



CORPORATE LAW NEWSLETTER

DECEMBER 2018 AND JANUARY 2019

OUTSTANDING REGULATION DEVELOPMENTS

DATA PROTECTION. Organic Law 3/2018, of 5 December, of Personal Data Protection and guarantee of digital rights. [Full Text.](#)

CORPORATIONS. MODIFICATIONS. Law 11/2018, of 28 December, which modifies the Commercial Code, the consolidated text of the Corporations Act approved by Royal Decree Law 1/2010, of 2 July, and Law 22/2015, of 20 July, of Auditing, with regards to non-financial information and diversity. [Full Text.](#)

HOUSING AND RENTAL. Resolution of January 22, 2019, of the Congress of Deputies, ordering the publication of the Agreement to derogate the Royal Decree-law 21/2018, of 14 December, of urgent measures in housing and rental. [Full Text.](#)

TAX MANAGEMENT. Resolution of December 21, 2018, of the State's Tax Administration Agency General Directorate, extending social collaboration to the internet filing of requests for amendment of self-assessment, and approving the standardized document to evidence the representation for its internet filing on behalf of third parties. [Full Text.](#)

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OTHER OUTSTANDING REGULATION DEVELOPMENTS

- **CNMC.** Royal Decree-law 1/2019, of 11 January, of urgent measures to adapt competences of the National Commission of Markets and Competition to requirements derived from the Community law in relation to Directives 2009/72/EC and 2009/73/EC of the European Parliament and the Council, of July 13, 2009, on common rules for the internal market in electricity and natural gas. [Full Text.](#)
- **TRANSPOSITION OF DIRECTIVES.** Royal Decree-law 23/2018, of 21 December, transposing directives on trade marks, rail transport and package travel and related travel services. [Full Text.](#)
- **CADASTRE.** Resolution of January 15, 2019, of the Cadastre General Directorate, approving the system for the establishment and functioning of Cadastral Information Points. [Full Text.](#)
- **VAT.** Royal Decree 1512/2018, of 28 December, which modifies the Value Added Tax Regulation, approved by Royal Decree 1624/1992, of 29 December, the Regulation on invoicing obligations, approved by Royal Decree 1619/2012, of 30 November, the General Regulation of tax management and inspection actions and procedures and development of common rules of applicable tax procedures, approved by Royal Decree 1065/2007, of 27 July, and the Regulation of Special Taxes, approved by Royal Decree 1165/1995, of 7 July. [Full Text.](#)
- **SOCIAL SECURITY.** Resolution of November 23, 2018, of the Social Security Fund, which modifies the territorial scope of certain executive collection units of the Social Security. [Full Text.](#)
- **INTELLECTUAL PROPERTY.** Royal Decree 1398/2018, of 23 November, which develops article 25 of the consolidated text of the Intellectual Property Law, approved by Royal Decree Law 1/1996, of 12 April, with regards to the private copying fair compensation system. [Full Text.](#)
- **FRANCHISERS' REGISTRY.** Royal Decree-law 20/2018, of 7 December, of urgent measures to boost economic competitiveness in the Spanish industry and commerce sector. [Full Text.](#)
- **COLLECTIVE INVESTMENT.** Circular 5/2018, of 26 November, of the National Securities Market Commission, which modifies Circulars 4/2008, 7/2008, 11/2008 and 1/2010, on public and periodic information of Collective Investment Institutions, accounting rules, annual accounts and reserved information statements of Venture Capital Entities, managing entities of Collective Investment Institutions and Venture Capital Entities and branches of European managing entities based in Spain. [Full Text.](#)
- **PAYMENT MEANS.** Resolution of January 8, 2019, of Bank of Spain, publishing the list of direct participants in TARGET2 - Bank of Spain. [Full Text.](#)
- **SOCIAL SECURITY.** Royal Decree 17/2019, of 25 January, modifying the General Regulation on Contribution and Liquidation of other Social Security Rights, approved by Royal Decree 2064/1995, of 22 December. [Full Text.](#)
- **CONTRIBUTION.** Order TMS/83/2019, of 31 January, developing legal standards on Social Security contribution, unemployment, protection for activity termination, Wage Guarantee Fund and professional training for 2019. [Full Text.](#)

