



## Corporate Law newsletter

### Outstanding regulation developments

**Urgent Measures.** Royal Decree-Law 12/2021, of June 24<sup>th</sup>, adopting urgent measures in the area of energy taxation and energy generation, and on the management of the regulation canon and the water use tariff. [Full Text.](#)

**Urgent Measures.** Royal Decree-Law 13/2021, of June 24<sup>th</sup>, amending Law 2/2021, of March 29<sup>th</sup>, on urgent measures for the prevention, containment and coordination to address the health crisis caused by COVID-19, and Royal Decree-Law 26/2020, of July 7<sup>th</sup>, on economic reactivation measures to address the impact of COVID-19 in the areas of transport and housing. [Full Text.](#)

**Organization.** Royal Decree 389/2021, of June 1<sup>st</sup>, approving the Statute of the Spanish Data Protection Agency. [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

- **Funds without legal personality.** Accounting. Resolution of June 2<sup>nd</sup>, 2021, of the General Intervention of the State Administration, amending the Resolution of September 12<sup>th</sup>, 2013, which regulates the procedure for obtaining, formulating, approving, and submitting the annual accounts for the funds without legal personality referred to in Article 2.2 of the General Budgetary Law. [Full Text.](#)
- **European Union.** Order PCM/648/2021, of June 23<sup>rd</sup>, publishing the Agreement of the Council of Ministers of June 22<sup>nd</sup>, 2021, extending for a period of four months the measures contained in articles 11 and 15, and in the third additional provision of Royal Decree-Law 38/2020, of December 29<sup>th</sup>, 2021, adopting measures to adapt to the status of Third State of the United Kingdom of Great Britain and Northern Ireland after the end of the transitional period provided for in the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of January 31<sup>st</sup>, 2020. [Full Text.](#)
- **Natural gas.** Informative Circular 5/2021, of June 2<sup>nd</sup>, of the National Commission of Markets and Competition, on the Spanish retail natural gas market. [Full Text.](#)
- **-Business and professional activities. Census declaration.** Order HAC/609/2021, of June 16<sup>th</sup>, which modifies Order EHA/1274/2007, of April 26<sup>th</sup>, which approves forms 036 of Census declaration of registration, modification and deregistration in the Census of businessmen, professionals and withholders and 037 of simplified census declaration of registration, modification and deregistration in the Census of businessmen, professionals and withholders and Order EHA/3695/2007, of December 13<sup>th</sup>, which approves form 030 for census declaration of registration in the Census of taxpayers, change of address and/or variation of personal data, which may be used by individuals, and determines the place and form of presentation of the same. [Full Text.](#)
- **Tax on Certain Digital Services.** Resolution of June 25<sup>th</sup>, 2021, of the Directorate General of Taxes, regarding the Tax on Certain Digital Services. [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. Partial demerger. Resolution of June 8<sup>th</sup>, 2021. [Full Text.](#)**

The possibility of registering the rectification of a demerger already registered with a capital increase in the beneficiary company, due to the fact that the agreement to make the operation subject to a suspensive condition was not recorded in the certification of the resolutions of the shareholders' meetings due to an error, is analysed. The DGSJFP clarifies that it is possible to rectify the content of the Registry, provided that the fact that the erroneous entry is proven in an absolute manner, that the error is accredited, that the consent of the interested parties is on record, and that it must meet the requirements for the protection of third parties. Regarding the demerger subject to suspensive condition, the DGSJFP determines that it cannot be registered until the condition is fulfilled, since the full effects of the demerger will only be reached once the deed has been executed and registered in the Commercial Registry (art. 46 LME), at which time the business becomes effective and fully enforceable. So, until the conditional event is fulfilled, it cannot be registered. The demerger and the two affected companies should consent to the cancellation of the entries made, taking the appropriate measures to protect the interests of the creditors, since the capital increase of the beneficiary would be rendered ineffective.

**DGSJFP. Appointment and dismissal of charges. Resolution of May 24<sup>th</sup>, 2021. [Full Text.](#)**

The registration of a deed of elevation to public deed of resolutions adopted by the board of directors of an S.A., relating to the dismissal of the secretary non-director and the appointment of his substitute, is requested. The registrar suspended the registration stating that, according to the company's bylaws, this power only corresponds to the board, when it has not been previously carried out by the General Meeting. The DGSJFP establishes that, by virtue of the freedom of self-organization (art. 245. 2 LSC), the Board of Directors can regulate the appointment of the secretary. Furthermore, it understands that the statutory provision, according to its own literal content, does not prevent the Board of Directors from removing the non-director secretary from the position or from appointing another

person to fill the position in the event that it becomes vacant.

