



## Corporate Law newsletter

### Outstanding regulation developments

**Alarm state. Extension.** Royal Decree 956/2020, of November 3<sup>rd</sup>, extending the alarm state declared by Royal Decree 926/2020, of October 25<sup>th</sup>, declaring the alarm state in order to contain the propagation of infections caused by SARS-CoV-2. [Full Text.](#)

**Urgent measures.** Royal Decree-Law 33/2020, of November 3<sup>rd</sup>, adopting urgent measures to support entities of the Third Sector of Social Action of state scope. [Full Text.](#)

**Urgent measures.** Royal Decree-law 34/2020, of November 17<sup>th</sup>, on urgent measures to support business solvency and the energy sector, and in tax matters. [Full Text.](#)

**CNMV.** Circular 2/2020, of October 28<sup>th</sup>, of the National Commission of the Stock Market, on advertising of investment products and services. [Full Text.](#)

**For further information, please consult [here](#) the section of the BOE dedicated to the COVID19 crisis with the consolidated regulations.**

The present newsletter is merely informative and non-exhaustive and does not constitute any type of legal advice. If you wish to receive the present newsletter, please send an e-mail to the sender: [mazars.taxlegal@mazars.es](mailto:mazars.taxlegal@mazars.es)

## Other outstanding regulation development

- **Social measures.** Royal Decree-law 32/2020, of November 3<sup>rd</sup>, approving social complementary measures for unemployment protection and support to the cultural field. [Full Text.](#)
- **Financial system.** Law 7/2020, of November 13<sup>th</sup>, for the digital transformation of the financial system. [Full Text.](#)
- **Electronic services.** Law 6/2020, of November 11<sup>th</sup>, regulating certain aspects of reliable electronic services. [Full Text.](#)
- **Gambling.** Royal Decree 958/2020, of November 3<sup>rd</sup>, on commercial communications in gambling activities. [Full Text.](#)
- **Medicines.** Royal Decree 957/2020, of November 3<sup>rd</sup>, regulating observational studies with medicines for human use. [Full Text.](#)
- **General Deposit Box.** Royal Decree 937/2020, of October 27<sup>th</sup>, approving the Regulations of the General Deposit Box. [Full Text.](#)
- **Renewable energies.** Royal Decree 960/2020, of November 3<sup>rd</sup>, regulating the economic regime of renewable energies for electricity production facilities. [Full Text.](#)
- **Financial measures.** Resolution of November 4<sup>th</sup>, 2020, of the General Secretariat of the Treasury and International Finance, updating Annex 1 of the Resolution of July 4<sup>th</sup>, 2017, of the General Secretariat of the Treasury and Financial policies, which defines the principle of financial prudence applicable to debt and derivate operations of the autonomous communities and local entities [Full Text.](#)
- **Urgent measures.** Order CIN/1062/2020, of November 6<sup>th</sup>, complying with the twelfth additional provision on financial support for actions on scientific and technologic parks of Royal Decree-Law 15/2020, of April 21<sup>st</sup>, on urgent complementary measures to support the economy and employment. [Full Text.](#)
- **Subsidies.** Order INT/1093/2020, of November 17<sup>th</sup>, approving the regulatory bases for the granting of subsidies to promote the implementation of cybersecurity in Spanish small and medium-sized companies within the framework of the Active Cybersecurity Program. [Full Text.](#)
- **AEPD.** Guide on the use of new technologies in Public Administrations. [Full Text.](#)
- **AEPD and AUTOCONTROL.** Code of Conduct for Data Processing in Advertising Activities. [Full Text.](#)

Please [click here](#) to access our analysis of key aspects in the labor, tax, corporate or financial field that companies will have to face, prepared by our specialist of Mazars, and also to our Covid Talks.

Please also visit our Global Tax and Law Tracker. Mazars' global tax and legal experts from more than **70 countries** have created this interactive **tool** to help you access and understand the **Covid-19** legislation and tax measures that impact you and your business, wherever in the world you operate.

