

Yesterday. Today. Tomorrow.

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Year in review, Year to come Spanish Law

December 2018

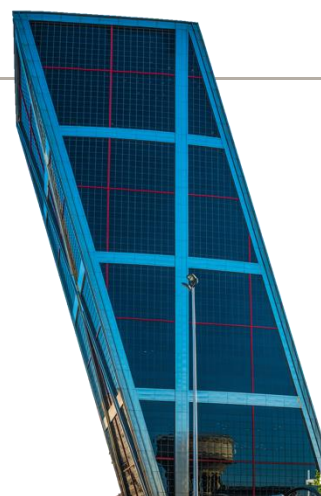
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Year in review

Spanish Law in 2018

We have seen major legislative changes in 2018, mostly as a result of the need to adapt Spanish law to European Directives and Regulations approved in recent years. We also highlight various new precedents set by the courts, such as those regarding executive directors' remuneration and who pays stamp duty for mortgages.



Executive directors' remuneration:

In a ruling on 26 February, the Spanish Supreme Court held that directors' remuneration for their executive duties must be set out by articles of association and capped at sums annually approved by shareholders. The ruling was a reversal of what had been the majority interpretation before then, forcing companies to reconsider their executive directors' pay structure.

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Money laundering:

Royal Decree-Law 11/2018 implemented the EU's Fourth Anti-Money Laundering Directive (AMLD IV) in Spain. We highlight as the main changes: (i) the new definition of beneficial owner, broader than before; (ii) the requirement for providers of certain services (company formation, providing a registered office or business address, external advice etc.) to be registered at the Spanish companies register (*Registro Mercantil*) and to file accounts; (iii) stricter sanctions; and (iv) establishing internal whistleblowing channels.

Annual accounts and beneficial owner register:

New forms for filing annual accounts at the Companies Register were introduced in March. These include returns on average payment terms, non-financial information and beneficial ownership. A new register of beneficial owners has been set up to contain the information reported to the Companies Register. The new register will be public and information on beneficial owners will be provided upon request to the relevant authorities, regulated persons or persons with a legitimate interest.

Investment firms. Transposition of MiFID II:

After more than a year's delay, on 28 September the much-anticipated Royal Decree-Law was approved that completed the implementation of MiFID II (Directive 2014/65/EU) into the Spanish legal system. Implementing regulations for the Royal Decree-Law are also expected to be approved before the end of 2018.

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Payment services (PSD2):

In November, Royal Decree-Law 19/2018 was issued, transposing Directive 2015/2366/EU on payment services in the internal market. The new law will bring major changes to the finance industry, as it enables third party access to banks' payment system infrastructure.

Market abuse:

With the approval of Royal Decree-Law 19/2018 transposing PSD2 (see above), the Spanish Government has adapted, amongst others, the Securities Market Act to the provisions of the Market Abuse Regulation.

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FinTech and ICOs. New guidelines from the CNMV:

The Spanish National Securities Market Commission (CNMV) has issued various guidelines on cryptocurrencies and ICOs, as well as interpretive guidelines for the possible application of securities regulations to firms wishing to pursue FinTech activities.

Transparency of financial instruments for retail investors:

CNMV Circular 1/2018 on warnings relating to financial instruments was issued in March.

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Stamp duty for mortgage loans:

After great legal controversy, with two contradictory rulings by Spain's Supreme Court, the government issued a Royal Decree-Law in November to change the law to say that stamp duty will be paid by lenders (and not borrowers) in mortgage loans. This is a complete reversal of the situation to date, where borrowers were required to pay the duty.

2018 highlights

Various financial EU Directives transposed in Spanish law: MiFID II, PSD 2 and AMDL IV and Spain's Securities Market Act adapted to the EU Market Abuse Regulation.

2018 highlights

Spain's new procurement law came into force in March.

2018 highlights

Spanish Data Protection Act adapted to the GDPR.

Unfair terms in mortgage loans:

Spanish courts and the CJEU continue to make judgments on the invalidity of certain general terms contained in mortgage loans to consumers. The CJEU is expected to rule in the next few months on: (i) the possibility of rectifying invalid default clauses through banks' reasonable conduct when applying them (e.g. waiting until a large number of payments have not been made and giving borrowers possibilities to pay before terminating loans); and (ii) the compatibility with Directive 93/13/UE of settlement agreements by banks and individual borrowers to moderate interest rate clauses with a view to these being held to be null and void.

Rental Housing:

The Spanish government passed a Royal Decree-law in December with urgent measures to help people find homes and enable affordable rents. Rental agreements are to be extended for longer periods, demands for guarantees in addition to deposits are curbed, rental housing is given better tax treatment, and vulnerable households are more protected in eviction processes. Property owners' associations are also allowed to restrict or impose conditions on tourist rentals.

