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CORPORATE & GOVERNANCE

COMPANIES CODE AMENDED

Decree-Law 79/2017, of 30 June 2017, was published last Friday and amends both the Insolvency and Corporate Recovery Code and the Companies Code, in order to implement the goals of the "Programa Capitalizar" approved by Council of Ministers Resolution 42/2016, of 18 August 2016.

Simplified share capital increase by conversion of shareholders loans

The main amendments are designed to implement a simplified mechanism for share capital increase by conversion of shareholders loans at limited liability companies by quotas as follows:

- Shareholders representing the voting majority required to resolve on amendments to the Articles of Incorporation may notify the board of directors of the company of the share capital increase by conversion of the their shareholders loans to the company as booked in the latest approved balance sheet;
- The board of directors then notifies the share capital increase to the other shareholders in writing within 10 days, advising that the share capital increase becomes effective if no other shareholder expressly opposes the notified conversion in writing within 10 days as from the notice of conversion.

Notwithstanding the fact that this type of share capital increase is an increase in kind, it may be made by mere statement of the certified accountant or statutory auditor (where the statutory audit is a legal requirement), setting out the amount in the accounting records, its source and the date.

The wording of new Article 87.4 of the Companies Code raises a few issues however, particularly because it only refers to shareholders of "*limited liability companies by quotas*" while at the same time referring to "*managers*" and "*directors*", and being included in the general provisions of the Code.

The relevant bill submitted to public consultation did not restrict the simplified mechanism to members of limited liability companies by quotas, and so we could arguably infer that the legislator intended afterwards to limit the mechanism to limited liability companies by quotas having "forgotten" to remove the references to "*directors*" (paragraph 4), "*board of directors*" (paragraph 5) – which should have been replaced with board of managers –, and to insert the new regime under the chapter dedicated to limited liability companies by quotas.
This doubt should be addressed by rectifying the statute.

This new regime also waives the rules of equality between members, as:

- The share capital increase is not required to be resolved at a general assembly duly convened or with unanimous waiver of prior notice formalities;
- A rather short deadline (10 days) is foreseen for the remaining shareholders to expressly state their opposition; and
- No tag along rights are foreseen for the remaining shareholders, whether through conversion of their own shareholders loans or through any other type of contributions, so as to avoid dilution of their stake.

We fear that the regime now approved may shoot itself in the foot, as it were, since it does not require the remaining shareholders to justify their opposition or the opposition to be underpinned by relevant own or equity interests.

Dematerialization and electronic minute books

As part of the development of one of the State's modernization axes – streamlining –, another amendment was made to the Companies Code, specifically Article 4-A, to expressly recognize that the demand for or requirement of a signed document under the Companies Code will be deemed satisfied with electronic signatures. The door is open for the implementation of one of the measures set out in the Simplex+ program, namely the adoption of electronic minute books. It will be interesting to see how Registry Offices and Notary Services will react to this amendment and the new documents issued under it.

The amendments come into force on 1 July 2017.

VdA is available to provide more detailed clarifications on the consequences of the new decree-law.