Please click **HERE** to have access to the Global Tax and Law Tracker

## Remarkable General Directorate of Legal Security and Public Faith resolutions

**DGSJFP. General Meeting called by the only remaining living Joint Director. Resolution of October 22<sup>nd</sup>, 2020. [Full Text.](#)**

There is a debate on the registration of a corporate resolution changing the structure of the governing body in favour of a Sole Director. The General Meeting was called by the only existing Joint Director because of the death of the other one. The DGSJFP understands that the General Meeting for the change of the governing body to a Sole Director is well called and the agenda is correct, and the right of information of the shareholders is being respected. The fact that any of the Directors that remain in the position can call the General Meeting for the appointment of directors, in order to avoid the paralysis of the company, should not prevent that, complying with what has been established above, the change in the structure of the governing body in favour of the Sole Director system can be adopted, when the intention is indeed not to replace the vacant position.

**DGSJFP. Identification of the attending Directors to the meeting of the Board of Directors. Resolution of October 23<sup>rd</sup>, 2020. [Full Text.](#)**

The DGSJFP rules on the lack of record of the names of the attending Directors to a meeting of the Board of Directors in which powers of attorney are granted to certain persons. Article 97.1.4 of the RRM provides that: *“in the case of collegiate bodies of administration, the name of the attending members shall be stated, indicating those who attend in person and those who are represented by another member”*. The DGSJFP confirms the Registrar’s qualification indicating that the purpose of this requirement is to prove the valid constitution of the governing body of the company, identifying the attending directors.

**DGRN. Calling of the General Meeting by two of the three Joint Directors. Resolution of October 23<sup>rd</sup>, 2020. [Full Text.](#)**

It is decided on the validity of the call for a General Meeting of a SL, carried out by two of its three Joint Directors, in which it was agreed on the dismissal of one of the Joint Directors (and item not included in the agenda), and the two Joint Directors remaining later called a new general meeting, changing the governing body to a Sole Director. The DGSJFP considers that the called meeting is not valid, since it must be called by all the Joint Directors, except for explicit and specific provision in the company’s articles of association. Furthermore, the claimant maintains that the possible defect in calling the meeting would have been remedied by the attendance of the representative of the third Director, who was also a shareholder. However, the DGSJFP establishes that, although the conditions of a Director and Shareholder coincide in the same person, the representative is the shareholders’, not the Director’s. The administration is not carried out through a representative, so it cannot be stated that the Director who has not call the General Meeting will attend. Thirdly, this is not a case of a Universal General Meeting, because the unanimous will to become a Universal General Meeting is not derived from the minutes of such meeting. Lastly, the DGSJFP reiterates the doctrine of the own acts and the legitimacy of the shareholders to challenge the agreements at the beginning of the meeting, which in this present case the shareholder did not do.

## Remarkable Case Law

### **Ruling of the Supreme Court, of November 17<sup>th</sup>, 2020.**

[Full Text.](#)

The SC rules on the duty of loyalty of the Directors of a company consisting in avoiding the conflict of interests (arts. 229.1.a) to f) LSC). In the present case, two directors had been dismissed who at one time were appointed by the minority shareholder through the system of proportional representation and these, in addition, were directors or high-level managers of the minority shareholder. In this sense, Article 229.1.f) establishes that the duty to avoid situations of conflict of interest compels the director to abstain from carrying out activities on his own behalf or on behalf of others that involve effective competition, whether actual or potential, with the company or that, in any other way, place him in a permanent conflict with the interests of the company. The SC considers that in this case there is a conflict of interest on behalf of third parties, and moreover an effective conflict of interest, because the dismissed directors were faced with the compliance of two incompatible duties between them, which were the conflict regarding the termination of the contractual relations between the company and the shareholder, and the determination of the debts. Even though the minority shareholder was not formally a person related to the dismissed directors because it did not fall within the definition of Article 231 LSC, the actions of the directors fell under the prohibition of Article 229.1.f) because, as high level managers or directors of the minority shareholder, they carried out activities on behalf of others that placed them in a permanent conflict with the interests of the company. Therefore, the violation of the duty of loyalty constitutes just cause for the dismissal of the directors appointed by the system of proportional representation to be legitimate. In addition, the corporate interest must prevail over the right of a shareholder in permanent conflict of interest to appoint directors by the system of proportional representation.

