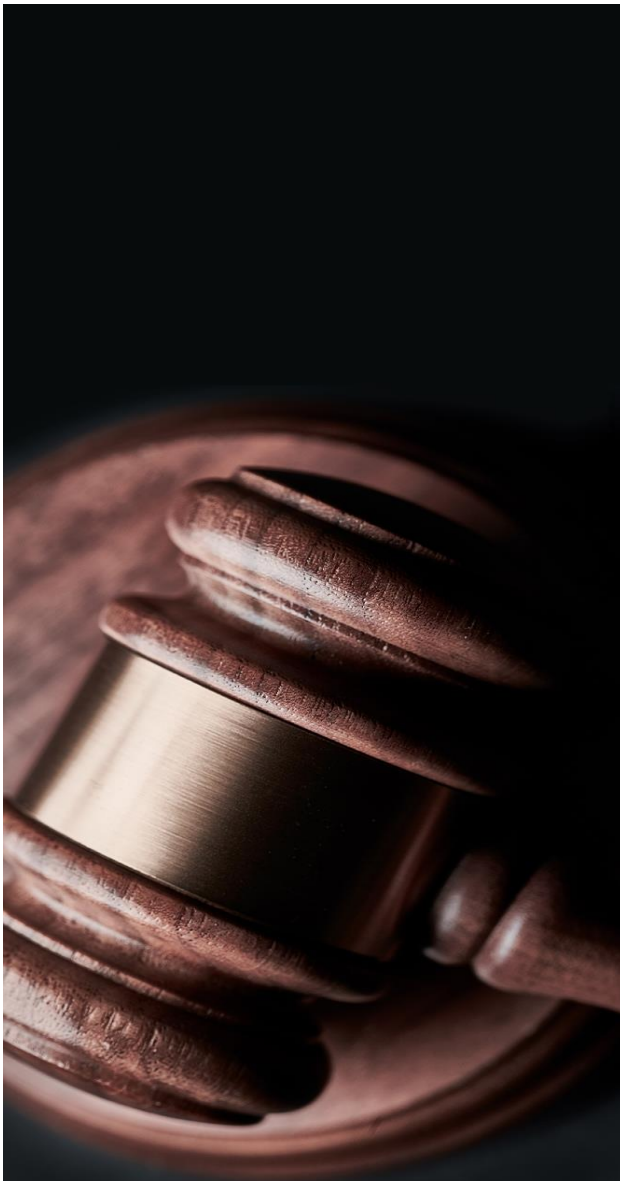

Legal update for 2021

Overview of the main new developments for 2021 and draft legislation likely to be approved to help companies plan ahead and assess their impact

Newsletter

January 2021



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This newsletter distinguishes current regulations from those expected to be approved in 2021, according to the key below:

-  Regulations and recommendations in force
-  Draft legislation

Corporate governance and compliance

-  **Reform of the Spanish Companies Act and the Spanish Securities Market Act.** In the first quarter, significant changes will be introduced affecting (i) all corporations, which will be required to review their joint venture company structure; and (ii) listed companies, which must assess the need to adapt their corporate governance rules and the opportunity to regulate loyalty shares in their bylaws.
-  **Online meetings.** In 2021, general meetings can be held online, even if not expressly provided in the corporate bylaws.
-  **Digitalization Directive (2019/1151).** Generally speaking, this must be adopted by August 1, 2021, to regulate the online incorporation of companies and free public access to certain information in the commercial registry.
-  **ESG.** *Regulation 2019/2088* will enter into force on March 10, 2021, obliging financial market participants and financial advisors to disclose the extent to which they have considered environmental, social and governance risks in their investment decision-making processes. Also, in 2021, the delegated act of the Taxonomy Regulation must be adopted, which will affect the preparation of non-financial information statements (see “Environment” section below).
-  **Fifth edition of the directive on the prevention of money laundering (2018/843).** Once this directive is adopted (which should have occurred before January 10, 2020), information on beneficial ownership will become available to all members of the public.
-  **Whistleblowing Directive (2019/1937).** The transposition deadline is December 17, 2021. It sets out minimum standards for the protection of persons who report breaches of Union law and subjects companies having 50 or more workers to new obligations.
-  **Guide to compliance programs on antitrust rules** (see “Competition” section below).



- Draft bill on the Code of Criminal Procedure.** The parliamentary process is expected to take place in 2021, although the bill will have a six-year period before it is required to take effect. For the purposes of compliance, we highlight (i) the explicit recognition of the discretionary principle to justify no penalties being imposed in certain cases—thus encouraging private collaboration with the procedural investigation— and (ii) the procedural representation of the legal entities under investigation by the director of the institution's internal monitoring system (usually the compliance officer).

