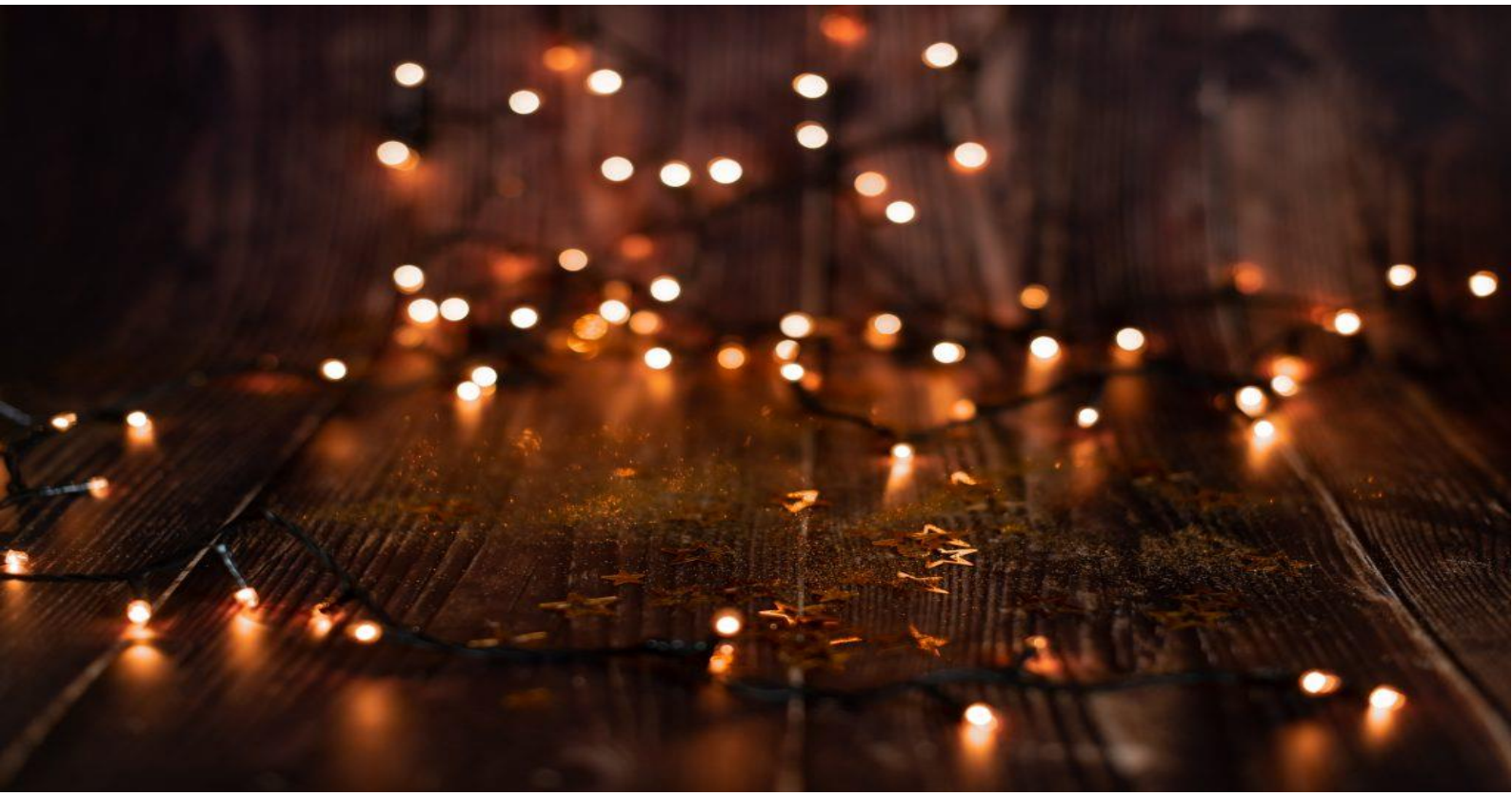

Corporate Law newsletter

Outstanding regulation developments

Emerging companies. Law 28/2022, of December 21st, on the promotion of the ecosystem of emerging companies. Full Text.

Criminal legislation. Organic Law 14/2022, of December 22nd, on the transposition of European directives and other provisions for the adaptation of criminal legislation to European Union legislation, and reform of crimes against moral integrity, public disorder and smuggling of dual use weapons. Full text.

