



COVID-19

Review of the year
that changed everything
and trends for 2021

December 2020

GARRIGUES

2020 has been a year like no other. The world health emergency caused by the spread of COVID-19 and the resulting declaration of a state of emergency (lockdown) in Spain in March 2020 brought an unprecedented whirl of legislative activity. Companies have now been placed in an uncertain scenario where decision-making is the key to the future survival of their businesses. Over these months the Garrigues [Special COVID-19](#) team have tried to provide answers to many of the questions that have arisen in the new context. Now that this traumatic 2020 is drawing to an end, we review and look back on the main legal matters of the year, from every angle of business law, while looking towards 2021 and picking out the most important trends to watch in the new year.

Corporate and Commercial

What were the main milestones in 2020?

All legislative activity in 2020 was dominated by the legislation approved as a result of the declaration of a state of emergency and the measures in response to [COVID-19](#). Notable in this field were the measures taken to push back the dates for the preparation and approval of financial statements and the option to hold remote meetings. Alongside this the [deregulation of the foreign investments regime](#) was suspended, measures were adopted in relation to the [distribution of dividends at companies that had elected ERTE temporary collective layoff procedures](#), and access to [ICO guarantee facilities](#) was approved, among a host of other measures, many of which were set out in royal decree laws numbers [8/2020](#), [11/2020](#) and [18/2020](#), mainly.

Outside the provisions approved in relation to the health/economic crisis, two other prominent pieces of legislation were adopted:

- Amendment of the [legislation on the food chain](#) adopted as a matter of urgency in RD-Law 5/2020; and
- Amendment of the [Good Governance Code of Listed Companies](#).

What to expect in 2021

2021 is going to be the year of sustainability and bank mergers.

- The European Commission recently issued a consultation document on sustainable corporate governance. The sought objectives are:
 - strengthening the role of directors in pursuing their company's long-term interest;
 - improving directors' accountability towards integrating sustainability into corporate strategy and decision-making; and
 - promoting corporate governance practices that contribute to company sustainability (e.g. in the area of board remuneration, board composition, stakeholder involvement).
- In Spain the bill on long-term shareholder engagement is awaiting approval.
- The approval of a new Anti-Money Laundering and Counter-Terrorist Financing Law is also expected.
- The CNMV (Spanish Securities Market Commission) is working on a new Capital Market Law.

Elsewhere, it is not clear whether the distribution in Spain of the loans and subsidies funded out of the European recovery package branded Next Generation EU could bring changes to corporate law.

Dates for the diary

The only definite date regarding corporate law matters to be put in the diary right now is the [extension until December 31, 2021 of remote attendance at meetings of companies' corporate bodies](#) (defined as all those governed by Legislative Royal Decree 1/2010, of July 2, 2010, civil-law partnerships (sociedad civil), cooperative companies, associations and foundations). The extension was adopted in Royal Decree-Law 34/2020, of November 17, 2020, on urgent measures to support the solvency of businesses and to support the energy sector, and, in the tax field. Moreover, 2021 is the year when companies are going to have to send their financial reports and financial statements in that new format and system which brings a change to current practice. It will also be the year when the 500-employee threshold determining exemption from the obligation to prepare the non-financial report goes down to 250 employees.

Tax

What were the main milestones in 2020?

The main event in the tax arena was the proliferation of legislation in 2020. Although a large part of the new provisions adopted this year appeared in central, autonomous community or local government legislation drawn up in response to COVID-19 for Spain (see [here](#)), new non-pandemic legislation was also passed, including the approval of the [tax on certain digital services and the financial transaction tax](#). And the legislation in response to COVID-19 notably included the reduction or removal of [VAT on medical supplies](#) and the option of performing [administrative steps remotely](#).