**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. Verification of the balance sheet with losses for the reduction of Share Capital. Resolution of May 17<sup>th</sup>, 2021. [Full Text.](#)**

The DGSJFP analyses whether the balance sheet on which a share capital decrease is carried out must be verified by an auditor (art. 323 LSC), or whether this can be avoided by a direct contribution to shareholders' equity, by means of a compensation of credits and a contribution in cash, but without increasing the amount of share capital. In this case, the balance sheet that had served as the basis for the capital decrease had not been verified by an auditor, but the company intended to justify that the operation was neutral for creditors by means of a contribution to shareholders' equity through the offsetting of credits and contribution in cash. The General Directorate considers that the requirement to verify the balance sheet is to protect the interests of the shareholders and creditors, and if there is no protectable interest, this obligation falls. In this case, where there is no increase in share capital, in which the Registrar understands that it is not a neutral operation, it cannot be accepted that the balance sheet is not verified by the auditors, since the resulting final capital is lower than the initial capital, and the function of guaranteeing the creditors is not given. It would be a different matter if it had been carried out by means of a mixed share capital agreement, by means of a set-off of claims and a cash contribution, in which case the rights of the creditors would be guaranteed. The action is therefore dismissed.

## Remarkable Case Law

### **Ruling of the Supreme Court of June 22<sup>nd</sup>, 2021. [Full Text.](#)**

The SC analyses whether, in the context of the insolvency proceedings of a company, a credit relating to a purchase agreement with a deferred price between the company and a shareholder with 30.6% of the capital of the insolvent company is or is not an "act of analogous purpose to the loan" for the purposes of art. 92.5 of the former Insolvency Act (now art. 281 LC), which regulates subordinated credits. The Court dismisses the appeal, considering that credits in which an analogy or similarity with the loan agreement can be appreciated are excluded from the exception to subordination, both by reason of the "legal nature" of the business, as well as its "economic purpose", since it is a business intended for the financing of the insolvent party. The SC concludes that, in general, there is nothing in the legal nature of the purchase contract with deferred payment of the price that determines that this is incompatible with the fact that, under certain circumstances, the deferral responds to a financing purpose of the buyer. Furthermore, it understands that there are certain circumstances that express the economic purpose of financing the purchasing company (later bankrupt), such as the high percentage of the deferred price, the long period of amortization of the previous one, and the refinancing that implied the recognition of the debt produced after the expiration of the payment period foreseen in the purchase contract. Therefore, the classification of the loan as subordinated is confirmed.

### **Ruling of the Supreme Court of June 8<sup>th</sup>, 2021. [Full Text.](#)**

The ruling deals with the compensation of a claim made by the CNMC with respect to an ordinary bankruptcy claim it had with a company in the electricity sector. The CNMC withheld the payment of some invoices generated after the insolvency proceedings, which it then offset against the credit it had against the insolvent company. The SC dismissed the appeal and analyzes art. 58 of the Insolvency Law (LC) for the compensation of credits and debts of the insolvent party once the insolvency proceedings have been declared. It understands that, in this case, the CNMC's offset claim arose from the transitional settlement system between two different applicable remuneration systems, during which the CNMC

had to make payments on account that would later be regularized. And it is when the regularization is carried out that the CNMC's claim, reported and recognized in the insolvency proceedings as an insolvency claim, comes to light. Therefore, this credit is a bankruptcy claim, not only because its inclusion in the list of creditors was not contested, but above all because, as it arises from the regularization of the transitional period, it refers to settlements prior to the declaration of bankruptcy.

### **Ruling of the Supreme Court of May 25<sup>th</sup>, 2021. [Full Text.](#)**

The SC analyzes the possible revocation of a joint and several power of attorney in favor of a joint director by decision of the other joint director. The joint director of a company intended to revoke the power of attorney in favor of the other, granted when the governing body was a board of directors. The SC considers that in this case it is possible to revoke the power of attorney by the will of only one joint director, and it is based on the fact that in these cases the "block" to the revocation would be imposed precisely by the other joint director/power of attorney, therefore, perpetuating this situation makes any attempt to control the management of the company unfeasible. In short, in the present case, the subsistence of the conferred power of attorney cannot depend solely on the representative himself, so that if this were the case, the governing body itself would be deprived of the right to revoke the representation granted.



## Review – Ruling of the Supreme Court of June 14<sup>th</sup>, 2021.

The Contentious-Administrative Chamber of the Supreme Court, in its ruling of June 14<sup>th</sup>, 2021 (Ruling number 839/2021) has established doctrine, stating that [telephone companies must deliver in advance and in writing the contract conditions to users who request them](#).

This ruling is issued in the framework of a sanctioning procedure in which the Regional Government of Andalucía imposed a sanction on a telephone company for committing certain administrative infractions in consumer matters, among others, for introducing abusive clauses in contracts with consumers and for the lack of information in the provision of the service.

The main question consists of analyzing whether, in the case of telephone contracts, in accordance with [article 12 of the Charter of Rights of the User of Electronic Communications Services](#) (hereinafter, the "Charter") and articles 97 and 98 of the General Law for the Defense of Consumers and Users, it is necessary to provide the user, in advance and in writing, with the general contracting conditions, when these have been expressly requested.