Data protection:

Following the entry into force of the European General Data Protection Regulation (GDPR): (i) an urgent Royal Decree-Law was introduced in July to allow oversight of GDPR applications in Spain (inspections and penalties for infringements); and (ii) in November the Parliament approved the new Data Protection and Digital Rights Law.

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Cybersecurity:

In September, the Spanish law was issued transposing Directive 2016/1148/EU concerning measures for a high common level of security of network and information systems across the Union.

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Public procurement:

Spain's new procurement act (*Ley de Contratos del Sector Público*) came into force on 9 March, transposing what are known as the "fourth generation" EU Directives. The new regulations coincided with the launch of a programme of extra road investment, which has been put on hold following the change of government in June 2018.

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Gas industry:

Royal Decree 335/2018 of 25 May 2018 amended various royal decrees applying to the natural gas industry. It contains a battery of measures aimed at increasing the use of gas facilities, as well as improving how the market works.

Ride hailing services:

In September, a law was passed handing over responsibility for regulating city ride hailing services to Spanish autonomous regions and local authorities. After a transition period of four years, the current ride sharing licences that apply nationwide will only be valid within particular cities.

Energy transition. Solar tax:

In October, the Spanish government published Royal Decree-Law 15/2018 containing urgent measures for energy transition and protecting consumers, introducing major changes to promote renewable energy sources. Among other steps, the government has removed the "solar tax", levied on photovoltaic solar energy developments and self-consumption, in the final quarter of 2018 and first quarter of 2019.

Inheritance and gift tax in Spain:

In February, the country's Supreme Court issued a ruling finding that, under the free movement of capital, those residing outside the EU and EEA can benefit from the inheritance and gift tax relief set by regional authorities like any other citizen in those regions. This put an end to the discriminatory treatment whereby relief was only available for those resident in the EU and EEA.

New economic and tax regime for the Canary Islands:

The law was changed in November, mainly so that firms resident for tax purposes in Spain can be part of a consolidation group when they have branches that apply the special Canaries tax rate of 4% (although individual profits taxed at 4% are not included to determine consolidation group profits, and are subject to a separate return).

Penalties for anti-trust infringements:

In October, the National Commission on Markets and Competition (CNMC) adopted provisional guidelines for setting penalties for infringements of Spanish and European competition law. The authority is expected to issue final guidelines in the future.

Damages claims for competition infringements:

In 2018 two Barcelona courts upheld five claims against companies penalised in March 2013 for anti-competitive practices, acknowledging the claimants' right to compensation for the harm caused by those practices. Further damages claims in connection with competition infringements were also lodged in Spain this year, notably those related to the truck manufacturers' cartel.

Year to come

Spanish Law in 2019

Important initiatives such as revising the Insolvency Act are expected to see the light in 2019. We will also be alert to news on controversial laws such as the financial transactions tax and mortgage reform.



Spanish national budget. Priority of social agenda:

In October 2018 the minority government (PSOE) and parliamentary party Unidos Podemos reached consensus on a number of areas to approve the country's budget for 2019. Commitments are predominantly social in nature, focused on improving pensions, helping first-time home buyers and avoiding property speculation. Also included are structural reforms of the electricity sector and a package of measures to shift public policy on jobs and employment relations.

Long-term shareholder engagement:

Public consultation began in July 2018 on the draft bill to transpose the European Directive on shareholder rights. Although the Directive represents little change in the law applying to Spanish companies, certain provisions of the Spanish Companies Act are expected to be amended (in particular, those relating to institutional investors and proxy advisers).

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Shareholders' right to be bought out when companies do not pay dividends:

A proposal is being considered to amend article 348 *bis* of the Spanish Companies Act (the right of shareholders to be bought out when companies do not pay dividends). The amendment is aimed at mitigating the negative consequences of the rule applying strictly, in particular, the possibility for this right to be abused by minority interests.

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Foreign investment:

The scope of proposals for screening foreign direct investment inflows into the EU is expected to be set in April 2019. These may entail greater restrictions on investments in strategic assets and sectors.

Insolvency law:

A draft of the new revised Insolvency Act was published in March 2017. The intention is to make Spanish insolvency law more systematically logical, incorporate the successive legislative reforms that have been made to it and clarify certain provisions in view of judgments made by Spanish courts in recent years. The intention would now appear to be for this hugely important bill to go through parliament in 2019.

Business restructuring and second chance:

In October 2018, the European Council agreed its position on the business insolvency and second chance directive. The directive, expected to be approved in 2019, is aimed at providing access by viable enterprises in financial difficulties to preventative restructuring frameworks.

Money laundering:

Spanish AML regulations are expected to be revised further in the coming months to adapt to the fifth directive (AMLD V), approved in June 2018.