Refinancing and insolvency

- Financial aid.** As a result of the pandemic, in 2020, the Spanish government approved different types of aid, offering companies financing and support for the liquidity and industrialization of certain industries (e.g., ICO guarantee facilities and the support fund for the solvency of strategic companies). [Read more.](#)
- Declaration of insolvency.** The insolvent debtors' obligation to file for insolvency has been suspended until March 14, 2021. If the debtor gave notice that negotiations had started to reach a refinancing agreement before December 31, 2020, it will not be obliged to file for insolvency until six months have elapsed from the notice date.
- Financing granted by “closely related parties”.** In proceedings filed until March 14, 2022, financing granted by “closely related parties” or financing in which they have been subrogated after paying (after March 14, 2020, in both cases) will not be subordinated, but rather considered preferential or ordinary claims, as applicable.
- Dissolution due to qualifying losses.** Losses corresponding to 2020 will not be taken into account to ascertain whether the company has grounds for dissolution. The assessment of these grounds must be carried out at the closing of financial year 2021.
- Directive on Preventive Restructuring (2019/1023).** The transposition deadline is July 17, 2021, although it can be extended by one year. The implementation of the directive will entail significant changes to preventive restructuring agreements, also requiring the amendment of the current insolvency regulations to ensure the whole system is consistent.

Contracts

- Government study of the *rebus sic stantibus* clause.** This may lead to the legal system of obligations and agreements including case-law rules on exceptional changes to contractual circumstances. In this case, the new regulations must be analyzed to explore the potential effects this may have on disputes arising before its entry into force. In any case, we expect litigation to increase regarding the *rebus sic*



stantibus clause owing to the pandemic.

- Rental payments.** In Catalonia, certain residential lease agreements are subject to a rent control regime ([read more](#)), and although the political will in some sectors is to introduce similar restrictions nationwide, no draft bill has yet been published. Also, several measures have been approved to mitigate the effects of the pandemic on the leases of housing and business premises ([read more](#)).

Foreign investment

- Forthcoming regulation on foreign investment.** This will affect the prior authorization of foreign direct investments made by non-EU/non-EFTA residents in strategic sectors or based on the investor's profile. [Read more.](#)
- EU investments.** Until June 30, 2021, certain investments in strategic sectors made by residents of UE/EFTA countries will also be subject to prior authorization. [Read more.](#)

Employment and social security

- Temporary redundancy plans ("ERTE").** As announced (pending approval), ERTE on the grounds of *force majeure* (including those owing to constraints or restrictions to activity) and ERTE on objective grounds arising from the pandemic have been extended until May 31, 2021. The types of businesses that can benefit from exemptions have increased, which means that protection is granted to more companies and employees, the legal formalities to change from one kind of ERTE to another have been simplified, and social security benefits are still granted to companies that commit to maintain jobs for another six months.
- Gender equality plans and salary audits.** By January 14, 2021, companies with 151 employees or more must have (i) diagnosed, negotiated and set out the content of their equality plan, and (ii) carried out a salary audit. The deadline for companies with between 101 and 150 employees is March 7, 2021. [Read more.](#)
- Salary record.** From April 14, 2021, all companies are required to keep a record of the salaries of the whole workforce (including senior positions), which will be made available to the workers' legal representatives. If there are no legal representatives, it will be made partially available to the employees. In cases where there is a difference of at least 25% in the average remuneration of either gender, the record must include an objective justification. [Read more.](#)
- Remote working.** Companies implementing a remote working system exceeding 30% of the employee's working day are required to adapt to the new regulations provided under Royal Decree-Law 28/2020. The adaptation period will vary



depending on whether remote working is regulated under the collective bargaining agreement or on an individual basis. [Read more.](#)



Digital labor platforms. Following the *Spanish Supreme Court's judgment of September 25, 2020*, stating that there was an employment relationship between a delivery rider and a digital platform, the Spanish government began a legislative reform, which it is negotiating with social partners, to regulate the employment relationship between these riders and the companies managing the technology platforms providing the services.



Labor reform. The Spanish government has announced its intention to amend the following matters that were reformed in 2012: (i) priority being given to companywide collective agreements, (ii) the restriction on the extended validity of collective bargaining agreements, and (iii) the laws on commercial contracts. Also, the pension reform arising from the Toledo Pact may move ahead, with measures aimed at (i) bringing the effective age of retirement closer to the age of ordinary retirement, (ii) discouraging voluntary early retirement, and (iii) banning compulsory retirement clauses in collective bargaining agreements.

Tax



General State Budget for 2021. It restricts the exemption on corporate income tax applicable to dividends and capital gains from the transfer of qualifying shares, raising their taxation in tax periods beginning January 1, 2021.



