



# NEWSLETTER CORPORATE LAW

October 2018

## OUTSTANDING REGULATION DEVELOPMENTS

**VALUE ADDED TAX.** Order HAC/1148/2018, of 18 October, which modifies Order EHA/3434/2007, of 23 November, which approves models 322 of monthly self-assessment, individual model, and 353 of monthly self-assessment, aggregated model, and model 039 of data communication, corresponding to the special regime for groups of entities in the Value Added Tax, Order EHA/3012/2008, of 20 October, which approves model 347 of annual declaration of operations with third parties, as well as physical and logical designs and place, manner and term of presentation, Order EHA/3786/2008, of 29 December, which approves model 303 Value Added Tax, self-assessment, Order EHA/3111/2009, of 5 November, which approves model 390 of annual return-summary of the Value Added Tax and modifies annex I of Order EHA/1274/2007, of 26 April, which approves models 036 of census declaration of registration, modification and deregistration in the census of employers, professionals and withholders and 037 simplified census declaration of registration, modification and deregistration in the census of employers, professionals and withholders, and Order HAP/2194/2013, of 22 November. [Full text.](#)

**WORK CALENDAR 2019.** Resolution of October 16, 2018, publishing the list of bank holidays for 2019. [Full text.](#)

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## OTHER OUTSTANDING REGULATION DEVELOPMENTS

- **INVESTMENT.** Circular 4/2018, of 27 September, of the National Securities Market Commission, modifying Circular 1/2010, of 28 July, of classified information of entities delivering investment services and Circular 7/2008, of 26 November, on accounting standards, annual accounts and statements of classified information of investment service companies, collective investment institutions' managing entities, and Venture Capital Entities' investment entities. [Full text.](#)
- **INDICATION AND USE OF MEDICINES BY NURSES.** Royal Decree 1302/2018, of 22 October. It specifies nurses' competences in the indication, use and authorization for the dispensation of certain medicines and health products. It modifies section 2 of article 2, articles 3 and 5, section 3 of article 6, section 1 of article 8, articles 9 to 11, first and fourth additional provisions, and the single transitory provision of Royal Decree 954/2015, which regulates the indication, use and authorization to the dispensation of health medicines and products for human use by nurses, and paragraph c) of section 1 of article 6 and paragraphs h) and i) of annex II of the Royal Decree 640/2014, which regulates the Spanish Registry of Health Professionals. It adds a new paragraph f) to section 1 of article 7 of the Royal Decree 954/2015, and a new caption in paragraph h) and i) of annex I of the Royal Decree 640/2014. It eliminates section 2 of annex I, and annex II of the Royal Decree 954/2015 and paragraph u) in article 5, paragraph u) in annex I, and paragraph u) in annex II of the Royal Decree 640/2014. [Full text.](#)
- **ENERGY.** Royal Decree-Law 15/2018, of 5 October, of urgent measures for energy transition and consumers' protection. [Full text.](#)
- **FINANCIAL SUPPORT TO INDUSTRIAL INVESTMENT.** Order ICT/1100/2018, of 18 October. It establishes regulating bases for the concession of financial support to the industrial investment within the frame of the public policy for the reindustrialization and strengthening of industrial competitiveness. It repeals Order IET/619/2014, which establishes bases for the concession of financial support to the industrial investment within the frame of the public policy for the reindustrialization and promotion of industrial competitiveness. [Full text.](#)
- **HOMEOPATHIC MEDICINES.** Resolution of October 29, 2018, establishing the list of homeopathic medicines for which the intention of adaptation to Royal Decree 1345/2007 has been reported. This Royal Decree regulates the authorization and registration procedure, and dispensation conditions for industrially-manufactured medicines for human use, establishes the schedule to file the trading authorization request, and orders the withdrawal from the market of certain homeopathic medicines. [Full text.](#)
- **SPECIAL TAXES.** Order HAC/1147/2018, of 9 October, which approves developing standards of articles 27, 101, 102 and 110 of the Special tax Regulation approved by Royal Decree 1165/1995, of 7 July. [Full text.](#)