In the courts, the reportable events were a few important judgments delivered by the Constitutional Court; such as the one holding [Royal Decree-Law 2/2016 unconstitutional](#), in relation to the minimum prepayment, in the context of the application for judicial review filed by a Garrigues client; or the unconstitutionality of the nuclear tax in Castilla y León. Also, the Supreme Court delivered important judgments on tax issues such as the restriction on the dynamic interpretation of tax treaties in the [Stryker](#) and [Colgate](#) judgments – the parties were advised by Garrigues -; the restriction on the scope of the definition of [household items](#) for the purposes of inheritance and gift tax; the ability to claim the [personal income tax reduction for residential property leases](#); or various judgments determining that the responsibility for proving that [per diems are paid in respect of the activity concerned lies with the employer not the employee](#). Alongside these there were other notable judgments and decisions on eligibility for [personal income tax exemption in dismissals of senior managers](#) and not only in relation to unilateral withdrawal; the TEAC decision in which [legal costs](#) in court proceedings are only taxable for personal income tax purposes on the net amount, after subtracting defense costs; or the recognition of tax relief for work performed abroad by directors.

What to expect in 2021

And heading into the new year, we must prepare for the main changes in sight or already approved, from a legislative and judicial standpoint. Namely the increases in personal income tax and wealth tax or the reduction to the relief for dividends and income from transfers of shares as already set out in the General State Budget Law for 2021; the potential CJEU and supreme court judgments in relation to [Form 720](#); the analysis of a potential tax harmonization for taxes devolved to the autonomous community governments; the introduction of a “reference value” for transfer and stamp tax and inheritance tax purposes in the Project Law on Measures to Prevent and Combat Tax Evasion; the new tax on single-use plastic packaging as defined in the [Draft Waste Law to achieve a circular economy, improve waste management in Spain and combat pollution](#); the transposition of directives [DAC6](#) (already made) and [ATAD 2](#) (not transposed yet); and the CJEU judgment on the compatibility of the tax on the value of electricity output with EU law.

Another date for companies' diaries is the first financial transaction tax assessment, in January 2021, and the first digital services tax assessment, in the first quarter of 2021.

Labor and Employment

What were the main milestones in 2020?

In the labor and employment field, the COVID-19 pandemic has had a major impact on employment relationships and led to the approval of a raft of rules, instructions, interpretation methods, among other items (as may be seen [here](#)).

At first, the priority goal of labor advisory services was to tackle the effects of lockdown with both the existing legal mechanisms and especially with others that were being approved, mainly in relation to temporary collective layoffs or collective working hour reductions or to the so-called recoverable paid leave arrangement (see their characteristics [here](#)). Working from home, in view of the absence of legal regulations until the recent [Royal Decree-Law 28/2020, of September 22, 2020, on remote working](#), was one of the main issues that companies have had to resolve in cases where employees are able to work remotely (see [here](#) for the main new legislation on working from home and the issues that have arisen following the approval of the new legislation).

Later on, labor advisory services focused on the need for companies to adapt to the new circumstances existing after the declaration of the state of emergency and lockdown, by considering the available options for reorganizing their resources following the approval of certain restrictions on terminating contracts or the requirement to retain jobs in certain cases (as may be seen [here](#)). Companies also had to confront issues that had never previously been tackled, relating mainly to the return of employees to the workplace following the end of the state of emergency, for which neither the legislation nor court precedents provided valid solutions (see [here](#) for the essential factors to consider for the return to the workplace). This involved addressing issues related to tracking and tracing, immunity passports, setting up technology to prevent and detect infection at workplaces, taking temperatures to allow entry to workplaces, conducting health surveys, etc.

The pandemic and the prolongation of its effects have also led to the introduction of communication technology in collective bargaining processes, so as to carry out remote or virtual processes, and another effect was remote attendance at trials and conciliation hearings. In this context, the use of tools for identification gained importance along with tools for the remote signing of documents electronically.

Additionally, other trends already in motion moved forward in 2020 such as achieving equality between men and women and combating the pay gap (see [here](#) for the latest new developments in this area) and the processes of achieving labor rights and protection for independent contractor workers especially within the scope of certain types of business activities.

What to expect in 2021

In line with the existing trend, in 2021 the process of achieving equality at work between men and women will continue, especially concerning pay. Additionally, it is predictable that collective bargaining processes will continue on altering working conditions to adapt the situations of companies, and of their resources, to the existing crisis; a shake-up of the concept of “employee” will occur, and, in view of the absence of rules capturing certain types of work (at the collective bargaining table for labor matters the parties are already discussing the new rules for digital platform workers), the process of achieving labor rights and protection en masse for independent contractor workers operating through these platforms will continue.

