

## 2023: The most significant legal developments that companies should keep on their radar

December 28, 2022

Garrigues analyzes from every business law angle the most significant legislative changes that are due to arrive next year.

In 2023 Spain faces a busy electoral schedule. The different elections – municipal, regional and national – could speed up the enactment of new legislation and lead to major changes to the Spanish legal system.

We set forth below some of the most significant new features in the different practice areas in Spain.

This document has been updated to December 28, 2022.

### Corporate/Commercial

#### ◆ Financial regulation

- With respect to financial regulation, on December 22, 2022, the Lower House of the Spanish Parliament approved **the new Securities Markets and Investment Services Bill**, which must complete its passage through Parliament. The goal is, in general, to implement a series of directives that affect the security market regulations, including those that concern the solvency of investment companies. It also covers areas that require updating and modernization, such as in relation to decentralized registration technologies and innovative business models in general, with a view to improving the competitiveness and attractiveness of the Spanish securities market. The Bill therefore strengthens the rules on investor protection, particularly with regard to unauthorized companies and financial fraud via the internet, social networks and the media in general.
- The **Bill for the Creation of the Independent Administrative Authority for Financial Customer Protection** was approved by the Council of Ministers on November 22, 2022 and is currently going through Parliament. The bill replaces the complaints services of the Bank of Spain, the CNMV and the Directorate General for Insurance and Pensions Funds with this new Independent Administrative Authority whose decisions as regards customer complaints will be binding on financial institutions provided that the value of the claim is less than 20,000 euros.
- As regards new EU law, one of the developments worth noting is the **Markets in Crypto-Assets Regulation (“MiCA”)**, the last draft of which was approved in 2022 by the European Parliament’s Committee on Economic and Monetary Affairs and is now awaiting the approval of the plenary of the Parliament and publication, which will probably take place in the first quarter of 2023. The regulation reflects the constant desire of the EU authorities, since the FinTech Action Plan approved in 2018 by the European Commission, to use legislation to deal with the opportunities and problems related to crypto-assets.

- A directive amending Directives 2011/61/EU (AIFMD) and 2009/65/EC (UCITS IV) is also expected to be finally adopted in the first half of 2023. This directive will essentially strengthen **the liquidity risk management of open-ended alternative investment funds**, especially after the illiquidity scenarios and redemption requests triggered by the COVID-19 health crisis. Fund managers will have to select at least one appropriate liquidity management tool from the list provided for this purpose and may temporarily suspend the repurchase or redemption of units, all in the interest of investors.

## ◆ Corporate governance

- **Corporate sustainability reporting.** The [recently approved](#) EU Corporate Sustainability Reporting Directive (CSRD) aims to improve the accountability of enterprises by obliging them to report regularly on the impact of their activities on people and the environment. The CSRD amends previous directives and Regulation (EU) No 537/2014 as regards corporate sustainability reporting. It aims to bring sustainability reporting into line with financial reporting, allowing the public to access reliable and comparable data. It will also be a step towards establishing global sustainability standards.
- **Due diligence as regards sustainability and human rights.** 2023 should also see the adoption of the proposed corporate sustainability due diligence Directive. The proposed Directive aims to promote sustainable and responsible business behavior and to make companies' operations and corporate governance anchored in human rights and environmental considerations. The new rules aim to ensure that companies address the adverse impacts of their actions, including in their value chains inside and outside Europe, a very important development.
- This proposal included, in its articles, an express reference to the duty of care of directors, urging Member States to ensure that, in fulfilling their duty to act in the best interests of the company, the directors of companies to which this directive applies take into account the consequences of their decisions in terms of sustainability, including, where appropriate, the consequences for human rights, climate change and the environment in the short, medium and long term. This clause has met with some criticism, which is hardly unsurprising given its subject matter. i.e. directors' liability, is a highly sensitive issue is treated very differently from one EU Member State to another. In fact, as recently announced, the latest text before the Council has removed the reference to directors' duties from its articles. In any case, it is a directive that could have a very significant impact on the risk management and control of the companies that fall within its scope of application.
- **Gender equality on boards of directors.** We also recommend focusing attention in 2023 on another directive that was published in the Official Journal of the European Union on December 7: [Directive \(EU\) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures](#). The regulation requires Member States to set a target of ensuring that members of the under-represented sex on the boards of listed companies hold at least 40% of non-executive director posts. The most relevant aspects are analyzed in this alert.