## NOTABLE RESOLUTIONS OF THE DIRECTORATE GENERAL REGISTRIES AND NOTARIES

**DGRN. DEPOSIT OF ACCOUNTS. Resolution of September 26, 2018.** [Full text.](#) The present resolution rejects the appeal against the negative qualification by the Registrar, rejecting the deposit of annual accounts when the auditor, designated by the Registrar at the behest of minority shareholders, differs from the auditor who finally signs the report of verification of accounts. The DGRN's reiterated doctrine is that the deposit of accounts is not possible when, after an auditor has been designated by the Registrar, the auditor's report ends being ratified by an auditor other than the one appointed and inscribed. As a consequence, the DGRN rejects the appeal.

**DGRN. DETERMINATION OF THE CORPORATE PURPOSE. Resolution of October 9, 2018.** [Full text.](#) Through the present Resolution, the DGRN resolves on the inscription of a large list of activities in the corporate purpose of the appealing Limited Liability Company. Such article of the bylaws configures an extensive list of activities, some of which are exclusively reserved to (i) professional companies; (ii) exercise of union, religious and political activities; (iii) exercise of insurance and reinsurance activities, banking activities, investment in financial markets, pension funds and fund management; and (iv) reserved to public authorities. Additionally, according to the Registrar, some activities, due to their generality, do not properly constitute an activity subject to constituting a corporate purpose. Accordingly, the DGRN, mentioning the special transcendence of the corporate purpose both for shareholders and directors and for third parties who embark in relationship with the company, and in compliance with requirements established by the Corporations Act and by the Law of support to entrepreneurs and their internalization, as well as standards related to securities and financial markets, it is not possible to inscribe activities not complying requirements established by these standards, and therefore partly accepts the appeal and solely authorizes the inscription of programming and computer consulting activities.

## QUESTIONS OF SPECIAL INTEREST FOR DIRECTORS AND MANAGERS

**JUDGEMENT BY THE SUPREME COURT OF OCTOBER 1, 2018.** [Full text.](#) The present judgement resolves procedural infringement and cassation appeals. The first appeal is based on an error in the valuation of the evidence by the Audience. The appellant considers that certain documentation, essential to sustain their thesis, has not been valued, and which was considered by the individual vote. The Supreme Court resolves by rejecting it, justifying the decision in the sovereignty of the appeal court in the selection of evidence. With regards to the cassation appeal, the cassation interest is not discussed, initially considering the non-compliance by a company and part of its shareholders with the legal precept that requires the disposal or amortization of treasury stock acquired within the three years prior to acquisition. The Court rejects the pretension because, even while the disposal has not been made once the term has ended, such late disposal does not damage the standard's purpose. In this sense, the Court concludes that it would not make sense to accept the nullity action, as it would damage the company, having achieved the purpose aimed by the standard, that is to say, the amortization of the treasury stock. Additionally, the second reason revolves around the possibility to incur in one of the prohibited cases of financial assistance at the moment of concession of the credit by the company to shareholders to acquire their own shares, not accruing interests, without contributing with guarantees, and with a payment deferral for several years. The Court reaffirms the decision of the Audience, considering that the standard does not require the nullity of the transfer and that it suffices to leave the deferral without effect, so that the company can immediately require the price.