### **Ruling of the Supreme Court, of November 12<sup>th</sup>, 2020.**

[Full Text.](#)

The SC discusses on the condition or not of shareholder and holder of the right to receive dividends as a result of a donation in favour of the three children of the initial shareholders. In particular, whether this condition

corresponds to the owner of an undivided third of the total shares in which the capital is divided, or whether it belongs exclusively to the community formed by the three participants. Article 91 of the LSC confers the status of shareholder of a SL to the legitimate owner of each share, and this status refers to the right of ownership. The SC understands that the status of shareholder is attributed to each co-owner of the shares, and that the right to receive the dividend, once approved by the meeting, is released from the legal-corporate relationship, and is integrated as an independent right of credit in the shareholder's assets. In essence, the right that corresponds to the shareholder over the agreed dividend is configured as a special right, separated from his or her condition as a shareholder and assimilated to his or her rights as a third party

### **Ruling of the European Union Court of Justice, of October 28<sup>th</sup>, 2020. [Full Text.](#)**

The ECJ rules on a preliminary ruling on Article 3.1 of Directive 2001/29/EC on copyright in the context of a dispute between two individuals concerning the copyright of a photograph. It is specified the concept of "communication to the public", and whether the sending of that photograph to the court is considered communication to the public or not. The ECJ considers that the concept of "communication to the public" brings together two cumulative elements: an act of communication of a piece of work, a situation that already exists, and a communication to a public (an undetermined number of persons). However, the second element does not occur, since it is intended for a private group and professionals working in a judicial body. Therefore, the electronic presentation of the photograph is not considered communication to the public.

## Review – Circular 1/2020, of October 28<sup>th</sup>, of the National Commission of the Stock Market, on advertising of investment products and services.

Last November 13<sup>th</sup>, Circular 2/2020 dated October 28<sup>th</sup>, of the National Securities Market Commission was published in the Official Gazette regarding the advertising of investment products and services. The purpose of such circular is to protect the investor by establishing a series of regulatory and supervisory measures so that the advertising activity regarding complex financial products is clear, sufficient, impartial and not misleading.

**This regulation will become effective on February 13<sup>th</sup>, 2021.**

However, Rule 7 will come into force six months after the publication by the Bank of Spain of a series of technical specifications on the advertising of banking products and services.

This Circular allows the CNMV to require the cessation or rectification of advertising that does not comply with the regulations and, if appropriate, to apply sanctions.

The most relevant innovations introduced in Circular 2/2020 are the following:

### Affected entities:

- Investment services companies,
- Credit institutions,
- The management companies of collective investment institutions, and
- Participatory financing platforms.

**Subject activity:** advertising activity addressed to investors or potential investors resident in Spain in which these products or services are offered or drawn attention to: **(a)** financial instruments of the Annex to the Spanish Stock Market Law, **(b)** investment services and activities and auxiliary investment services; **(c)** the activity of management of collective investment institutions, venture capital entities and securitization funds, **(d)** structured

deposits, **(e)** the services of Participatory Financing Platforms (PFPs).

### Content and format of the advertising message:

The advertising campaigns and pieces to be carried out by the subject entities must, in addition to complying with the conditions of lawfulness established in the regulations on general advertising, comply with the provisions of the Annex to Circular 2/2020, which establishes a series of general principles and criteria to be followed, to achieve greater clarity of information.