## ◆ Real Estate

- With respect to the real estate sector, 2023 looks set to begin with uncertainty about whether the **Right to Housing Law**, the draft of which was approved in February 2022, will be enacted. Doubts exist in relation to its passage through Parliament in terms of both its final content and the timescale.

If the statute is finally approved, amongst the main new features worth noting is the intervention in the residential leasehold market in the form of the setting of maximum rents as regards residential leases by “major owners” (i.e. those with more than 10 dwellings or with a joint area of more than 1,500 m<sup>2</sup>) which form part of “hot” residential housing market areas, which will have to be adjusted in line with the benchmark indexes that are established for these areas. The declaration of the specific “hot” areas will correspond to the authorities subject to the procedure and criteria established by law.

- Moreover, the Government has confirmed the extension for 2023 of the **extraordinary limitation placed on annual rent reviews in relation to residential leases, as well as a six-month extension of rental agreements in force**, until June 30, 2023, maintaining the same terms and conditions.

#### ◆ Competition Law

- The increase in **private damages actions** for competition law infringements is expected to continue in 2023. On December 20, 2022, the Council of Ministers authorized the urgent administrative processing of the Preliminary Bill on representative actions for the protection of the collective interests of consumers (class actions). Accordingly, the new law transposing the EU directive on representative actions for the protection of the collective interests of consumers will materialize in 2023, thereby allowing this type of claim.
- With respect to **merger control**, the president of the CNMC publicly announced the intention of the Spanish competition authority to increase gradually the number of **concentrations that are assessed in the second phase**, which means a more in-depth analysis by the CNMC of the potential competition problems of a concentration. In addition, it should be noted that the second phase extends the period of the CNMC to authorize an operation and allows the participation of interested third parties unconnected to the operation.
- The CNMC has made subject to a public consultation its **draft notice on the criteria for determining the scope and period of time of the exclusion from participation in public tenders**. This is a measure contained in the legislation on public tenders that the CNMC may impose on an additional basis on enterprises sanctioned for antitrust violations in order to prevent them from participating in tenders called by public sector entities. It is therefore foreseeable that in 2023 the CNMC will begin to impose such prohibitions in its decisions imposing penalties, in accordance with the abovementioned criteria.
- **Foreign Subsidies Regulation.** The Foreign Subsidies Regulation, which was published in the Official Journal of the European Union on December 23, 2022, and will come into force 20 days thereafter, lays down a new system for controlling subsidies provided to non-EU companies that may distort the single market in the EU. The new legislation will introduce the following three mechanisms: (i) a system of *ex ante* notification of concentrations that exceed the foreign investment thresholds fixed therein; (ii) a system of *ex ante* notification of bids in public tenders that involve financial investments of third countries that exceed certain thresholds; and (iii) a mechanism of own-initiative investigation or request to notify public bids and concentrations that fall outside of the scope of application of (i) and (ii). The Commission may also order restorative measures, including orders to return subsidies, if it concludes that the foreign involvement in question distorts the single market.

### ◆ The Industry Law

Another piece of legislation that industrial companies will have to comply with in 2023 – although still at a much early stage in terms of its passage through Parliament – is the new **Industry Law**, which replaces the current statute, which was passed in 1992. The Council of Ministers approved its draft Bill on December 5, 2022 and the Government will press ahead with its passage through Parliament since it is one of the legislative milestones laid down in the Recovery, Transformation and Resilience Plan. Of the new features to be introduced, it is worth mentioning the fact that it will regulate for the first time what are known as general interest industrial projects, the special protection of energy intensive industry and the possibility of establishing regulatory testbeds or “sandboxes” for the development of pilot projects (with certain similarities to those that already exist in the financial sector).

### ◆ The Startups Law

The **Law on fostering the ecosystem for emerging enterprises (better known as the Startups Law)** entered into force on December 23, 2022. One of the legislative milestones of the Recovery, Transformation and Resilience Plan, its aim is to strengthen the entrepreneurial ecosystem and promote such emerging enterprises, seen as one of the driving forces behind the recovery and modernization of the Spanish economy. The regulation defines the concept of start-ups, focusing on compliance with a series of requirements, such as their new or recent creation and the innovative and scalable nature of their business project, among other issues. These matters are important, as only companies that meet the legal requirements will be eligible for the benefits laid down in this new regulatory framework.