Budgets. Law 31/2022, of December 23rd, on the General State Budget for the year 2023. Full text.

Other noteworthy regulatory developments

Money laundering. Order ETD/1217/2022 of November 29th, regulating the declarations of movements of means of payment in the field of the prevention of money laundering and the financing of terrorism. Full text.

Explosives. Law 25/2022 of December 1st, on Explosives Precursors. Full text.

Food products. Royal Decree 1021/2022 of December 13rd, regulating certain hygiene requirements for the production and marketing of foodstuffs in retail establishments. Full text.

Export credits. Order ICT/1281/2022, of December 19th, regulating various aspects related to the granting of official support for export credit through reciprocal interest adjustment agreements. Full text..

Railway sector. Law 26/2022, of December 19th, amending Law 38/2015, of September 29th, on the railway sector. Full text.

Evaluation of public policies. Law 27/2022, of December 20th, on institutionalising the evaluation of public policies in the General State Administration. Full text.

Radiation protection. Royal Decree 1029/2022 of December 20th, approving the Regulation on health protection against the risks arising from exposure to ionising radiation. Full text.

Criminal Code. Organic Law 13/2022 of December 20th, amending Organic Law 10/1995 of November 23rd, 1995 on the Criminal Code to increase the penalties for crimes of trafficking in human beings displaced by armed conflict or humanitarian disaster. Full text.

Food Agreements. Royal Decree 1028/2022 of December 20th, on the development of the Register of Food Agreements. Full text.

Eurojust. Law 29/2022 of December 21st, adapting national legislation to Regulation (EU) 2018/1727 of the European Parliament and of the Council of November 14th, 2018 on Eurojust and regulating conflicts of jurisdiction, international legal cooperation networks and staff working for the Ministry of Justice abroad. Full text.

Stock market. CNMV Circular 4/2022 of December 22nd, on accounting standards, annual accounts and interim financial statements of Spanish securities market infrastructures. Full text.

Common Agricultural Policy. Law 30/2022 of December 23rd, 2002 regulating the management system of the Common Agricultural Policy and other related matters. Full text.

Contamination. Royal Decree 1052/2022 of December 27th, regulating low-emission zones. Full text.

Packaging. Royal Decree 1055/2022 of December 27th, on Packaging and Packaging Waste. Full text.

Administrative procedures. Computerised management. Order JUS/1333/2022, of December 28th, on the conditions of access and mode of operation of the electronic service for the completion of the standardised forms and technical specifications of the electronic platform for the liquidation of assets provided for in Law 16/2022, of September 5th, on the reform of the revised text of the Insolvency Act. Full text.

Sport. Law 39/2022 of December 30th, 2002 on Sport. Full text.

Remarkable General Directorate of Legal Security and Public Faith resolutions and case law

DGSJFP. Resolution of November 4th, 2022. Capital reduction in an LLC. Amortisation of own shares. Full text.

The DGSJFP upheld the appeal filed against the registrar's negative classification, analysing the creditor protection regime applicable, in a limited liability company, to a capital reduction due to the redemption of own shares, purchased three years earlier. In his classification, the registrar had considered it necessary for the company to set aside a restricted reserve for the nominal value of the shares, as provided for in articles 141 and 332 of the LSC. In relation to this classification, the Directorate General emphasises that each of the two articles cited affects a different case: article 141.1 concerns the reduction of capital due to the redemption of shares whose acquisition does not entail the restitution of contributions (in which case, the reserve is imperative - without mentioning against which the reserve must be constituted), and Article 332 to capital reductions which do involve the return of contributions (in which case the reserve is voluntary and must be funded out of profits or free reserves). The Directorate General draws two main conclusions from both articles: that their respective provisions refer to different cases, and that the creation of the reserve sought by the registrar is only mandatory when the acquisition by the company of the redeemed shares does not involve the restitution of its contribution to the transferor.

