

## Corporate Law newsletter

### Outstanding regulation developments

**Taxes.** Royal Decree 366/2021, of May 25<sup>th</sup>, implementing the procedure for filing and payment of self-assessments of the Tax on Financial Transactions and amending other tax regulations. [Full Text.](#)

**Workers' Statute.** Royal Decree-Law 9/2021, of May 11<sup>th</sup>, amending the consolidated text of the Workers' Statute Law, approved by Royal Legislative Decree 2/2015, of October 23<sup>rd</sup>, 2015, in order to ensure the labour rights of persons engaged in delivery in the field of digital platforms. [Full Text.](#)

**Urgent measures.** Royal Decree-Law 11/2021, of May 27<sup>th</sup>, on urgent measures for the defence of employment, economic reactivation, and protection of self-employed workers. [Full Text.](#)

For further information, please consult [here](#) the section of the BOE dedicated to the COVID-19 crisis with the consolidated regulations.

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## Other outstanding regulation development

- **Account Auditing.** Technical Standards. Resolution of May 4<sup>th</sup>, 2021, of the Spanish Accounting and Auditing Institute, whereby the Technical Auditing Standards, "Consideration of legal and regulatory provisions in the audit of financial statements" and "Identification and assessment of the risk of material misstatement" are submitted for public information. [Full Text.](#)
- **Urgent Measures.** Royal Decree-Law 8/2021, of May 4<sup>th</sup>, adopting urgent measures in the health, social and jurisdictional fields, to be applied after the expiration of the state of alarm declared by Royal Decree 926/2020, of October 25, declaring the state of alarm to contain the spread of infections caused by SARS-CoV-2. [Full Text.](#)
- **Urgent Measures.** Royal Decree-Law 10/2021, of May 18<sup>th</sup>, adopting urgent measures to alleviate the damages caused by the storm "Filomena". [Full Text.](#)
- **Guarantees.** Resolution of May 12<sup>th</sup>, 2021, of the Secretary of State for Economy and Business Support, publishing the Agreement of the Council of Ministers of May 11<sup>th</sup>, 2021, extending the application period and adapting the conditions of the guarantees regulated by Royal Decree-Laws 8/2020, of March 17<sup>th</sup>, and 25/2020, of July 3<sup>rd</sup>, and developing the regime for the collection of executed guarantees, established in Article 16<sup>th</sup> of Royal Decree-Law 5/2021, of March 12<sup>th</sup>. [Full Text.](#)
- **Climate Change.** Law 7/2021, of May 20, on Climate Change and Energy Transition. [Full Text.](#)
- **AEPD.** Update of the Guide for notifying personal data breaches. [Full Text.](#)
- **AEPD.** Guide on data protection and labour relations. [Full Text.](#)

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

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

**DGSJFP. Incorporation of a Limited Liability Company. Resolution of April 14<sup>th</sup>, 2021. [Full Text.](#)**

The analysis of a clause in the by-laws, according to which each shareholder of a company may appoint a representative for the exercise of the corporate rights of the community of heirs, if so provided in the respective inheritance deeds, is discussed. For the registrar, this provision contradicted art. 126 LSC (in case of co-ownership over shares, only one natural person must be appointed for the exercise of the shareholder's rights). The DGSJFP revokes the qualification, considering that it is the own deceased owner the person who may designate in the succession deed a sole representative of the members of the community of heirs to facilitate the exercise of the shareholder rights as long as the shares are not allocated to an heir. In short, the bylaws are allowed to refer to the succession title for the appointment of the representative.

**DGSJFP. Remuneration of directors and monetary contributions. Resolution of April 26<sup>th</sup>, 2021. [Full Text.](#)**

The DGSJFP analyses whether a clause in the bylaws regarding the remuneration of directors, which provides that the position of director is not remunerated, without prejudice to the payment that may be made as fees or salaries for the provision of professional services or employment relationship, is subject to registration. The DGSJFP establishes that two different scenarios must be distinguished: (i) the remuneration of functions inherent to the position of director and (ii) the remuneration of functions that are not related to the management and direction of the company. The latter does not need to be included in the bylaws, but only in the corresponding contracts. Likewise, it recognizes that although the wording of the clause could have been clearer, when interpreted as a whole there is no doubt that the position of director is free of charge, without prejudice to the remuneration that may correspond as fees or salaries for professional services or labour relationship, unrelated to the powers inherent to the position of director.

**DGSJFP. Call of the Meeting. Expired positions. Resolution of May 7<sup>th</sup>, 2021. [Full Text.](#)**

The validity of the general meeting of a company convened by the board of directors whose positions had expired is discussed. In this case, the DGSJFP upholds the appeal, exceptionally admitting the validity of the meeting called by the expired administrative body, with the aim of avoiding the company's acephaly, and with the sole purpose of appointing the directors. However, it considers that the expired and unexpired governing body (art. 222 LSC) is a governing body in law, with the complete exercise of the functions inherent to it. Furthermore, with regard to the approval of the annual accounts at the same meeting, it concludes that the validity of the notice of meeting admitted for the renewal of the directors can be extended to the approval of the accounts.