## Tax

- ◆ In 2023 and 2024 the **new temporary levies on (i) credit institutions and credit financial establishments and (ii) energy entities** will apply. Credit institutions with revenue of more than 800 million euros or those that are supervised by the European Central Bank will have to pay 4.8% of their profit margin on interest and commissions in the preceding year, while the main operators in the energy sector will pay 1.2% of their net revenue of the preceding year. In both cases, an initial advance payment of 50% will be paid in February followed by the second payment in September 2023. Neither of these levies will be deductible from the corporate income tax base and it is expressly prohibited to pass them on to customers.
- ◆ Moreover, the **Temporary Solidarity Tax on Large Fortunes** became law in 2022. This tax will be paid by taxpayers with net assets of more than 3 million euros (at rates of between 1.7% and 3.5%) and will apply in a way that is very similar to the Wealth Tax. The debt will be reduced by the amount actually paid as Wealth Tax. It is initially foreseen that this tax will apply only in 2023 and 2024 in relation to assets for 2022 and 2023, respectively.
- ◆ In addition, with effect in fiscal years commencing in 2023, a limitation has been established on the **use of losses in tax groups for corporate income tax purposes** (so that, when aggregating the tax bases of the entities in the group, only 50% of the losses will be used). Losses that have not been used may be offset over the next ten years for this purpose.
- ◆ The above-mentioned **Startups Law**, already published in December 2022, makes improvements to the corporate income tax payable by this type of company; reduces the personal income tax

(IRPF) payable on stock option plans for employees in such companies; improves the deductions as regards IRPF for investments in such companies; and makes improvements to the rules on inbound expatriates as regards IRPF. In addition, it contains specific rules on the remuneration arising as a result of the management of private equity entities (carried interest).

- ◆ A **new reporting obligation with respect to corporate income tax has also be included** in the Startups Law. This will affect companies and groups with revenues of more than 750 million euros, although this obligation will be applicable to tax years as from June 22, 2024.
- ◆ In addition, the following directives must be transposed: **ATAD3** (the purpose of which is to eradicate the undue use of holding companies) and **DEBRA** (which aims to reduce the differences between the fiscal treatment of financial costs and that of equity financing).
- ◆ The publication of the judgments of the Supreme Court on the **deductibility of the remuneration of Board members and directors** is expected soon. These rulings will decide whether such remuneration falls within the concept of gratuity in specific cases (sole shareholder, lack of statutory reserve, severance for removal), with particular emphasis on how it affects the contractual relationship absorption doctrine ("*teoría del vínculo*").
- ◆ Other judgments expected in the Supreme Court are those concerning the procedures concerning the **declaration of joint and several liability** (article 42 of the General Taxation Law ("*LGT*")) or the **difference between the general power of classification under article 13 of the LGT and conflicts in the application of the provision (article 15 of the LGT)**. Finally, the Court's interpretation of the **anti-abuse clause foreseen in relation to the parent-subsidiary exemption (dividends) is awaited**, in light of the case law of the Court of Justice of the European Union and the Supreme Court.

## Administrative

### ◆ Public procurement – Review of prices

As regards public procurement, the review of contract prices will be a recurrent issue, due to the level of inflation and the expected extension to a greater number of cases of the restrictive rules regarding such reviews.

### ◆ Judicial review – Assessment of a possible amendment to the Judicial Review Administrative Law (LJCA) with respect to the issue of the right of appeal against the ruling of the court of first instance in sanctions cases

Everything suggests that the right of appeal in serious sanctions cases will continue to be a thorny issue for Spanish courts which, in both appeal cases on a point of law and in referrals to the Constitutional Court, have recently started to take on board the consequences for the Spanish legal system of the judgment of the European Court of Human Rights (ECtHR) in *Saqueti Iglesias v. Spain*. According to the ECtHR's ruling, the Spanish legislature should examine whether the LCJA requires amendment in order to recognize the right to appeal against a judicial review ruling at first instance concerning the exercise of the right to impose an administrative sanction.