And with regard to the registrar's position that there is only a return of contributions in the strict sense when the acquisition of own shares takes place in execution of a prior capital reduction agreement, and that there is no such return when the redeemed shares are already in the equity, the Directorate General clarifies that although in these cases there is no return of contributions in the "civil" sense in the reduction by amortisation of treasury stock (given that the shares at that time belonged to the company and not to the shareholder), it considers that there is indeed a "return of contributions" in the sense given to this expression in the context of capital reduction and as one of the "modalities" in view of the consideration used: articles 317 and 329 et seq. of the Capital Companies Act". The Directorate refers to the Resolution of 22 May 2018, according to which "the amortisation of shares previously acquired by the company for valuable consideration is equivalent to a capital reduction by restitution of contributions". On the basis of the foregoing, the Management emphasises that because the acquisition of the shares later redeemed was for valuable consideration, the reduction must be subject to the regime of those produced by restitution of contributions and, as such, the requirements of articles 331 to 333 LSC must be complied with. This being the case, and insofar as no right of objection had been granted to creditors in the articles of association (Article 333 LSC), the protection of creditors will be provided by the personal liability of the recipients for the company's debts prior to the date on which the reduction can be opposed, up to the limit of the amount received and for five years (Article 331 LSC). However, this measure may be replaced by the creation of a reserve, charged to profits or free reserves, for an amount equal to the amount received by the shareholders as restitution of the contribution and unavailable for a period of five years, unless the debts have been paid beforehand (Article 332 LSC).

The DGSJFP concludes by stressing that the creation of this reserve is voluntary and is conditional on the existence of profits or free reserves that allow it to be set aside. And that the mandatory allocation of a reserve, as the registrar claims in his classification, only takes place when "the acquisition does not entail the return of contributions to the shareholders", i.e. when it has taken place for profit (article 141.1 LSC).

DGSJFP. Resolution of November 15th, 2022. Operation accordion. Full text.

The DGSJFP upheld The DGSJFP upholds the appeal lodged against the negative classification of the Commercial Registrar refusing registration of a deed of conversion to public deed of company resolutions to simultaneously reduce and increase share capital, basing the defect on

the failure to publish a notice of reduction, in accordance with the provisions of art. 319 LSC and for not having exercised the right of opposition of creditors within one month from the date of the last notice, in accordance with the provisions of art. 334 and 336 LSC.

In that regard, the DGSJFP points out that, in this case, following the transactions carried out, the capital figure remains unchanged and the actual payment of the increase is evidenced by the audit report, from which it concludes that the publication of the prior announcement is not required, nor is the creditors' right of objection. The DGSJFP therefore upheld the appeal and revoked the contested rating note.

DGSJFP. Resolution of November 21st, 2022. Deposit of annual accounts. Beneficial owner. Full text.

The DGSJFP dismisses the appeal brought against the registrar's refusal to register the filing of the annual accounts of a limited liability company on the ground that they were not accompanied by the form relating to the declaration of identification of the beneficial owner referred to in Order JUS/616/2022. The company appealed on the grounds that: (i) it is not necessary to file the said form, since the Order containing this obligation does not have the rank to do so and, (ii) that the registrar exceeded his powers by not including the said form in the annual accounts subject to filing. The DGSJFP concludes, on the basis of the National High Court ruling of 26 June 2019, that it is not the Ministerial Order that creates the obligation to declare, nor the obligation to identify the beneficial owner, but rather that both obligations are prior to and based on rules with the status of law, and that therefore, the said Order does not introduce an obligation that does not have legal status. This being so, the Directorate General clarifies that the Order simply implements new forms in which certain companies, when filing their annual accounts with the Commercial Registry, must include the declaration of the beneficial owner, thereby facilitating compliance with this obligation by the obliged parties. In short, therefore, the Directorate confirms the need for the submission of beneficial ownership information for the filing of accounts.

Judgment of the National Court, Contentious-administrative Chamber, of November 18th, 2022. Data protection. Full text.

The National High Court dismissed the contentious-administrative appeal brought by a company against the decision of the Spanish Data Protection Agency ("AEPD") in relation to the figure of the data protection officer. In this regard, the AEPD had declared that (in breach of art. 37 RGPD) the company had not appointed a data protection officer to whom complaints could be addressed, when it was not exempt from that obligation as its activity was intermediation between customers and users through an application, in which customers provide their personal data to request products or services.

The company objected, stating that it did comply with that duty, since it acted as guarantor of the data subjects' rights through a data protection committee that performed the functions required of the data protection officer under art. 39 RGPD. In this regard, the Court considers that in this case Article 37 RGPD is not duly complied with because the aforementioned Committee had not been notified to the supervisory authority, nor was its designation published. For all these reasons, the Audiencia Nacional dismissed the appeal.

Judgment of the Supreme Court of November 22nd, 2022. Duty of loyalty of directors. Full text.