**DGSJFP. Accordion operation. Resolution of May 5<sup>th</sup>, 2021. [Full Text.](#)**

In the present case, the General Directorate examines the scope of the expression "in any case" of art. 343.2 of the LSC, which stipulates that the pre-emptive subscription right must be respected in simultaneous capital reductions and increases. In this sense, the DGSJFP understands that this expression does not admit any exceptions, and that its purpose is to prevent that, by a majority agreement, minority shareholders may be excluded de facto from the company or see their participation become insignificant. Therefore, the required respect "in any case" of the right of pre-emption is aimed at guaranteeing that all the shareholders remain in the company, even if subject to the burden of making a new disbursement.

## Remarkable Case Law

### **Ruling of the Supreme Court of May 4<sup>th</sup>, 2021. [Full Text.](#)**

The SC interprets article 8 of Law 3/2004, which establishes measures to combat late payment in commercial transactions. The aforementioned article provides that when the debtor is in default, the creditor shall be entitled to collect from the debtor a fixed amount of 40 euros, which shall be added in any case and without the need for an express request to the principal debt. In this sense, the SC considers that when the debtor is in default, the debtor must pay the amount of 40 euros, as collection costs, for each of the invoices paid after the due date and not as a single amount for all of them. Furthermore, it understands that this amount must be paid in any case and without the need for justification. Finally, it establishes that these 40 euros operate as a minimum amount, which operates as a floor, and that it is paid automatically, so that the compensation for collection costs must be paid as soon as an invoice is presented for collection and is not paid on time, thus triggering the payment of interest for late payment.

### **Ruling of the Supreme Court of May 4<sup>th</sup>, 2021. [Full Text.](#)**

In the present ruling, the SC decides on the insolvency classification of a debt arising from a lease of a berth in a port paid in advance. In this sense, the lease is considered as a bilateral contract, from which reciprocal obligations arise for the parties. The SC understands that the obligation of the insolvent company to maintain each of the lessees or assignees of the berths in the contracted annuities, after the declaration of insolvency must be paid from the mass and is not properly an insolvency credit, in application of the rule of article 61.2 LC, which provides that the declaration of insolvency, by itself, shall not affect the validity of the contracts with reciprocal obligations pending fulfillment by both the insolvent party and the other party. The obligations to which the insolvent party is bound shall be charged to the mass.

### **Ruling of the Supreme Court of May 13<sup>th</sup>, 2021. [Full Text.](#)**

The SC first analyzes art. 190.1, c) LSC, which regulates the situations of conflict of interest between the company and the shareholders that entail the deprivation of voting rights. It understands that the granting of rights or the extinction of obligations must be subject to the duty of abstention when they are within the pure scope of the company agreement and, outside this, only if their origin is in a unilateral act of the company. However, the approval of the director's remuneration is a matter that goes beyond the corporate agreement. And outside the shareholder-company relationship, not every agreement by which a mandatory relationship with one of the shareholders arises, is modified or extinguished, allows a conflict of interest with deprivation of the right to vote to be appreciated. Only in those cases in which the release of the obligation or the concession of the right has its origin in a unilateral act of the company the voting right can be deprived, but not when they have it in a bilateral relationship from which reciprocal rights and obligations arise. In the case in question, the shareholder could not be deprived of the right to vote, since it was a case of remuneration in a provision of services agreement between the director and the company. However, the SC understands that, in accordance with art. 190.3 LSC (if the vote of the shareholder is decisive, the burden of proof is on the company), although he could not be deprived of his vote, there was a situation of conflict of interest and the vote cast by the affected shareholder was decisive for the adoption of the resolution that recognized his remuneration. Furthermore, it concludes that the agreement did not respond to a reasonable need of the company and was adopted by the majority in its own interest and to the detriment of the other partners.



**Review – DGSJFP. The purchase option in mortgage does not violate the prohibition of commissory agreement. Resolution of March 15, 2021. [Full Text.](#)**

In relation to a real estate mortgage, the Registrar rejected the registration of a purchase option on the mortgaged property that could be exercised by the lender through a procedure before a Notary Public in the event of non-payment of installments. The rejection was argued by the Registrar on the grounds that it violated the commissory agreement of articles 14859 and 1884 of the Civil Code.

In contrast to the foregoing, the Directorate General accepts the registration of the purchase option agreement, emphasizing that, although the commissory agreement is generally prohibited, it is not absolute and *"those covenants or agreements that allow a balance between the interests of the creditor and the debtor, avoiding unjust enrichment or abusive practices, but that allow the creditor, in the event of a default by the debtor, to have expeditious mechanisms to achieve the greatest satisfaction of its debt, must be admitted. Therefore, such an agreement could be admitted provided that the conditions of balance between the benefits, contractual freedom between the parties and the existence of good faith between them with respect to the agreement in question are met;"*.