◆ **Energy**

- **Calling of access capacity auctions.** To date, the Secretary of State for Energy has passed four resolutions agreeing to make the available power in several nodes of the transmission and distribution network subject to access capacity tenders. In June 2022, the Proposed Order to call a tender for access capacity in several of these nodes went through the hearing and public information phases. If the tender is not finally called in 2022, it will most likely be called in early 2023. This tender is vital as regards absorbing the foreseen new renewable power generated in order to comply with the National Integrated Energy and Climate Plan and other environmental commitments that form part of the green transition.
- **Access and connection milestones.** The first months of 2023 will probably be marked by the expiry of the deadlines for many renewable generation facilities to comply with the milestones for obtaining the most important administrative authorizations established in Royal Decree-Law 23/2020 (unless these deadlines are extended). Failure to comply with these milestones will result in the automatic expiry of grid access and connection permits and the forfeiture of substantial financial guarantees.
- **Approval of the legislative framework for offshore wind power.** In the current energy context, given that the instructions at the EU level on maritime management, progress in the development and approval of the regulatory framework for offshore wind power generation technology and other offshore energy sources is expected to intensify. To date, the following have occurred: the hearing and public information stages of the draft royal decree approving the maritime space organizational plans (POEM) of the five Spanish marine areas (June 2021) and the prior public consultation in relation to the regulatory framework for the development of offshore wind and marine energy facilities (June 2022). Given its extensive coastline, Spain has major potential as regards this particular type of power generation technology.

◆ **Environmental**

- **Waste flows.** Law 7/2022, of April 8, on waste and contaminated land for a circular economy, has made significant changes to the rules on extended producer responsibility. The royal decrees regulating each specific waste flow will have to be adapted to these changes and they will probably start to be approved during 2023 (some draft legislation has already been submitted for consultation in 2022). These regulations are important for certain industrial, commercial and economic operators which are particularly concerned because of the economic activity that they carry out.
- **Packaging and packaging waste.** The Official State Gazette of December 28, 2022 has published the Royal Decree on Packaging and Packaging Waste. Among other issues that could be relevant, this regulation (i) modifies the extended producer responsibility rules in accordance with the new Community guidelines, so that the affected producers assume the real and total cost of packaging waste management, taking into account the fact that the financing provided by the producers must be based on circular economy criteria; and (ii) applies the extended producer responsibility regime to commercial and industrial packaging.
- **Sustainable mobility.** It is expected that the Sustainable Mobility Bill, which was submitted by the Council of Ministers to the Parliament on December 13, 2022, will be approved in 2023, thereby complying with Spain's commitments vis-à-vis the European Commission in relation to the Recovery, Transformation and Resilience Plan.

## ◆ Other regulated sectors: the tobacco market, transport, consumption, housing

- **New Tobacco Market Law.** In June of this year, the Draft Bill on the tobacco market and other related products went through the public information stage. This reform deals with significant issues, such as the introduction into the monopolistic regime of devices used for the consumption of new tobacco products. In principle, it is expected to be approved in 2023.
- **Consumption.** 2023 will, in principle, see the approval of the Bills currently before Parliament concerning (i) the transposition of Directive 2019/882 on accessibility requirements for products and services in Member States; and (ii) the regulation of customer services. Both texts may impose significant additional obligations on economic operators which will affect their relations with consumers and users.
- **Housing.** In 2023, the Right to Housing Bill, referred to above in the Real Estate section and currently before the Lower House of Parliament, is expected to become law. This may significantly impact real estate developers and managers, especially if limitations on residential property prices are introduced.
- **Road transport.** Legislation may be approved in 2023 amending the rules on subcontracting in road freight transport to foster its efficient use, avoiding the loss of non-productive value in the subcontracting chain of road freight transport. The Government undertook to place this bill before the Spanish Parliament pursuant to Final Provision 16 of Royal Decree-Law 14/2022, of August 1, 2022. This change to the legislation has been urged by road freight transport operators through the National Road Transport Committee.
- **Preparatory work vis-à-vis a Draft Bill on Mines.** The Government's intention is to initiate in 2023 the procedures leading to the preparation of a Draft Bill on Mines, ultimately with a view, among other things, to optimizing the sustainable management of mineral raw materials, thus replacing, as a relevant time milestone, the current sectoral statute in force, which was originally approved in 1973.