Financial transactions tax. This tax will apply from January 16, 2021, at a 0.2% rate, to transactions involving the acquisition of shares of listed companies with a market capitalization value of over €1 billion. [Read more.](#)



Tax on certain digital services. This tax is levied on online advertising and online intermediary services, and the sale of data generated from the information provided by users. Companies exceeding certain thresholds must pay this tax at a 3% rate every three months for services provided from January 16, 2021.



Act on transposing DAC 6 or the Intermediaries Directive (2018/822). A new obligation has been introduced to report potentially aggressive crossborder tax planning arrangements, which lies with intermediaries and other relevant taxpayers. The regulation will set out the terms for reporting transactions carried out since June 25, 2018. [Read more.](#)



Fight against fraud. The proposed amendments to the draft legislation in the context of corporate income tax would significantly affect (i) international structures, due to the amendment to the regime of international tax transparency; (ii) SICAVs, as additional requirements are imposed on calculating the minimum number of shareholders; and (iii) REIT, as a 15% tax rate is applied on undistributed profit. [Read more.](#)



- Ratification of the Multilateral Instrument.** This international treaty modifies a significant number of double tax treaties Spain has entered into based on the options chosen by Spain and other state that is party to the treaty.
- Hybrid arrangements.** Corporate income tax laws must be adapted to the directive standardizing the regulations in these situations, as the tax treatment applied is largely unequal in different jurisdictions.

Intellectual Property

- Copyright.** The Directive on copyright and related rights applicable to online transmissions (2019/789) and the Directive on copyright in the Digital Single Market (2019/790) have to be transposed into national regulation by June 7, 2021.

Digital services

- Electronic signature.** Act 6/2020, on electronic trust services, repeals the Electronic Signature Act and supplements certain aspects of the eIDAS Regulation.
- Online platform services for business users.** Act 6/2020 establishes an infringement and penalty regime for breaches of the P2B Regulation (promoting fairness and transparency for business users of online intermediation services).
- Geoblocking.** Act 6/2020 establishes an infringement and penalty regime for breaches of Regulation (EU) 2018/302, on geoblocking.
- Online gambling.** Royal Decree 958/2020, on commercial communications for gambling activities, places tight restrictions on gambling advertising. [Read more.](#)
- Audiovisual services.** The Audiovisual Media Services Directive (2018/1808) is expected to be transposed in 2021 by means of a General Law on Audiovisual Communication. The draft bill has been issued for *public consultation*. [Read more.](#)
- Electronic communications.** A new General Telecommunications Act is expected to be approved, transposing the directive establishing the European Electronic Communications Code (2018/1972). [Read more.](#)
- Online sale of goods and the provision of digital services.** Member States have until July 1, 2021, to transpose the Directive on contracts for the online sale of goods (2019/ 771) and the Directive on contracts for the supply of digital content and digital services (2019/770). They must apply these measures from January 1, 2022.



Data protection

- Personal data transfers to the United Kingdom.** The *Cooperation Agreement* between the United Kingdom and the European Union of December 24, 2020, provides that for four months (which may be extended by two months), data transfers from the European Union to the United Kingdom will not be considered international transfers. Meanwhile, the European Commission is analyzing the adoption of an adequacy decision.
- Personal data transfers to the United States.** The European Data Protection Board's *recommendations* must be taken into account. [Read more.](#)
- Cookies.** It is advisable to adapt the cookies policy to the Spanish Data Protection Agency's new *Guidelines on the use of cookies*. [Read more.](#)
- ePrivacy.** Although it is still too early to say, the EU Regulation on privacy and electronic communications may be approved in 2021.

Competition

- Reform of the Law for the Defense of Competition.** The *draft bill* (i) provides an increase in the maximum amount of fines for all infringements of up to 10% of the worldwide business volume; (ii) sets an increase in the limit for fines imposed on directors of up to €400,000; (iii) strengthens the Spanish Markets and Competition Commission's powers of investigation; and (iv) introduces the settlement procedure, among others. The draft bill transposes *Directive ECN+*.
- Vertical agreements.** In 2021, the European Commission will continue reviewing the *Vertical Block Exemption Regulation* together with the *Vertical Guidelines*. Although the new regulations do not enter into force until May 2022, it has been found during the review process that certain changes must be made to address the challenges arising from online distribution.
- State aid.** At the end of 2020, the European Commission agreed to *extend the temporary framework* for state aid in the context of COVID-19 until June 30, 2021 ([read more](#)). A draft proposal has been sent to Member States for *consultation* to approve a further extension until the end of 2021.
- Guide to compliance programs on antitrust rules.** The Spanish Markets and Competition Commission published this *Guide* on June 10, 2020, setting out the criteria it will take into account to analyze the efficiency of a compliance program.
- Horizontal agreements.** In 2021, the European Commission will publish an evaluation report on the *Regulation on research and development agreements* and the *Regulation on specialization agreements*, together with its *guidelines*.



