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Managing Directors and Certain Board Members in Spain May Need to Revisit Their Contracts

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Reforms of the ***Spanish Companies Act*** (*'Ley de Sociedades de Capital')* which came into force at the end of 2014 introduced new regulations challenging the historical professional relationships of members of Boards of Directors. Now that we are in the middle of the Annual General Meeting season in Spain, perhaps it is time for a quick review of the impact of those reforms over the last half-year: From a corporate perspective, the reforms make directors (whether expressly appointed or "de facto") of a Spanish legal entity individually liable towards the legal entity, its shareholders and creditors for any damages resulting from a breach of their duties – provided that willful misconduct or negligence on their part can be shown. The new regime also reinforces the principle previously established by the Spanish Supreme Court that if an employee is or becomes a member of the Board of Directors with delegated authority and powers of representation, then the employment relationship is deemed converted into a commercial relationship. Section 249 of the Act requires that all appointed managing directors and board members with designated management duties must enter into an agreement for services. Whilst the legislation is unclear as to whether this requirement applies retrospectively, we strongly recommend that agreements for services are put in place for all such Managing Directors and executive Board members – irrespective of when they were first appointed. Businesses in Spain must therefore ensure that such agreements are in place and that they:

- are first approved by the Board of Directors by a two thirds majority (the director in question excluded from the vote);
- set out the specific details of any remuneration for management duties, including any compensation for the early removal of the director from the post and the amounts to be paid in insurance premiums or savings scheme contributions;
- are attached as an annex to the minutes of the Board meeting approving it.

Note also that Managing Directors and other board members with designated managerial duties cannot receive any amounts that are not provided for in the agreement for services. If they do, there could be potential tax liabilities for the Company as it may be treated as a non-deductible expense in its tax returns. Our perception is that companies are reacting only slowly to these changes, and that

many will go into their AGMs this summer still having senior directors on employment contracts rather than self-employed arrangements. There is little clarity around legal consequences of non-compliance, and it may be that it is the Spanish tax authorities which will act as “enforcer” through their review of companies’ tax returns for calendar 2015. At that stage the different tax regimes applicable as between employment and consultancy will effectively force disclosure by companies of the contractual arrangements they have in place with senior management. To comply with the tax provisions on the deductibility of the payments made to MDs and other board members, companies will be forced to introduce agreements for services for those officers.

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