NOTABLE RESOLUTIONS OF THE DIRECTORATE GENERAL REGISTRIES AND NOTARIES

ANNUAL ACCOUNTS. Resolution of December 10, 2018. [Full Text.](#) The present resolution rejects the Appeal filed before the Registrar's negative qualification to inscribe the 2017 annual accounts, not contributing the compulsory auditor's report. The appellant argues that, although an auditor was appointed for financial years 2015, 2016 and 2017 (as inscribed), in 2017 the obligation to audit the annual accounts disappeared, as the company did not comply with the requirements (art. 279 of the LSC). The DGRN understands that, referring to a wide cast of resolutions, having inscribed on a company's particular sheet the designation of an auditor to verify the annual accounts, the deposit cannot be performed unless they are accompanied by the appropriate auditor's report elaborated by the inscribed auditor

DISSOLUTION OF A LIMITED LIABILITY COMPANY. Resolution of December 19, 2018. [Full Text.](#) Through public deed, certain agreements unanimously adopted by the universal general shareholders' meeting of a company are formalized, agreeing its dissolution, approving the liquidation balance, resulting on no asset to be liquidated, appointing liquidator, and declaring the company as liquidated and extinguished, requesting the cancelation of its registry sheet. Furthermore, it expresses that the company does not have any creditor or debtor, and there is no divisible credit. The Registrar resolves not to practice the requested inscription because the company's open sheet inscribes the declaration of provisional insolvency enacted by the Corporate Court, which, in the Registry's opinion, is contradictory with expression of inexistence of creditors contained in the qualified deed. The DGRN accepts the appeal and clarifies that there is no contradiction between the abovementioned declaration of insolvency and the declaration of inexistence of creditors subsequently made through the public deed in question, negatively qualified. However, the DGRN understands that there would have been contradiction if the insolvency had been declared by a Commercial Court, which would have required the existence of several creditors, according to the commercial standard. The DGRN asserts that, in absence of assets, the bankruptcy declaration does not make sense, concluding that the fact that the company is empty of equity does not prevent stating in the Corporate Registry the company's extinction, with the consequent cancelation of its registry sheet.

MATTERS OF SPECIAL INTEREST FOR DIRECTORS AND MANAGERS

DGRN. EXECUTIVE DIRECTORS' REMUNERATION. Resolution of December 12, 2018. [Full Text.](#) Through the present resolution, the DGRN reiterates, once again, the obligation to subscribe a contract between the managing director or director with executive functions and the company, even in the case when such position or functions will be developed without receiving any remuneration in agreement with the bylaws. In this sense, the Mercantile Registrar, referring to the famous STS of February 26, 2018, argued that *"since the position of member of the Board of Directors is free and not remunerated, and since the remunerations regime is necessarily and uniquely the one established on the Bylaws, as declared by the STS of February 26, 2018 for all members of the board of directors, it can only be concluded that it is not appropriate to subscribe the contract indicated by art. 249 of the Corporations Act, detailing the remuneration system which, in coherence with the Bylaws, is non-existent."* In turn, the General Directorate resolves by accepting the appeal, rejecting the Registrar's qualification and reiterating that (i) based on the literal content of article 249 of the LSC, there is an obligation to subscribe a contract between the member of the board of directors with executive functions and the company, even in absence of remuneration for such director, while the contract could envision other economic (indemnities, directors' expenses, etc.) or non-economic matters (specification of certain obligations, etc.); (ii) it is not the registrar's remit to appreciate whether the contract's content contradicts or not the remuneration for the director's position, due to the fact that the contract lacks disclosures on the Mercantile Registry.

DGRN. CALL FOR MEETING. Resolution of October 17, 2018. [Full Text.](#) The present resolution accepts the appeal against the Registrar's negative qualification related to the call for general shareholders' meeting. The main question lies in determining how a general meeting should be called when the procedure established on the bylaws has not been followed, as these have not been updated in agreement with the applicable regulations at the time of the call. In view of this question, the DGRN accepts the appeal, understanding that, in case of contradiction between the bylaws' provision with regards to call means, the legal body in force at such time will always prevail.

JURISPRUDENCIA DESTACABLE

SENTENCE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION of January 16, 2019. [Full Text.](#) The present Sentence of the ECJ rejects the prohibition to acquire a company dedicated to express parcelling services, proposed by the Commission. The Commission's main argument is that the company's acquisition would hinder the market's effective competition and would imply an increase of final prices for the consumer. The appellant considers that the main reasons for the prohibition to acquire are based on an econometric analysis by the Commission through a report that has not been contrasted by the affected parties, who have not been able to formulate the corresponding pleadings. Conversely, the ECJ understands that, on the one hand, the right of defence has not been respected and, on the other, the commission has not acted transparently when elaborating econometric models used on concentrations' control procedures, thus not respecting all guarantees. As a consequence of the above, the prohibition to acquire the company enacted by the Commission is rejected.