## REMARKABLE CASE LAW

**JUDGEMENT BY THE ECJ OF OCTOBER 18, 2018.** [Full text.](#) The present Judgement determines that the owner of an internet connection through which copyrights have been breached (online publication of the audio version of a book on which copyrights are not held, causing its downloading by an unlimited number of users) cannot be exempted from responsibility for the mere fact of designating other family members as responsible for the assumed breach. The ECJ, throughout its Judgement, determines that there is a contradiction between the national regulations and the EU law. This is due to the fact that the national regulations advocate for the defence of the family intimacy right against copyrights. Accordingly, designating family members, without further precision, when these used the internet connection, the alleged offender is exonerated, based on the national regulations. Nonetheless, once preliminary judgements were sent to the ECJ, the latter understands that, in view of the community law, the simple designation of several family members, without further evidentiary effort, limits the right to effective legal protection, and breached copyrights. Thus, the fair balance between right to family intimacy and the above is breached. Having said this, in view of circumstances surrounding the main litigation, the ECJ pronounces in favour of allocating a responsibility to the owner of the Internet connection from which material protected by copyrights was shared.

**JUDGEMENT BY THE ECJ OF OCTOBER 25, 2018.** [Full text.](#) The present Judgement, in mark inscription rights, determines that the term “DEVIN” could be subject to registration. The contentious matter is whether “DEVIN” refers to a specific geographic area. According to the thesis sustained by the EUIPO, the term “DEVIN” is clearly linked to a Bulgarian town, and is thereby contrary to art. 7.1 of Regulation 207/2009. Likewise, the reference to this geographic area is considered to influence the product’s features, since the town of “DEVIN” is known for its medicinal water. However, in order to elucidate whether there is really an evocation to the Bulgarian town, it is necessary to determine the average consumer’s knowledge. The Judgement analyzes the degree of relevance of average consumers in Bulgaria, Greece and Rumania, as well as the remaining EU. Having completed the study, the ECJ determines that there is no sufficient knowledge and relevance as to reject the inscription of the name “DEVIN” as mark. Accordingly, the appeal filed by EUIPO is rejected, and the mark is inscribed.

## REVIEW – CNMV. Annual Corporate Governance Report during 2017

Last October 17, 2018, the CNM published its Annual Corporate Governance Report (hereinafter, the “Report”). Such report is structured as follows:

- Historical evolution of compliance
- Listed companies
- Entities issuers of different securities admitted to trading
- Benchmarking study in corporate governance

Entities issuer of securities admitted to trading are compelled by the Corporations Act (LSC) and Securities Market Law (LMV) to file a report on structures and compliance degree with recommendations approved by the CNMV on February 2015.

Having filed this report, the CNMV is legitimized to collect and disseminate such information on corporate governance by virtue of art. 540 LSC, in order to increase standards of compliance among national listed companies.

With regards to the enforceability to implement CNMV recommendations, the Spanish legislation leaves to free discretion of will the decision to comply or not with said recommendations. However, through the “comply or explain” system, those non-complying companies must justify reasons for which this decision has been taken.

In order to increase the quality of explanations, the CNMV, during July 2016, published technical guidelines to assist companies in their review of criteria used to explain reasons for non-compliance. These guidelines’ purpose was to increase specific explanations against generic ones. For this purpose, the Report explains that, during 2017, specific explanations have increased, although generic explanations continue being widespread.

**The Report exposes the compliance degree by listed companies during 2017 has experienced a slight increase in comparison with 2016. Currently, it amounts to 84.6% of the CNMV’s recommendations.**

However, only 4 companies out of the 139 which have filed the corporate governance report have complied with 100% of recommendations. The following aspects receive the lowest compliance:

- Separation of the appointment committee from the retributions committee (31.6% of compliance).
- Information transparency in the General Shareholders’ Meeting (36.7% of compliance).

The structure of Boards of Directors has not substantially changed, comprising from 5 to 15 members in average. Additionally, women’s presence in Boards has increased by 5.4% since 2014.

With regards to shareholding, it is structured as follows:

- Significant shareholders non-board members represent 14.7%.
- Boards of Directors represent 40.1%. Out of this percentage, 20.3% correspond to shareholders non-board members, and 19.8% to board members.

Lastly, we highlight the proliferation of the distance voting in General Shareholders’ Meetings, reaching 36.7% among analyzed companies.

The full text shall be consulted on the [following link.](#)



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