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New European prospectus regulation:

The new EU prospectus regulation (Regulation (EU) 2017/1129) will apply fully (certain provisions are already in effect) and directly in all Member States from 21 July 2019. With regard to other implementing rules (levels 2 and 3), the European Commission is expected to adopt an Implementing Regulation before January 2019 on the content and format of prospectuses (annexes). The ESMA will also publish, among other things, final versions of the guidelines on risk factors and the minimum disclosure requirements for exchange offers, mergers or spin-offs to benefit from the exemption from publishing a prospectus for offering/listing before March 2019.

Basel reforms:

On 23 November 2016, the European Commission set out a package of legislative measures to strengthen the resilience of EU credit institutions and investment firms and enhance financial stability. Amendments are expected to be made in 2019 to: (i) the Capital Requirements Regulation (CRR II) and Capital Requirements Directive (CRD V), approved in 2013; and (ii) the Bank Recovery and Resolution Directive (BRRD II), approved in 2014.

Prudential rules for investment firms:

The European Commission is working on a new prudential and supervisory framework for investment firms, which will take into account each firm's particular risk profile. Trilogue discussions are expected to begin at the start of 2019.

2019 highlights

New Prospectus Directive to apply fully and directly in Spain from 21 July.

2019 highlights

New revised version of the Spanish Insolvency Act due to be approved in 2019.

2019 highlights

Wide range of tax measures to be approved with changes in tax transparency rules.

EU NPL reforms:

In March 2018, the European Commission published a draft Directive and Regulation, aimed at accelerating the reduction of NPLs in Europe. The proposals in the draft Directive would require implementation by 2021.

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Digital transformation of the financial system. Regulatory sandbox:

A draft bill is in progress containing steps for the digital transformation of Spain's financial system. Measures include a regulatory sandbox or controlled testing ground, aimed at technology-based financial innovations.

Securitisation:

An amendment of Law 5/2015 of 27 April 2015, encouraging lending to businesses, was put out for public consultation in July. The change is to adapt current securitisation regulations to Regulation (EU) 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation.

Mortgage reform:

The bill to regulate credit agreements for property, which partially incorporates Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property, is still going through the Spanish Parliament. Among others, we highlight the new requirements to be met when demanding that consumers repay mortgage loans early.

Housing:

The government has announced a shift in housing policy in 2019. Changes in the law are planned to safeguard the constitutional right to housing throughout the Spanish state, defining this as a public service, and to prevent public housing from being sold to investment funds. Further measures are aimed at benefiting developers of social housing and boosting available rental housing.

Climate change and energy transition:

The regulatory framework for meeting European targets for reducing greenhouse gas emissions is expected to be outlined in 2019.

Financial transaction tax:

The Spanish government has published a draft bill creating an indirect tax for buyers of shares in Spanish listed companies (with a market cap above €1 billion), irrespective of brokering agents' country of residence. Liability for the tax, which will apply at a rate of 0.2%, will generally lie with the broker that transmits or executes the buy order.

Measures to combat tax fraud:

The Spanish government has published a draft bill of measures to prevent and combat tax fraud, transposing EU Directives 2016/1164 against tax avoidance practices and 2017/1852 on tax dispute resolution mechanisms in the European Union. A broad range of tax measures is set out, notably to enhance international tax transparency, to increase taxation in Spain of income coming from low tax territories, and to introduce the so-called exit tax on gains earned in Spain by companies that move to another company.

Digital services tax:

The government has published a draft bill proposing a 3% indirect tax on those digital services where users make an essential contribution to adding value for the service provider.

Local capital gains tax:

A bill has been proposed to amend Spain's local tax authorities act (*Ley de Haciendas Locales*) with respect to the urban land tax (*Impuesto sobre el Incremento de Valor de Terrenos de Naturaleza Urbana*). The aim is to introduce exemptions from the tax where taxpayers can prove that they did not make any profit from selling land. Under the proposal, this reform is expected to apply retroactively from June 2017.

Tax intermediaries directive:

The fifth amendment to the administrative co-operation directive was approved in May, establishing the obligation for intermediaries and, on occasion, taxpayers, to report "potentially" aggressive cross-border tax planning arrangements. The directive allows for a long transition period: before the first information exchange (set for 31 August 2020) mechanisms must be reported that began between the date the directive came into force (25 June 2018) and the date it applies (1 July 2020).

Anti-trust infringements and bars from public contracts:

The CNMC has announced plans to apply this measure under the Spanish Procurement Act (*Ley de Contratos del Sector Público*), which could be imposed for the first time in enforcement decisions by the competition authority in 2019.

Damages claims for anti-trust infringements:

Damages claims against companies penalised for anti-trust infringements are expected to grow in 2019, settling Spanish court case law as the positions taken by different courts need to be harmonised.

Brexit:

The Spanish government has announced a law to navigate the effects of a possible 'hard Brexit', if the UK leaves the European Union without a deal on 29 March. Details of the law will become known in January.

What now?

Your contacts

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