



Corporate Law Newsletter

Outstanding regulation developments

National Statistical Plan. Royal Decree 17/2023 of 17 January approving the Annual Programme 2023 of the National Statistical Plan 2021-2024. [Full text.](#)

Radio public domain. Digital terrestrial television. Royal Decree 16/2023, of 17 January, amending the Regulation on the use of the public radioelectric domain, approved by Royal Decree 123/2017, of 24 February, and Royal Decree 391/2019, of 21 June, approving the National Technical Plan for Digital Terrestrial Television and regulating certain aspects for the release of the second digital dividend. [Full text.](#)

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Other outstanding regulation developments

National Securities Market Commission. Agreement of 22 December 2022, of the National Securities Market Commission, on delegation of powers. [Full text.](#)

Energy. Royal Decree 36/2023, of 24 January, establishing a system of Energy Saving Certificates. [Full text.](#)

Organisation. Order TED/1351/2022, of 29 December, creating and regulating the Anti-Fraud Measures Unit of the Ministry for Ecological Transition and the Demographic Challenge in projects financed under the Recovery and Resilience Mechanism (Next Generation UE) in execution of the Recovery, Transformation and Resilience Plan. [Full text.](#)

Water for human consumption. Royal Decree 2/2023 of 10 January amending Royal Decree 1798/2010 of 30 December regulating the exploitation and marketing of natural mineral waters and spring waters packaged for human consumption, and Royal Decree 1799/2010 of 30 December regulating the process of preparation and marketing of prepared waters packaged for human consumption. [Full text.](#)

Urgent measures. Royal Decree-Law 1/2023, of 10 January, on urgent measures regarding incentives for employment contracts and improvement of the social protection of artists. [Full text.](#)

Borders. Resolution of 3 January 2023, of the State Secretariat for Security, on restrictions at external air borders for public health reasons, due to the health situation caused by COVID-19 in China. [Full text.](#)

European Union. Commission Implementing Regulation (EU) 2023/174 of 26 January 2023 amending Implementing Regulation (EU) 2019/1793 on temporary increases of official controls and emergency measures governing the entry into the Union of certain goods from third countries and implementing Regulations (EU) 2017/625 and (EC) No 178/2002 of the European Parliament and of the Council. [Full text.](#)

European Union. Council Implementing Regulation (EU) 2023/156 of 23 January 2023 implementing Regulation (EU) No 101/2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Tunisia. [Full text.](#)

European Union. Council Implementing Regulation (EU) 2023/180 of 27 January 2023 implementing Regulation (EU) 2022/2474 amending Regulation (EU) No 833/2014 concerning restrictive measures due to actions by Russia which destabilise the situation in Ukraine. [Full text.](#)

Notable rulings by the DGSJFP and the Jury of Autocontrol

DGSJFP. Resolution of 9 January 2023. Deposit of annual accounts. [Full text.](#)

The DGSJFP upheld the appeal brought against the refusal of a commercial registrar to file the annual accounts of a company on the grounds that the declaration of beneficial ownership accompanying them was incompatible with the company's registration information. Specifically, the company was registered as a sole proprietorship and, nevertheless, the filing of the annual accounts was accompanied by a declaration of beneficial ownership which included several persons who, without being shareholders, had effective control over the company. In his arguments, the appellant considered that the registrar had exceeded his powers by analysing the content of the declaration of beneficial ownership and that he had also erroneously equated sole proprietorship and beneficial ownership. The DGSJFP upheld the appeal, concluding that the sole proprietorship of a company is compatible with the declaration of beneficial ownership in which several persons appear if they have effective control over the company. It therefore revokes the contested rating note.

Resolution of 13 January 2023 of the Fourth Section of the AUTOCONTROL Jury. Covert advertising. [Full text.](#)

The Jury of AUTOCONTROL upheld the complaint filed by an association against a beverage company for a publication disseminated by an influencer in which she showed products of the aforementioned company. The complainant alleges that it is a case of hidden advertising, as there is no mention or commentary accrediting the advertising nature of the communication. For its part, the respondent company claims that this is not a case of surreptitious advertising, but rather a publication in which the influencer thanks for

the free gift of its products without there being an advertising relationship. her products without there being a contractual relationship between the parties. Notwithstanding the above, the Jury considers that this is a case of surreptitious advertising incompatible with rule number 13 of the AUTOCONTROL Code of Advertising Conduct. This rule includes the principle of authenticity which aims to ensure that the consumer can grasp the advertising nature of the message, which is not fulfilled in this case as the communication combines both the advertising purpose and the intention to conceal this purpose.