**Commercial communication policy:** the obligation to establish a commercial communication policy including (i) a description of the advertising activity developed, (ii) the general principles set forth in the Annex to Circular 2/2020 and (iii) the procedures and internal controls established to ensure compliance with Circular 2/2020. This commercial communication policy shall be kept updated and always available to the CNMV.

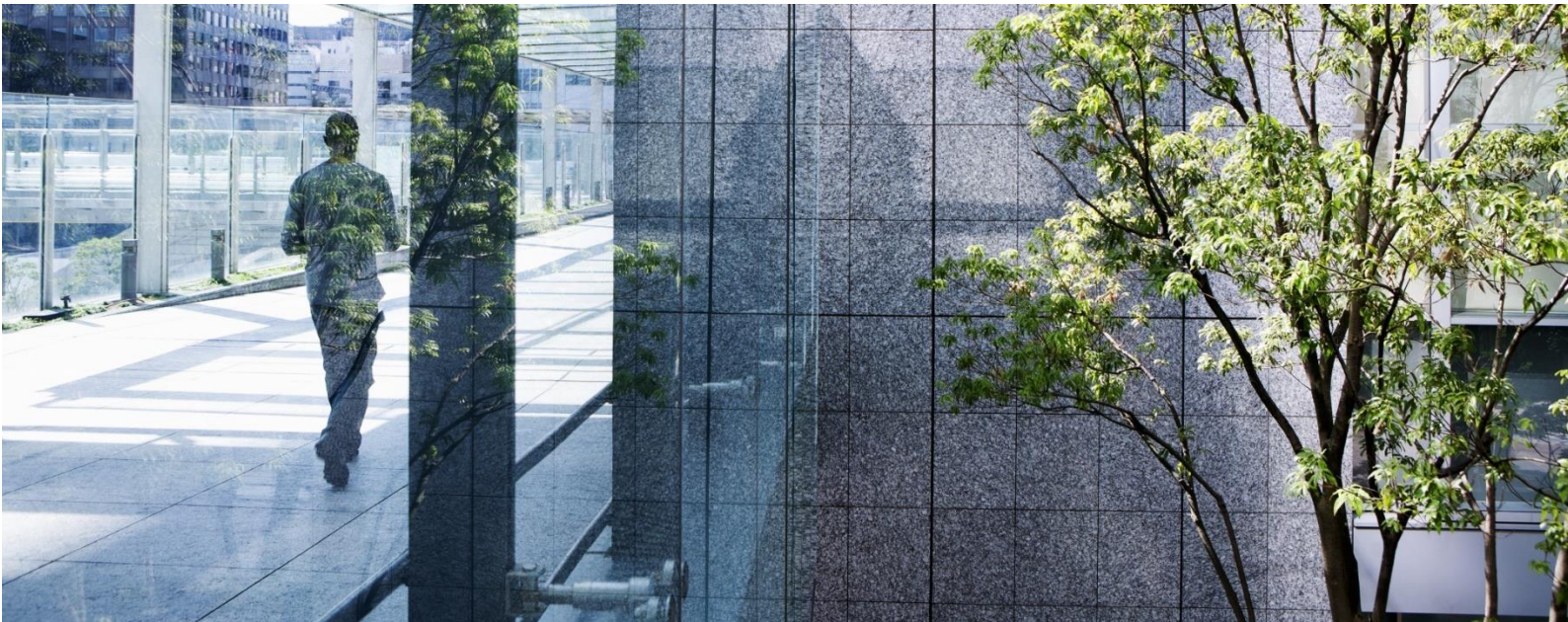
**Registry of Advertising:** an internal registry of their advertising activities is established to ease the supervision, which will be maintained and available to the CNMV for five years from the beginning of the advertising campaign.

Finally, the **monitoring function of the CNMV** is established, contemplating: information requirements on advertising campaigns or pieces and the possibility of communicating to the different entities about the discrepancies observed in their activity, being able, if necessary, to require the cessation of the advertising or its rectification.

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

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