SENTENCE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION of December 13, 2018. [Full Text.](#) The present Sentence resolves the controversy of an obligation established by the German regulations on the passenger's identification in cross-border transport lines which destination is Germany. The German law compels transport companies to identify individuals when boarding the bus and only when the destination is Germany. If the companies did not comply with this obligation, coercive fines will be imposed. However, penalized companies appeal these penalties, considering that the identification obligation is a measure with an effect equivalent to border controls. The Court considers that the German regulation to identify passengers whose destination is Germany is contrary to the Schengen Borders Code, as it is presented as a measure identical to a domestic border control.

CONCLUSIONS BY THE ADVOCATE GENERAL. ECJ. DATA PROTECTION. [Full Text.](#) The Advocate General of the ECJ analyzes the preliminary ruling of interpretation filed by the Regional Superior Civil and Criminal Court of Düsseldorf, Germany, in relation to the interpretation of the Data Protection Directive of 1995 (currently substituted by the General Data Protection Regulation of 2016), with regards to data protection in the case of a website administrator who has inserted a third party's plugin on said web (such as Facebook "Like" button), which generates the collection and transfer of the user's personal data. The Advocate General understands, and proposes to the ECJ for resolution, that this website administrator must be considered as jointly responsible for the processing, together with the third party (in this case, Facebook Ireland), for operations with regards to which they jointly make decisions on the means and purposes of the personal data processing. Accordingly, the Advocate General determines that, with regards to the data processing in the stage of collection and transfer of personal data, the third party is acting as data controller and, to this extent, is responsible together with Facebook Ireland. Therefore, the third party must obtain the user's content on their website, as they have inserted a third party's content. In this same sense, the obligation to provide the website user with minimum information is imposed to the website administrator. With regards to the legitimacy of the personal data processing without the website user's consent, the Advocate General reminds that it is legal if three cumulative requirements are met: (i) the company's legitimate interest; (ii) the need for this data processing to satisfy such legitimate interest; (iii) that the data subject's fundamental rights and freedoms must not prevail.

REVIEW – Trade marks. Modifications introduced in law will allow further protection of the trade mark rights, the harmonization between state and EU standards, and the facilitation of procedures.

Last December 27, the State's Official Gazette (BOE) published *Royal Decree Law 23/2018 of 21 December* which transposes Directive 2015/2436 on trade marks, which introduces a series of important developments.

Among the most notable **substantial amendments**, we find the following:

1. The concept of trade mark:

The wording of art 4 is modified, eliminating the requirement of graphic representation of the sign to be registered as trade mark.

Thus, the new wording in the abovementioned precept indicates that *“all signs shall constitute trade marks, particularly words, including personal names, drawings, letters, figures, colours, the product's shape or packaging, or sounds, provided that such signs are appropriate to distinguish a company's products or services from other companies, and are represented in the Trade Mark Register so as to enable the competent authorities and the general public to determine the clear and precise subject matter of the protection granted to its holder”*.

2. The previous distinction made between well-known or renowned trade mark of art 8 disappears:

With the disappearance of such distinction, now there is only the category of the renown for Spain and the European Union, regulated as national renowned trade marks or EU trade marks.

By virtue of the above, art 8 is now worded as follows: *“A trade mark shall not be registered where it is identical with, or similar to, an earlier trade mark irrespective of whether the goods or services for which it is applied or registered are identical with, similar to or not similar to those for which the earlier trade mark is registered, where the earlier trade mark has a reputation in the Member State in respect of which registration is applied for or in which the trade mark is registered or, in the case of an*

EU trade mark, has a reputation in the Union and the use of the later trade mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

Additionally, in relation to **procedural modifications**, we highlight the following:

1. Powers of the SPTO to declare trade mark's nullity or expiry:

One of the most notable developments (which will not become effective until January 14, 2023) is the awarding of direct powers to the Spanish Patents and Trademarks Office (SPTO) to declare a trade mark's nullity or expiry, that is to say, the courts will only have competence in trade marks' infringement proceedings.

The main objective is to accelerate these procedures to prevent delays within courts.

2. Use of the registered trade mark. Art 39:

The period to count the beginning of the trade mark's use, after its registration, is modified.

Such period will be of **FIVE YEARS**, to be counted from the date when the trade mark's registration is definitive, which date will be noted on the Trade Mark Register.

As a consequence of the above, in cases of opposition to the trade mark's registration, the opposing party could be required to present evidence of the use of such trade mark.

The above would also be applicable in case of declaration of expiry through civil proceedings (art. 40), in the expiry procedure before the SPTO, and in counterclaims through civil proceedings in actions for trade mark breaches (art 54) and in the nullity procedure before the SPTO (art 59).

The full text can be consulted in the [following link](#).



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