The judgment of the Commercial Court declared that the sole administrator's conduct consisting in the payment in lieu of payment to the company of three flats in order to settle part of a debt owed by him to that company was disloyal and declared that payment in lieu of payment to be null and void as of right.

Both the administrator and the company appealed the judgement and the Provincial Court partially upheld the appeal, maintaining the declaratory pronouncement of disloyalty of the administrator's conduct, but revoking the pronouncement regarding the nullity of the payment in lieu of payment.

For its part, the SC starts from the fact that the facts set out in the appeal stated that the administrator had been appointed at the same meeting at which the resolution authorising the delivery to the company of three flats was

adopted, without increasing the share capital, in order to settle the debt that the new administrator owed to the company. Therefore, at the time the loans were granted by the company, the borrower was not a company director, and was therefore not affected by the prohibition of art. 229.1.a) LSC. The SC emphasises that the Court considers that the administrator could have breached his duty of loyalty, for example, if he had assigned flats to the company that were not his property or were not in his possession or had agreed with the appraisers that the valuations would be higher than the market value. However, the Court of Appeal emphasised that it did not find any of these cases to be present, and therefore did not find it accredited that the director had sacrificed the company's interest for his own benefit and, therefore, the infringement of the duty of loyalty. In accordance with the foregoing, the SC emphasises that the Provincial Court only considered as a breach of the director's duty of loyalty the loan that, in his capacity as sole director of the company, he had granted himself, without having abstained from voting on the waiver resolution approved at the meeting. However, the Court of Appeal did not consider that the conditions under which the payment in lieu of payment was made infringed his duty of loyalty, and this is the reason for the reversal of the nullity of that legal transaction. This being so, the SC concludes that the Provincial Court did not infringe the law. And with respect to the granting of the loan by the director, on behalf of the company to himself, in the claim, no action for the nullity of such a transaction was brought, therefore the nullity of such a transaction cannot be granted.

Judgment of the Supreme Court of December 9th, 2022. Insolvency proceedings. Insufficiency of the active mass. Full text.

The Supreme Court upheld the appeal filed by a creditor company against a company declared insolvent. Initially, the creditor company filed an insolvency proceeding requesting to maintain the priority of claims under article 84.3 of the Insolvency Act. After seeing its claims rejected both at first instance and on appeal, the creditor company lodged an appeal in cassation based on two grounds; firstly, it considered that the appeal judgment unduly applied the doctrine of unfair delay without having established the existence of an action contrary to good faith, and secondly, it again requested that the priority of claims under article 84.3 LC be maintained. In relation to the foregoing, the SC upheld the appeal on the first ground of appeal, concluding that the judgment under appeal wrongly applied the doctrine of unfair delay, without finding the existence of an act contrary to good faith.

Review of Interest: Law 28/2022 of December 21st, on the promotion of the startup ecosystem ("Startup Law")

On December 22nd, 2022, Law 28/2022, of December 21st, on the promotion of the ecosystem of emerging companies (also known as the "*Startups Law*") was published, which seeks to implement a legal ecosystem of digital and scientific innovation for emerging companies or startups, as they have characteristics that prevent their exact regulation in the previous regulatory framework.

The Startups Law complements Law 18/2022, of September 28th, on the creation and growth of companies, as well as complementing and amending Law 14/2013, of September 27th, on support for entrepreneurs and their internationalisation. These laws, with the approved regulatory amendments, will be the regulatory pillars of this legal ecosystem, with relevant measures of different natures, including corporate, tax, labour and administrative measures.

In order to benefit from these measures, the company must have the status of a start-up company, simultaneously meeting the conditions set out in Article 3 of the Law; (1) it must be newly created, not being considered as such when more than five years have elapsed since its incorporation in the Mercantile Register, (2) it must not have been created as a result of a merger, spin-off, transformation or segregation of companies that are not considered emerging companies, (3) it must not distribute or have distributed dividends, (4) it must not be listed on a regulated market, (5) it must have its registered office or permanent establishment in Spain, and (6) 60% of the workforce must have an employment contract in Spain. Notwithstanding the above, companies may lose this status when, among other reasons, they cease to meet these requirements, or when their turnover exceeds 10 million euros.

