Consequences of incorporating a shareholders' agreement into an ancillary obligation attached to company shares

This paper intends to highlight the consequences that attaching to company shares an ancillary obligation consisting of compliance with a shareholders' agreement has (and does not have), consequences that derive from the integration of the agreement into the corporate organisation.

FERNANDO MARÍN DE LA BÁRCENA
Associate Professor of Corporate & Commercial Law, Complutense University of Madrid
Academic counsel, Gómez-Acebo & Pombo

1. Introduction

The technique of strengthening the effectiveness of a shareholders' agreement, through the design of ancillary obligations carried by company shares that consist of the requirement to fulfil the obligations assumed in said agreement, is widespread in Spanish corporate practice and is endorsed by the Decisions of the Directorate-General of Legal Certainty and Public Authentication (formerly DGRN) of 26 June 2018, 11 October 2024 and 29 November 2024.

The aforementioned decisions held that the legal requirement to determine the content of this kind of ancillary obligation (Art. 1273 of the Civil Code - CC -) is fulfilled if the articles of association refer to a deed executed before a notary, without the need to file the agreement or charter with the Registry of Companies. According to the latest two decisions cited, although it is true that future acquirers of shares requiring compliance with a shareholders' agreement must be able to know the content thereof, this is a matter reserved to the scope of party

autonomy within the framework of preliminary dealings of the legal transaction of acquisition.

The main purpose of the drafting and approval of this kind of ancillary obligation is to activate the corporate remedy of expulsion of a shareholder for – wilful or not - breach of the shareholders' agreement, so provided in the articles of association of a public limited company (Arts. 89(2) and 350 of the Companies Act - LSC -), as well as to ensure the limitation on the transferability of shares carrying ancillary obligations, since such a transfer requires the company's authorisation by means of resolution or decision of the competent body (Art. 88 LSC).

The following seeks to highlight the consequences that the decision to create and register in the Registry of Companies an ancillary obligation consisting of compliance with the shareholders' agreement has (and does not have), consequences that derive from the modification of the legal nature of the shareholders' agreement, which, once linked to the ancillary obligation, becomes part of the corporate organisation of the company limited by shares[1].

2. Enforceability against future acquirers and against the company

Registration in the Registry of Companies of the ancillary obligation consisting of fulfilling the shareholders' agreement merely mentioned in a deed does not determine the enforceability of the agreement against future acquirers of shares, not even when the agreement or charter is filed with said Registry. The public recording provided for under Royal Decree 171/2007, of 9 February, regulating the public recording of family charters, is one of mere disclosure or news, but it does not generate the enforceability of registration because this requires scrutiny of the legality of that which is registered, here absent (Art. 21 of the Code of Commerce).

The enforceability of shareholders' agreements requires registration with the Registry of Companies, a possibility recognised for limited companies by the Emerging Companies (Ecosystem Promotion) Act 28/2022 of 21 December. In this case, said agreements must be executed in solemn form as deeds and a notary must check the legality of the agreements' clauses ("if they do not contain clauses contrary to the law").

As a general rule, an ancillary obligation consisting of fulfilling a non-registered shareholders' agreement only requires that the agreement be identified (not necessarily in a deed) in a manner that future shareholders can be aware of it prior to acquiring shareholder status.

In any case, from a company's point of view, what matters is that no third party can obtain the necessary authorisation to become a shareholder without signing the shareholders' agreement, which guarantees that the shareholders and signatories of the agreement are one and the same at all times and, consequently, that the agreement is fully enforceable against the company (Art. 1257 CC).

[1] *Cf.*, for what follows, Pérez Millán, D., *"La inscripción de la prestación accesoria de cumplimiento de un protocolo familiar" (RDM*, no. 311, January-March 2019), which also addresses the complex issue of how this type of article works when there are shareholders who are not a party to the shareholders' agreement.

The possibility of the shareholders' agreement being amended over time is also usually provided for, generally because the entry of new shareholders requires that internal relations be reshuffled. For this reason, a rule must be included in the agreement on amendments by a majority and a line in the wording of the ancillary obligation referring the determination of the content of the shareholders' agreement to the initial deed along with its unique protocol number and *"its amendments in accordance with the provisions thereof"* (that is, to the current version of the agreement at any given time).

3. Content of the agreement and activation of corporate remedies

The approval and registration of an ancillary obligation consisting of compliance with the shareholders' agreement means that the signatories to the agreement are bound, in respect of the company and *in their capacity as shareholders*, to fulfil the obligations set out therein. And once the transition from the merely obligational to the corporate takes place, the agreement becomes part of the corporate organisation and, consequently, is subject to the same limitations of content that would apply to a rule in the articles of association.

The above also has consequences for the application of company rules tied to a shareholders' agreement.

As for the activation of the corporate remedy of expulsion for breach of an ancillary obligation, such requires the passage of a general meeting resolution (which can be challenged) and (in addition) a court decision if the percentage of the expelled shareholder's capital exceeds twenty-five percent. In both cases, the court of law or arbitration tribunal settling the dispute must analyse the conformity between the agreement rule deemed infringed and mandatory company law rules. Furthermore, the expulsion of a shareholder cannot be carried out for any reason but must be based on a just cause or the breach of an obligation that is key for the achievement of the common goal pursued by the parties (Art. 1707 CC).

With regard to the decision to authorise or deny the transfer of shares carrying an ancillary obligation, it is necessary to take into consideration that the competent authority to give permission cannot act discretionally, but must justify its decision based on the capacity of the acquirer to fulfil the obligations defined in the agreement; it has even been argued that, at least in the case of a public limited company, the reasons that would allow the transfer to be denied would have to be identified in the articles of association (Art. 123(3) LSC).

4. Conclusions.

1st. The approval and registration of an ancillary obligation consisting of compliance with the shareholders' agreement involves the integration of the agreement into the corporate organisation and, consequently, its content will be subject to the same limitations as articles of association rules (that is, to mandatory company law rules).

2nd. The incorporation of the agreement into the ancillary obligation does not require the agreement to be executed in solemn form as a deed, needing only to be identified in such a way that it can be known not only by the shareholders who have signed it but also by future shareholders. Accessibility of the

The agreement will be subject to the same limitations of content that would apply to a rule in the articles of association

agreement is a requirement for the proper formation of consent in the acquisition of shareholder status, although this is a matter that is reserved to party autonomy in the context of preliminary dealings. It is not necessary to file the agreement with the Registry of Companies.

3rd. New acquirers of shares (whether directly or derivatively) must obtain authorisation from the competent body in order to acquire the status of shareholder, although said body's decision will not be entirely free or discretionary but will be limited according to the acquirer's ability to fulfil the obligations laid down in the shareholders' agreement.

4th. Failure to comply with the shareholders' agreement will determine the possibility of expelling the defaulting shareholder, although the same rules that apply to the expulsion of any shareholder from a public or private limited company will apply (need for board resolution, court decision according to shareholding and fair value, unless otherwise agreed or stipulated by the articles of association). The expulsion resolution may be challenged if the alleged breach of ancillary obligation is based on the infringement of a clause of the shareholders' agreement that should be considered void according to company law or results from a breach that cannot be considered just cause for the expulsion of a shareholder.

5th. It is advisable to take all of the above into consideration before deciding whether to incorporate the agreement into the ancillary obligation or to ensure compliance by means of traditional contractual remedies (penalty clauses, call and put options between shareholders, etc.) or the typical restrictions on the transferability of company shares (authorisation clauses, preferential purchase rights, etc.).