DGSJFP. Resolution of 23 January 2023. Deposit of annual accounts. [Full text.](#)

The DGSJFP dismissed the appeal brought against the refusal of a commercial registrar to register a deed appointing directors of a company. The company was owned by two shareholders with the same percentage of share capital and the resolution to appoint directors was adopted with the favourable vote of the only shareholder attending the meeting. In view of this, the registrar considered that the resolution had not been validly adopted as it did not comply with the majority required by the company's articles of association. For his part, the appellant argued that the content of the provision in the articles of association contravened art. 200.1 LSC, since in the case of the company in question, it implied the adoption of the resolution by unanimity. However, the DGSJFP dismissed the appeal, concluding that the articles of association of a company adopted in accordance with the law are a kind of "magna carta" that must be respected as long as they are not amended, and therefore a resolution that does not have the favourable vote of the majority provided for in the articles of association cannot be considered valid, confirming the contested qualification note.

Remarkable case law

Judgment of the Supreme Court (First Chamber) of 10 January 2023. Challenging corporate resolutions. [Full text.](#)

The First Chamber of the Supreme Court dismissed the appeal brought against the judgment of the Provincial Court of Pontevedra (1st Section). The company's financial situation was negative and, in order to remedy it, it entered into a refinancing agreement involving the capitalisation of part of its liabilities. This capitalisation was carried out by means of an increase in the share capital by offsetting claims, which resulted in the appellant's share capital going from 20% to 1.65%. After seeing her claims rejected at first instance and on appeal, she appealed in cassation against the infringement of art. 204.1.II LSC on the grounds that the abusive nature of the agreement had not been considered. The High Court dismissed the appeal, concluding that the increase complied with the judicially approved refinancing agreement, responding to the need to resolve the company's financial situation, and was therefore not abusive.

Judgment of the Supreme Court (Civil Division) of 22 December 2022. Stock Market. Information obligations. [Full text.](#)

The Supreme Court dismisses the appeal brought by three companies against the judgment of the Barcelona Provincial Court (16th Section). The appellants (commercial companies dedicated to investment) incorporated investment-oriented limited companies, but without the distinctive character of collective investment companies and therefore without being supervised by the CNMV. The appellants claimed that the financial damage suffered was due to the financial institution's failure to comply with its reporting obligations and to the lack of control by the CNMV. of control by the CNMV. The Supreme Court dismissed the appeal, concluding that the appellants were aware that, as they had set up

public limited companies without the distinctive character of collective investment, they would not be supervised by the CNMV. Likewise, it does not see any justification that the financial institution's failure to provide information caused the losses, and therefore does not find a causal link.

Judgment of the Court of Justice of the European Union of 22 December 2022. Industrial property and trademark law. [Full text.](#)

The Grand Chamber of the Court of Justice of the European Union has given preliminary rulings on questions referred for a preliminary ruling by the courts of Brussels and Luxembourg concerning the sale through an electronic marketplace operator of shoes with the same sole colour as those of a registered trademark. The case arises from claims brought by the plaintiff, who had registered the colour of the sole of her shoes as a Benelux and EU trademark. However, it was possible to purchase shoes with the same colour sole through the defendant's platform without her consent. The question then arises whether a market operator may incur liability for infringement of trademark rights even if the infringing goods are marketed by third parties through its platform. In that regard, the Court concludes on a theoretical level that a marketplace operator may indeed be understood to be using a sign as if it were the proprietor of the trademark if a normally informed and reasonably attentive user links the trademark operator with the product offered. However, it does not analyse whether such a circumstance exists in the specific case, delegating the decision to the courts in Brussels and Luxembourg.

Review of Interest: the Supreme Court establishes the doctrine on the forced distribution of dividends. Ruling of the Supreme Court (First Chamber) of 11 January 2023. Challenging corporate resolutions.

The First Chamber of the Supreme Court dismisses the appeal filed against the judgment of the Provincial Court of A Coruña (4th Section), in proceedings challenging corporate resolutions. In the [lawsuit](#) that initiated said proceedings, [the minority shareholder challenged the corporate resolutions](#) adopted by the 2015 and 2016 general meetings approving the annual accounts of previous years and the application of the results to reserves, [requesting the nullity of the aforementioned resolutions, as well as the distribution of dividends](#) in proportion to the degree of shareholding in the company.

At [first instance](#), Commercial Court no. 2 of A Coruña dismissed the claim, against which the minority shareholder lodged an appeal. In the [second instance](#), the Provincial Court of A Coruña upheld the minority shareholder, understanding that the contested resolutions had been adopted abusively, without taking into account a reasonable need of the company, and ordered the company to distribute dividends.

The majority shareholder brought an [extraordinary appeal for infringement of procedural rules](#) and an appeal in [cassation](#) against the judgment at second instance.

In the [extraordinary appeal for procedural infringement](#), the majority shareholder complained of the Court's erroneous assessment of the minority shareholder as an accredited party to a refinancing agreement in which the parties assumed the obligation not to distribute dividends until the agreement had been fulfilled. However, the High Court considers that this allegation does not affect the meaning of the ruling.