## Labor and Employment

- ◆ 2023 will once again be a key year for employment relations. The complex economic situation, the uncertainty existing and the **lack of flexibility of the Spanish system of employment relations may mean that many enterprises choose to restructure in 2023** in order to reduce costs and adjust given the complicated state of affairs at present.
- ◆ In this context the **monitoring of the grounds for collective layoffs** may be changed, with the need for a report from the Work and Social Security Inspectorate being included in the relevant procedure.
- ◆ Other significant changes expected in relation to employment law are summarized below.
- ◆ The Government is preparing a new **Workers' Statute for the 21st Century** to bring the regulatory framework into line with the current situation. Moreover, an **Internship Statute** is expected to be approved to regulate, and limit, interns' activities.

- ◆ With regard to **social security**, an increase in contributions of more than 8% is foreseen, which will increase business costs, as will the probable increase in the minimum wage.
- ◆ The **pension reform** will entail not only an increase in the maximum contribution base but also an increase in the previous contribution period used to calculate the pension, and certain measures to correct the gender gap will also be introduced.
- ◆ New measures are foreseen to foster the **work-life balance**, with new types of leave for caregivers, to attend to unforeseen family circumstances and for the care of minors.
- ◆ Also, as a consequence of the application of EU regulations, rules are expected to be put in place to guarantee **more transparent and foreseeable employment conditions**, for example with regard to essential aspects of work, such as time or place of work, duties to be performed and remuneration. Legislation is also envisaged in relation to companies' obligation to have internal channels for the reporting of irregular or illegal behavior within the company itself.

## Litigation and arbitration

- ◆ **The three Bills on efficiency – organizational, procedural and digital – that form the legislative basis of the 2030 Justice Plan continue to make their way through parliament:**
  - The Organic Bill on the organizational efficiency of the public justice service, currently awaiting the opinion of the Justice Committee, seeks to undertake a significant reform of the justice system by (i) converting the current one-judge courts of first instance into multi-judge courts of first instance, (ii) adapting justice of the peace courts, which will become the newly created justice offices in the municipalities, and (iii) establishing a new judicial office.
  - In turn, the Bill on public justice service efficiency measures, which is currently awaiting a report from the Justice Committee, tackles the three-fold objective of (i) introducing into the Spanish legal system adequate means for resolving disputes out of court – making this prior attempt at dispute resolution a requirement to be able to proceed to commence civil and commercial proceedings –, (ii) expediting court proceedings and improving their efficiency, with measures such as fostering the issuance of oral rulings, broadening the scope of the expedited oral civil proceeding, incorporating the conduct of so-called “test proceedings” – intended to reduce mass litigation –, and reforming the cassation appeal, in order to make it more streamlined and markedly extraordinary in nature; and (iii) adapting the public justice service to new information technologies, on the terms contained in the third and last bill to which we refer below.
  - Lastly, the Bill on Public Justice Service Digital Efficiency Measures, currently in the amendment phase, which seeks to provide the courts with the necessary legal framework and capacity to tackle the digital transformation of the public justice service. Among the objectives sought by the law are the creation of multiple digital services accessible to citizens and which enable digital identification and communication with the government, permit justice system personnel to work remotely and ensure interoperability with the rest of the government.

## ◆ Consumers

- Furthermore, on December 20, 2022, the Council of Ministers authorized the urgent administrative processing of a Bill on representative actions for the protection of the collective interests of consumers. This new law will result in the much-anticipated transposition of Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020, thereby providing citizens with tools to exercise their rights and obtain compensation through class actions.