Moreover, after the end of the public consultation period, the creation of the charter of digital rights will continue, which, in the area of labor law, sets out, for example, the right to disconnect or the protection of workers' privacy.

Also set to take center stage in 2021 are a potential further increase in the minimum wage, the announced limit on subcontracting in certain activities (either in the form of a ban or by requiring equal working and pay conditions between the employer's own staff and subcontracted workers),

the likelihood that “forced” retirement (where the employee cannot choose to continue working) will again be banned, which will clearly have an impact on managing the generational shift in a particularly difficult period for young people to find jobs, and the debate will be revived on the reduction of the weekly number of working hours to thirty-two hours over four days.

Dates for the diary

In 2021 we will undoubtedly see labor and employment matters in the spotlight again.

In principle, unless there is a further extension, January 31, 2021 will be the last day of the extension of the collective layoff procedures due to force majeure that are in progress, and the inaccurately named prohibition on dismissing (see [here](#) for a summary of the legislation that so provides). This circumstance, bearing in mind the continuing existence of the pandemic and its effects on the economy as a whole, and on business activity in particular, will mean that many companies will have to undertake adaptation processes to the existing circumstances and to their estimated projections, in terms of both collective layoffs and working conditions.

Elsewhere, on April 14, 2021 the equal pay regulations will come into force which require a detailed pay register for the workforce and lay down the obligation to carry out pay audits, while companies with between 101 and 150 workers will have to have an equality plan before March 7, 2021 and companies with equality plans in force will have to adapt them within twelve months from January 14, 2021, which is when the implementing regulations on equality plans will come into force (see [here](#) for a summary of both pieces of legislation).

Administrative Law

What were the main milestones in 2020?

The amount of legislation produced in the field of administrative law was particularly high in 2020. A large part of the rules approved this year were related to [COVID-19](#), such as the centerpiece Royal Decree 463/2020, of March 14, 2020, declaring a state of emergency, and all the laws, royal decree laws, royal decrees and ministerial orders linked to or issued to implement it, which, as a whole, have had an enormous impact on this particular legal sector, above all in relation to public procurement, to administrative procedure, to the judicial review jurisdiction, energy, infrastructure, aid and subsidies, mandatory services, sanctioning law, etc. Throughout this period we have been analyzing the main new developments in our special [COVID-19](#) newsletter.

Notable new non-pandemic legislation includes the [new renewable energy](#) financial regime for electricity generation plans, approved in Royal Decree 960/2020, of November 3, 2020, as well as Order TED/1161/2020, of December 4, 2020, on the auction mechanism for granting this new financial regime and the Decision of December 10, 2020, by the Secretary of State for Energy, under which the [first auction](#) provided for in it was called, the adaptation to EU law in relation to [waste shipments, through Royal Decree 553/2020](#), of June 2, 2020 or [Royal Decree-Law 23/2020](#), of June 23, 2020, approving measures related to energy, mainly, regarding the orderly implementation and drive for renewable energy, the rules on access and connection, and the enhancement and simplification of authorization procedures for electricity plants.

What to expect in 2021

A wide range of important new pieces of legislation with impacts in the field of administrative law are planned for 2021. Including the expected approval of the Climate Change and Energy Transition Bill, the General Telecommunications Law, progress in the procedure for the Law creating the National Fund for the Sustainability of the Electricity System and for the European Climate Law or the calling of additional auctions in relation to the renewable energy financial regime. Also, in the coming year, the

royal decree on the procedure and general methods for access and connection to the transportation and distribution grids could finally be approved, as well as the law establishing the greenhouse gas reduction targets during the life cycle of the fuels and the energy supplied in transport, or the royal decree on closed electricity distribution grids.

In relation to the setting up of the European Recovery Instrument (Next Generation EU), approval should take place in the short to medium term of both the royal decree-law for the implementation of the recovery, transformation and resilience plan and the relevant implementing legislation which will enable the specific measures for physically rolling them out to be adopted (administrative registers, specifications and call notices, measures for modernizing public authorities to adapt them to the challenges posed by that implementation process, etc.).

Restructuring an insolvency

What were the main milestones in 2020?