In the formulation of the [first ground of appeal](#), the appellant alleges infringement of Article 204.1.II LSC on the grounds that the resolutions adopted were not abusive, since the fact of allocating to reserves the profits obtained during the 2014 and 2015 financial years of the investee company responded to a reasonable need imposed by the refinancing agreement adopted in 2013.

On this point, the Court states that, [although there was such a refinancing agreement, which imposed on the company an obligation not to distribute dividends, the minority shareholder's participation in the agreement was very small](#). Moreover, the Court states that at the end of 2014 the company had such large reserves that [the obligation not to distribute dividends was no longer a reasonable necessity but an unjustified excuse imposed by the majority](#).

In the following grounds of appeal, the appellant alleges infringement of [Articles 93, 160 a\) and 273.1 of the LSC](#), which stipulate that [the general meeting of shareholders must intervene in order for the shareholder to be entitled to a dividend](#). The High Court concludes that by accepting the challenge to the resolutions adopted, and thus not allocating the profit to reserves, the distribution of dividends is presumed.

In this ruling, the Supreme Court pronounces in the same sense as in the [STS of 26 May 2005](#), with the speciality that, as there are now two rulings of the High Court that coincide on the forced distribution of dividends, [it can be said that it has established doctrine](#) and specifically recognises that together with the [request for annulment of the company agreements](#) opposed to the distribution of dividends, the [judicial body may be asked to rule on their distribution](#).

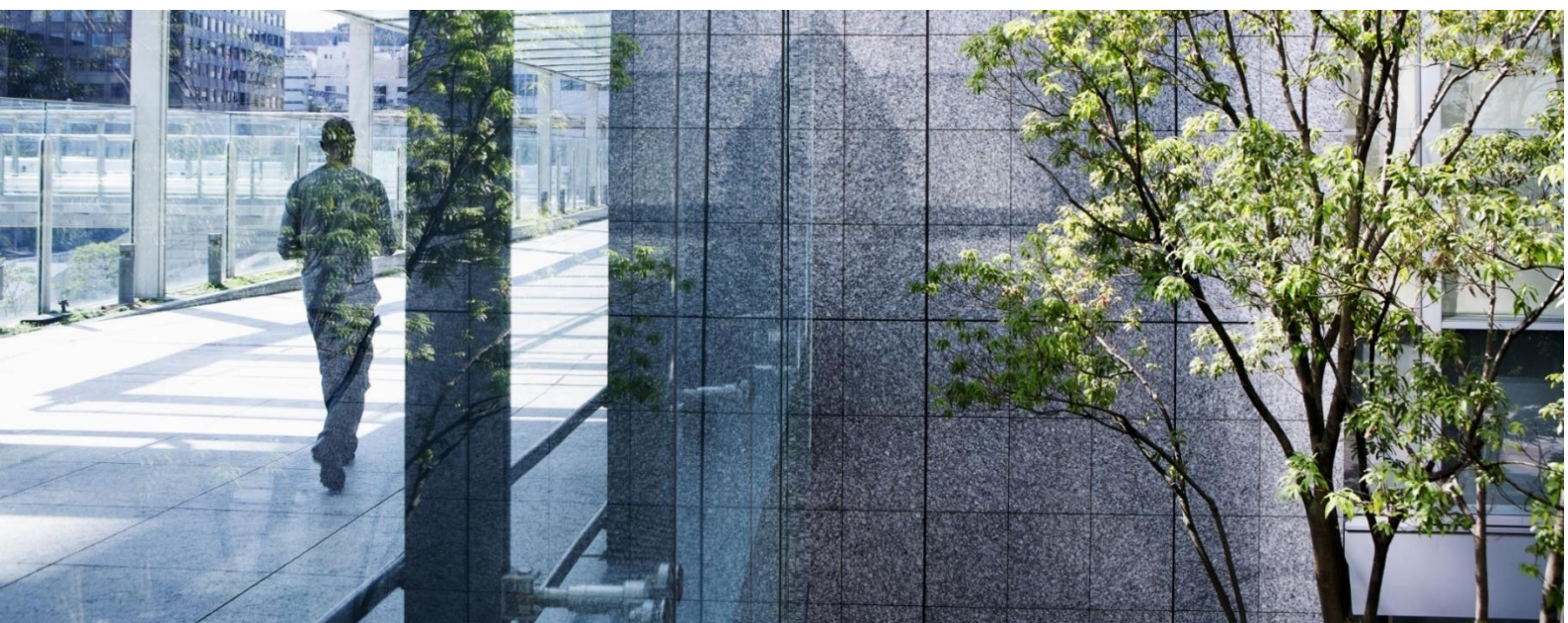
The full text of the judgment is available at the following [link](#).

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