## Restructuring and Insolvency

- ◆ In January 2023, the **special insolvency proceeding for micro-enterprises** provided for in Book Three of the Revised Insolvency Law will come into force. Consequently, the Ministry of Justice will have to simultaneously implement the electronic platform for the liquidation of assets from this special proceeding. This electronic platform will be a critical element to ensure the effectiveness and efficiency of the new special procedure for micro-enterprises.
- ◆ In March 2023 the **Insolvency Practitioners Regulations** will come into force, which will govern the access to the activity, the appointment and the remuneration of these professionals. This legislation is expected to also contain provisions applicable to two experts which have been introduced following the transposition into Spanish law of the Preventive Restructuring Directive: the restructuring expert and the expert or monitor in procedures for the preparation of the sale of a production unit (or “pre-packer”).
- ◆ In March 2023 the so-called **Liquidation Portal** will be created in the Public Insolvency Register, setting out a list of companies in liquidation proceedings and the information required to facilitate and promote the advertising and competition in the transfer of all establishments or production units.
- ◆ March 2023 **will witness an amendment to the Regulations on the Public Insolvency Register** (which regulates the structure of the register, its content and the notice system, together with the procedures for being included in and accessing the register and interconnection with the European platform) in order to include the conditions for the publication of the remuneration set for insolvency practitioners.
- ◆ Moreover, 2023 will also be the year of the enactment of the **Proposal of the Directive harmonizing certain aspects of insolvency law** (COM (2022) 702 final), such as (i) the so-called “pre-pack”, (ii) avoidance actions, (iii) creditors’ committees, (iv) the duties of directors; and (v) the introduction of a simplified insolvency regime for micro-enterprises in order to reduce the costs of their liquidation and allow entrepreneurs who are natural persons to be able to discharge their debts. This second Insolvency Directive promises to have a significant impact in the different Member States, as the first Preventive Restructuring Directive did, which was recently transposed into Spanish law through Law 16/2022 of September 5, 2022.

## Industrial and Intellectual Property

### ◆ Intellectual property

The Directive on copyright in the digital single market was transposed in Spain by Royal Decree-Law at the end of 2021. Immediately thereafter, it was agreed that it would be processed as an “urgent” bill, but its approval has been held up in the Lower House of Parliament. It is to be hoped that in 2023 Parliament will complete the reform of the Intellectual Property Law and put an end to the current situation in which the relevant law is found in different statutes rather than in one place and, moreover, defectively drafted. In addition, on December 27, 2022, the Council of Ministers submitted to the Parliament the Law creating the Spanish Copyright Office. Other legislative proposals waiting in the wings include the royal decree on private copying (equipment concerned and amounts) and the order on tariffs for copyright collection societies.

### ◆ Industrial property

The most recent amendment of the Trademark Law 17/2001, of December 7, pursuant to Royal Decree-Law 23/2018, of December 21, attributes to the Spanish Patent and Trademark Office (OEPM) the power to decide directly on the invalidity and revocation of Spanish distinctive signs (cf. additional provision 1.2). This amendment will come into force on January 14, 2023.

### ◆ Audiovisual law

One of the most eagerly awaited pieces of legislation in the entertainment sector is the new Cinema and Audiovisual Culture Law. The law, the bill for which was approved by the Council of Ministers on December 27, 2022 and which will in principle be processed under the urgent procedure, extends aid and subsidies beyond cinematographic films to include series and other programs; modifies the quota for European and Latin American films to 20% of those screened; and creates the State Council of Cinematography and Audiovisual Culture, among other measures.

## Digital economy

### ◆ Digital Markets Act (DMA)

As of May 2, 2023, digital platforms that meet the criteria set out in the DMA will have to notify the European Commission in order to be designated as gatekeepers. From the moment of their designation, these platforms will have 6 months to adapt their practices to the obligations imposed by the DMA, some of which will involve very significant changes to their business models.

### ◆ Digital Services Act (DSA).

Digital platforms must publish their number of active users by February 17, 2023. Based on these numbers, the European Commission will designate the very large platforms subject to the obligations under the DSA. After their designation, these companies will have 4 months to comply with the obligations provided for in the EU Regulation, which aim to increase their transparency, as well as to strengthen the fight against the dissemination of illegal content and to detect and mitigate systemic risks caused by the use of these services. The Regulation establishing the DSA will be applicable in its entirety for all intermediary service providers as of February 17, 2024, requiring a global adaptation of services, terms and conditions of use and reporting mechanisms, including due diligence obligations in the establishment of mechanisms for notification and removal of illicit content, collaboration in the identification of third parties that provide services aimed at end consumers (marketplaces) and the performance of independent audits, among others.

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