure of a company is one-tiered.

V. Reporting

16. Are companies required or permitted to disclose the impacts of their operations (including stakeholder impacts) on non-shareholders, as well as any action taken or intended to address those impacts? Is this required as part of financial reporting obligations or pursuant to a separate reporting regime? Please specify for each reporting route whether it is mandatory or voluntary. Please describe any mandatory reporting requirement, major voluntary initiative or trend towards voluntary reporting with regard to transparency (for example, payments to government or state-owned entities, reports on government orders to undertake surveillance or interception, reports on tax payments etc.).

Companies in Spain (both public limited companies (S.A.) and limited liability companies (S.L.) are subject to mandatory reporting requirements. The Law requires that the balance sheet and financial statements report shall be approved by the general
shareholder’s meeting. This information is public subject to the compliance by the Spanish companies to deposit the annual accounts with the Commercial Register, but the access to this information requires to ask for it to the Commercial Register. In addition to this obligation, periodically the stock corporations shall make their financial and accounting information available to the whole society by submitting them to the CNMV. Additionally, material economic facts affecting a listed corporation shall be reported to the CNMV in the form of relevant facts (hechos relevantes), so the investors can make a picture of the company circumstances.

There is also a corporate governance annual report which stock corporations shall fill and deliver to the CNMV which contains, among others, the director’s remunerations schemes, independent directors details, etc.

Moreover, the very recent Good Governance Code for listed companies, approved by the CNMV on February 24, 2015, contains some provisions to this respect based on the principle “comply or explain.” The code contains voluntary reports which detail some political reports related to the company (e.g., the external auditor’s independency report for presenting at the general shareholder ‘meeting’).

The European Union has adopted recently a Directive on Reporting (EU CSR-Reporting Directive) on nonfinancial factors and diversity. This Directive will be now transposed to the Spanish legal regime.

17. Do legal reporting obligations extend to such impacts outside the jurisdiction; to the impacts of subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction?

The board of directors must prepare the annual report considering the activity and results of the company, its subsidiaries and the companies it controls. Moreover, there are companies which must prepare consolidated financial statements; in such case the information will be included in the annual report of the parent company.

18. Who must verify these reports; who can access reports; and what are the legal or regulatory consequences of failing to report or misrepresentation? Is there a regulator tasked with investigating complaints of misreporting?

The annual accounts are compulsory subject to verification by an independent auditor appointed by the shareholders meeting.

The interim financial statements prepared by the stock companies are not legally subject to any auditor’s verification, however the stock companies board of directors can voluntarily decide the interim financial statements for six months period to be reviewed
by an auditor and in such a case the auditor’s report must also be reported to the CNMV.

The annual accounts and the interim financial statements are also subject to the official supervision by the CNMV.

19. What is the external assurance regime for reporting on a company’s impacts on stakeholders? Please specify any mandatory requirements and also where reporting is voluntary what the current market practice is as regards third party assurance. Please summarise any regulatory guidance on reporting that relates to impacts on non-shareholder stakeholders.

There is no such assurance regimen under the Spanish legal framework.

VI. Stakeholder engagement

20. Are there any restrictions on circulating shareholder proposals which deal with impacts on non-shareholders, including stakeholder impacts?

There is no legal or regulatory provision restricting shareholders proposals.

21. Are institutional investors, including pension funds, required or permitted to consider such impacts in their investment decisions? What is legal duty that pension funds owe with regard to investment decisions in this regard? How does the legal duty of the fund align with term and contractual performance criteria of fund managers – does this facilitate or deter consideration of such impacts?

There is no legal requirement in Spain for institutional investors to consider the impact of their investment decisions on stakeholders or anyone else.

22. Can non-shareholders address companies’ annual general meetings? What is the minimum shareholding required for a shareholder to raise a question at a company’s AGM?

According to Spanish law, only shareholders may attend a general shareholders’ meeting but there are some exceptions to the general rule. The by-laws may authorise or require the attendance of directors, managers, technicians, and others involved in the proper handling of company affairs. Additionally, the person chairing the general meeting may authorise anyone else he/she deems appropriate to attend the meeting, although the shareholders with a simple majority decide to revoke such authorisation.
There is no minimum shareholding required to raise questions at the general shareholders’ meeting.

VII. Other issues of corporate governance

23. Are there any other laws, policies, codes or guidelines or standards applied in the context of particular contractual relationships (for example project finance) or through adherence to particular sustainability principles (for example the UN Global Compact, the OECD Guidelines for Multinational Enterprises etc.) related to corporate governance that might encourage companies to consider in a structured way their impacts upon and the interests of their wider stakeholders including through a stakeholder engagement process?

As mentioned in our response to question #1, a number of companies (particularly listed companies) are involved, on a voluntary basis, in corporate social responsibility programs. The corporate social responsibility is implemented directly by the companies or through foundations owned by such companies. In addition, a lot of them have adhered to UN Global Compact or other non-binding instruments relating to sustainability principles.

24. Are there any laws requiring representation of particular stakeholder constituencies (i.e. employees, representatives of affected communities) on company boards?

There is no such a legal requirement under the Spanish law.

25. Are there any laws requiring gender, racial/ethnic, religious or other stakeholder representation; or non-discrimination generally, on company boards?

The Good Governance Code of Listed Companies 2015 establishes, on its recommendation number 14, an aimed percentage of 30% women on the listed corporation’s board of directors. The compliance of such Good Governance is not mandatory, but if companies do not comply, they must explain why they do not comply.

In addition, the Organic Law 3/2007 for the Effective Equality between Women and Men establishes that companies, even non-listed ones, should pursue the goal of having a balanced participation of women and men in the boards of directors; in particular, 40% of the members should be women.
26. **In your jurisdiction is there any legal route whereby a parent company can incur liability with regard to the impacts that one of its subsidiaries has had on stakeholder groups? Are there any serious proposals to impose such responsibility?**

Provided the stakeholders are not entitled to claim a legal right, parent companies are not liable.

27. **Are you aware of any incoming law or proposals that are relevant to the issues raised in this questionnaire? If so please describe, providing an indication of the anticipated date the legislation will come into force or be adopted.**

We are not aware of any incoming law relating to the issues here discussed.

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