The Charter insists on the necessary protection of final users in the registration processes and on the catalog of user rights.

In this sense, the Supreme Court understands that, *"although it is well known that nowadays many telephone or remote contracts are made with reference to Internet pages to know the general contracting conditions, it is also true that there are users of electronic communications services of different categories"*.

Therefore, although there are users known as "[digital natives](#)", people who have grown up with the network and technology, and are totally familiar with it, there are other people that the SC calls "[digital immigrants](#)", who would be users who have become familiar with the digital world in their adult years. In addition, there are even users who may completely lack the skills or the means to access the general terms and conditions that are published on the web.

In accordance with art. 12 of the Charter, companies must provide in writing the general contracting conditions prior to the conclusion of the contract when this is requested by the user, and without the remote or telephone pre-contracting altering the nature of the future contract to be signed (art. 98.6 of the General Law for the Defense of Consumers and Users). If the aforementioned is not done, the telecommunications company may be sanctioned.

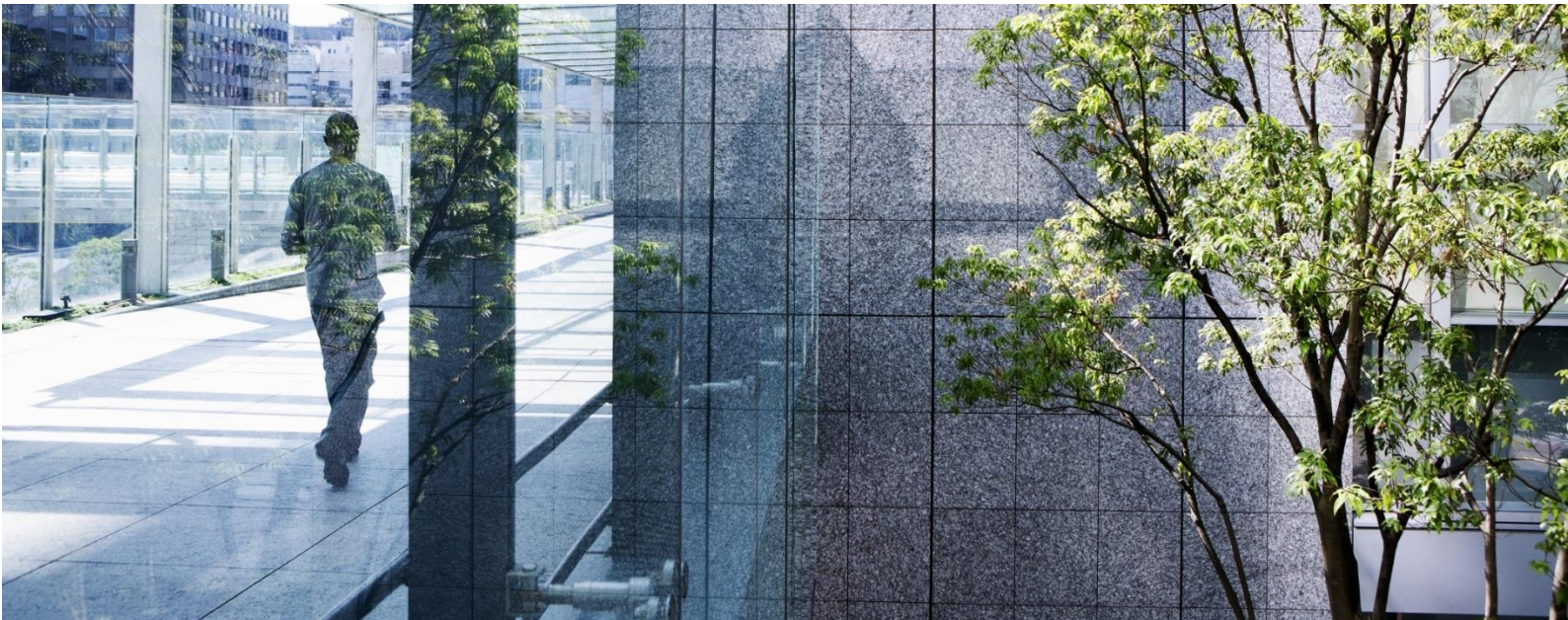
In addition, the SC points out that, when art. 12 of the Charter says "in writing", it includes both the traditional paper format sent to the domicile, as well as more innovative means such as WhatsApp or any other instant messaging system, SMS, or an email, because what it is about is that if the user demands an individualized written text, the user receives it.

In summary, the Supreme Court resolves the main issue, understanding that it is indeed necessary to provide the user, in advance and in writing, either in traditional paper format or by means of instant messaging systems or e-mail, with the general contracting conditions, when the consumer and user has expressly requested them, even in the case of telephone contracting.

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

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