In 2020 we witnessed a proliferation of urgent legislation largely in response to the economic crisis caused by COVID-19. Notably, [Royal Decree 463/2020](#) declaring the state of emergency and suspending procedural time periods (this situation was extended until June 4, 2020); or [Royal Decree Law 16/2020](#), approved by parliament in [Law 3/2020](#), in which, among other measures, the duty to petition for an insolvency order was suspended - originally until December 31, 2020 and later extended until March 14, 2021- and the options of amending the arrangement with creditors or the court-sanctioned refinancing agreement were introduced. Also needing to be mentioned is the distribution of government funds for strengthening the solvency of businesses and self-employed workers (ICO and CESCE facilities and loans), and of strategic businesses ([FASEs](#)).

On another note, the [Revised Insolvency Law](#), approved by Legislative Royal Decree 1/2020, of May 5, 2020 came into force on September 1, 2020. Despite being a recast law, it contained a number of new items. Particularly notable is the recast legislation on the sale of productive units, in which a definition of “productive unit” has been added, a limit has been placed on the purchaser’s liability, and the jurisdiction of the insolvency judge to determine the existence of a transfer of undertakings has been confirmed. Moreover, this year certain courts opened up to adopting the role of silent administrator to speed up pre-pack sales of productive units, by appointing a kind of scrutineer before the insolvency order to oversee that the competitive process for selecting the best bidder is conducted properly.

What to expect in 2021

The new year will see the end of the moratorium on petitioning for insolvency orders, which [Royal Decree-Law 34/2020](#) of November 17, 2020 has been extended until March 14, 2021. That is also the last date on which debtors can file an amendment to the arrangement with creditors or to the court-sanctioned refinancing agreement reached with their creditors.

Moreover, unless there is an exceptional extension, July 17, 2021 will be the last date in the time period for Spain to transpose the new [Directive 2019/1023](#), on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt. The transposition of this directive will bring important new legislation, especially on the subject of the “second chance mechanism”, in pre-insolvency restructuring processes, and on the interrelationship between insolvency and corporate law.

Litigation and arbitration

What were the main milestones in 2020?

The impact [COVID-19](#) has had on the performance of contracts was one of the main issues in 2020 in the area of litigation. The pandemic has also had effects in the field of arbitration, from various standpoints: and it could turn into an [opportunity to revolutionize arbitration](#) or due to its [impact on investment arbitration](#).

Alongside this, reportable events outside the pandemic were the coming into operation and presentation of the [Madrid International Arbitration Center \(CIAM- Centro Internacional de Arbitraje de Madrid\)](#), which we talked about [here](#), noting that it came into being with a clear intention to become the leading Spanish arbitration institution in the international arena.

There have also been important judgments for the world of arbitration, such as [judgment 46/2020, of June 15, 2020, by the Spanish Constitutional Court](#) which recalled and settled its case law on a few important definitions falling within the scope of control of arbitral awards by the courts, and by doing so strengthened Spain's position as an arbitration venue (see here for further information).

What to expect in 2021

From the standpoint of litigation, the key issue will continue to be, as it was in 2020, the disputes arising from the impact the pandemic has had on the performance of contracts. As occurs at the beginning of any crisis phase for the economy, disputes over breaches of contract will be a prevalent feature of 2021.

Intellectual Property

What were the main milestones in 2020?

COVID-19 wreaked havoc on the entertainment industry: interrupted filming, canceled or postponed concerts, temporarily closed bookshops and delayed fairs and festivals. The legislation approved in response to COVID-19 in this area was mainly aimed at mitigating the effects of the pandemic on procedural issues (at intellectual and industrial property offices, for example). With a few specific exceptions - such as the option for more relaxed use of assistance funds of authors' and artists' societies to help out their members -, it has not affected major issues.

More important as a strategy for the country was the approval of generous tax incentives for audiovisual productions through the partial amendment of article 36 of the Corporate Income Tax Law (see [here](#)).

Outside the pandemic and within the Spain 2025 strategy by which it is sought to make our country a leader in the production of audiovisual works, the publication of the draft General Audiovisual Communication Law (DSCA) on November 6 was one of the major events of the year.

Another important event was the European Parliament's adoption on October 20, 2020 of three reports studying how to regulate artificial intelligence while boosting innovation, ethical standards and trust in technology. Lastly, the European Commission's [proposal to regulate digital markets](#) (which we analyze [here](#)) and the [proposal to regulate digital services](#), still at an embryonic stage, seek to rebalance the rights and responsibilities of the players that come together in a digital environment.