With regard to new legislative developments in **corporate matters**, we could highlight the following:

Firstly, the possibility of treasury stock in limited liability companies. As an exception to the provisions of the Capital Companies Act (hereinafter LSC), emerging companies in the form of limited liability companies are allowed to acquire a maximum of 20% of their own shares for delivery to directors or employees, for which they must comply with certain requirements. Among other things, this remuneration system must be provided for in the articles of association and approved at the general meeting, and the shares must be fully paid up.

Secondly, an exception is introduced to the compulsory cause for dissolution in Article 363.1 e) of the LSC, such that emerging companies will not incur a cause for dissolution as a result of the net assets being reduced by losses of less than half of the share capital during the three years following their incorporation, provided that it was not necessary to file for insolvency proceedings.

Lastly, a new feature is the simplification of registration formalities. In this regard, the Law provides for a period of five days for the registration of emerging companies. Except in the case of standard articles of association, the period will be reduced to six working hours from the time of receipt of the deed. In this regard, the Government will approve by Royal Decree various models of standard articles of association so that they can be incorporated into the deeds of incorporation. You can consult the full text at the following link.

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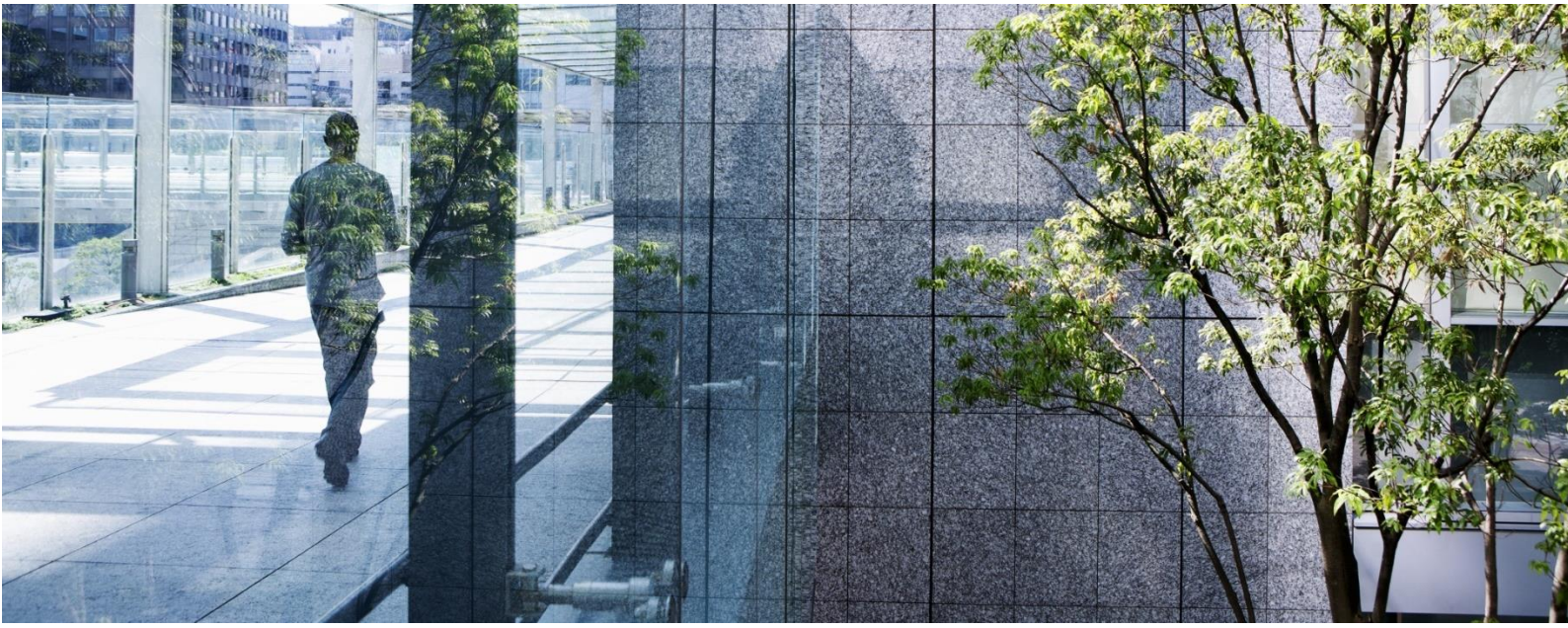
Contact

Clementina Barreda, Partner, Mazars

Tel: 915 624 030

clementina.barreda@mazars.es



Newsletter coordinated and edited by Clementina Barreda and María Vicedo

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