A balance that is understood to exist in the present case, in which a valuation procedure is established that avoids an unjust patrimonial imbalance for the seller, which would be guaranteed by the fact that the purchase option is made before a Notary Public and by the fact that a fair valuation of the property by a third party at the time of the exercise of the option is foreseen.

All of the above should be qualified in the event that consumer and user regulations are applicable, in which case, it would be necessary to strictly abide by the mandatory mortgage execution regulations.

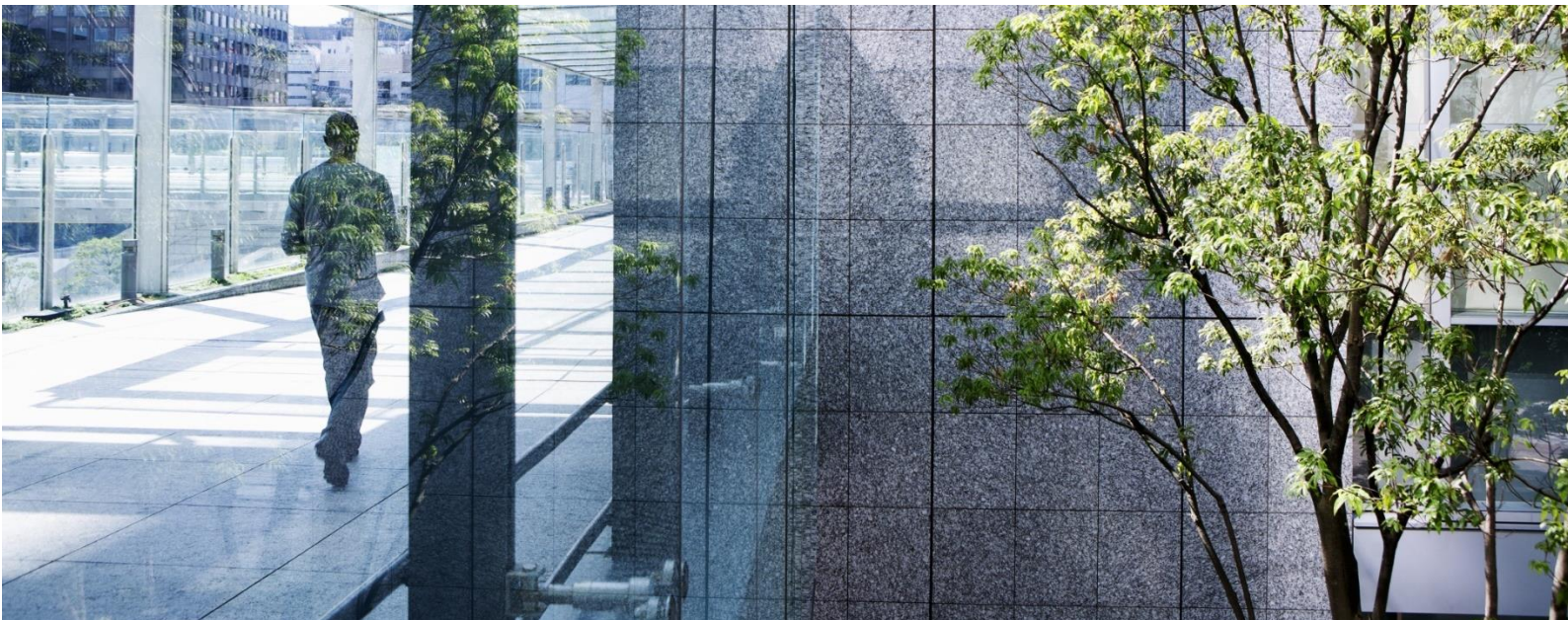
Likewise, the Registrar had rejected the term of exercise of the option because she had understood that, in accordance with article 14 of the Mortgage Regulations, it could not be longer than four years. In relation to this point, the Directorate brings up its doctrine according to which, when it is a complementary option of another legal figure that admits it (as in this case), as long as it is sufficiently delimited, it can be registered with a longer term, since the contrary would make the option unfeasible if it were strictly limited to four years. Specifically, it stands out:

*"As a matter of principle, it is derived from such provision that in order to have access to the registry books, the right of option must necessarily be subject to a term and this must not exceed four years, although it is true that the provision itself also allows a longer term in the case of lease with purchase option.*

*However, as this Administrative Center has already had occasion to declare (cfr. Resolution of May 19, 2016), an option right that forms a unit with another legal business other than the lease or that is exercised on a real right other than the freehold produces a dependence that cannot be ignored by the legal system. Otherwise, it would be impossible for the law to advance and adapt to the changing times. In any case, it must meet the requirements required by the legal system; fundamentally that there is a justified cause and that the requirements imposed in favor of third parties by the registry system are respected, with full respect for the principle of the autonomy of the will and the freedom in the creation of new legal-real forms, requiring that the constituted right has sufficient clarity and certainty to provide it with erga omnes effects."*

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