What to expect in 2021

In 2021, we will see the completion of the new General Audiovisual Law, and also, the transposition in Spain of the [Directive on copyright in the Single Digital Market](#) which, in hard times for authors and artists, includes renegotiation mechanisms for contracts to increase streaming royalties. The legislative process in Europe for the approval of the regulations on digital markets and services, together with the European legislation on artificial intelligence will definitely be talking points.

Privacy, technology, digital services, communications and cyber security

What were the main milestones in 2020?

The past year has seen many innovations in the privacy sector, and not just those arising from the pandemic. Starting with the latter, we have seen how preventive and security measures have had to be deployed for businesses and public bodies alike, carefully taking into account how they would affect people's privacy. There has been considerable debate on the potential conflicts between privacy and health, as may be seen [here](#), aiming to fully safeguard these rights while ensuring that one is not detrimental to the other. The Spanish Data Protection Agency (AEPD) has also made its presence felt, with the issue of several [documents, reports and recommendations](#) relating to data processing and COVID-19.

Beyond pandemic issues, Spain and the rest of Europe underwent some important new developments in privacy. The [new regulation on cookies](#), cancellation of the [Privacy Shield](#) which has once again revolutionized regulations on international data transfers to countries outside the European Union, or the proposed [Digital Rights Charter in Spain](#) are just some of the innovations and matters that will continue to develop in the new year.

Regarding compliance with privacy regulations, we have seen the Spanish Data Protection Agency impose its first multi million fine, along with many other lower penalties which are becoming indicative of the way it is interpreting the General Data Protection Regulation (GDPR) in practice.

In matters of technology law, we have seen a significant increase in cases concerning use and application of blockchain and digital identity; and from a regulatory perspective, Spain has repealed the obsolete Electronic Signature Act of 2003, along with all provisions that were incompatible with the eIDAS Regulation through [Law 6/2020, of 11 November, 8 regulating specific aspects of electronic trust services](#), complementing aspects that the Regulation has not harmonized and is for the different member States to develop.

Spain has a draft general telecommunications act which is set to replace the current law, and will incorporate new provisions contained in the European Directive implementing the [European Code of Electronic Communications](#). This Directive, which was due to be transposed by December 2020, brings together under the same regulation, traditional telecommunications operators and electronic service providers, who, while using those networks, had remained outside the scope of the regulation (messaging services such as those we use every day with cell phones, cloud services etc.).

With respect to cyber security, we continue to see how cyber-attacks are on the rise and are becoming increasingly sophisticated, with ransomware being a common practice in recent months (encryption of all of a company's information with a ransom demanded in exchange for decryption keys) together with data theft (accompanied by the threat of online publication if the victim fails to pay the ransom).

This was also the year of entry into force of [Regulation \(EU\) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services](#) (which regulates specific aspects of P2B2C platforms, [see here](#)), as well as approval, through the aforementioned Law 6/2020 on penalties for failure to comply with the Regulation (see also [this news item](#) in this regard).

What to expect in 2021

Some of the aforementioned matters will continue to develop as the new year unfolds. In terms of regulations, both in Spain and the European Union, significant developments are expected in terms of digital rights (with final approval of the Digital Rights Charter in Spain), regulation of platforms and digital services with the European Union Digital Services Act and the Digital Markets Act (see our [special](#) here) and it is very likely that we will have some news about regulation of artificial intelligence at European level, where some regulatory proposals are beginning to be dealt with in this area.

We will continue to await developments regarding approval of the European Regulation on e-Privacy, the most recent draft of which was published by the German presidency of the Council of the European Union and which has been sidelined for some years now.

This year will also see 5G networks deployed. Spain is already preparing its regulatory framework which, in addition to the new telecommunications act, will see the approval of a specific cyber security act for 5G.

In terms of cyber security, businesses will need to take information security very seriously, and they should combine the necessary audits under GDPR, with prevention plans to be prepared in case of cyber-attacks.

Dates for the diary

Among the milestones that we expect in 2021, we hope to see the Official State Gazette publish the new General Electronic Communications Act, and there is no harm in wishing for the new e-Privacy Regulation to be finally approved at European level.

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