Automotive industry. In the second quarter of 2021, the European Commission is expected to publish an evaluation report on the *Motor Vehicle Block Exemption Regulation* to review its contents.



Digital markets. The European Commission's *legislative proposal* to adopt the first Digital Markets Act, forbidding gatekeepers from imposing unfair conditions on businesses and consumers, establishing fines of up to 10% of the gatekeeper's worldwide turnover.

Capital markets



Reform of the Spanish Securities Market Act. This act will be amended in the first quarter of 2021, adapting it to the reform of the regulation of prospectuses and remove the obligation to publish financial information on a quarterly basis, among others.

Financial Institutions



Brexit. The United Kingdom and the European Union have agreed to conclude a protocol no later than March 2021, laying down the basis for financial cooperation, and to discuss the application of the principle of equivalence.



For the time being, under *Royal Decree-Law 38/2020*, financial service agreements with UK entities signed before January 1, 2021, will remain in force. British entities can continue to operate in Spain until June 30, 2021 to (i) terminate any agreements in an orderly way, or (ii) transfer existing agreements to entities authorized in Spain.



Credit institutions. Solvency Most of the provisions in CRR II (*Regulation (EU) 2019/876*) will apply from June 28, 2021.



Credit institutions. This year, the amendment of Act 10/2014, of June 26, on the regulation, supervision and solvency of credit institutions with regard to corporate governance and remuneration policies may be approved. According to this amendment, institutions are required to apply a remuneration policy ending the gender pay gap.



Alternative investment funds. August 2, 2021, is the deadline for transposing *Directive (EU) 2019/1160*, which allows the premarketing of alternative investment funds (marketing of funds that are not yet incorporated).



- Anti-money laundering.** This year, the fifth edition of the directive on the prevention of money laundering is expected to be implemented in Spain (see Corporate Governance and Compliance section above). P
- Fintech.** February 23, 2021, is the deadline to submit requests to the Secretariat General of the Treasury regarding projects granting access to the controlled testing area (“sandbox”) provided under Act 7/2020. [Read more.](#) L
- Fintech.** From November 10, 2021, *Regulation (EU) 2020/1503* will apply, on European crowdfunding service providers for business. L

Litigation and arbitration

- Draft law on measures on the procedural efficiency of the public service of justice.** The *draft bill*, published on December 15, 2020, foresees significant changes in civil proceedings to be approved halfway through 2021, introducing compulsory mediation before bringing a case to court, the complete reform of civil cassation, and introducing the so-called “witness lawsuits.” P
- Class actions.** These will also undergo significant changes if the draft bill is approved. P
- International Chamber of Commerce (ICC) Rules of Arbitration.** On January 1, 2021, the *final review* of these rules entered into force, including improvements such as the use of new technologies, efficiency and flexibility in proceedings involving low amounts, multiparty and multicontract arbitration, protection against conflicts of interest and transparency requirements. L

Public procurement

- General State Budget for 2021.** Among other developments concerning public procurement, the General State Budget Act raises the thresholds of open simplified and ultra-simplified procedures for supply and services agreements. L
- Next Generation funds.** *Royal Decree-Law 36/2020* has introduced new provisions on public-private partnerships and subsidies, and regulates public sector contracts that will be executed with financing from European funds. The implementing regulations of the Spanish Recovery, Transformation and Resilience Plan are expected to be approved in 2021, along with strategic projects and the call for these projects. P



Environment

Taxonomy Regulation (Regulation (EU) 2020/852). 2021 will also see the approval of delegated acts concerning the classification of economic activities that are environmentally sustainable, covering six environmental objectives. Approval is also expected of the delegated act specifying the rules on the content and submission of reports on how companies obliged to publish non-financial information align their activities with those considered environmentally sustainable under the Taxonomy Regulation.

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Forthcoming Act on Climate Change and Energy Transition. This act will set out decarbonization goals and tools to achieve climate neutrality by 2050, which significantly affect sectors such as fossil fuels, renewable gases, sustainable mobility and urban planning, as well as incentives to mobilize resources in the fight against climate change and for large-scale energy transition.

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New Act on Waste and Contaminated Land. The aim is to move towards a circular economy by transposing Directive (EU) 2018/851 into Spanish law, amending Directive 2008/98/EC on waste. It also seeks to prevent and reduce the impact of single-use plastic, transposing Directive (EU) 2019/904. It reinforces the prevention of waste through financial tools such as the tax on non-reusable plastic packaging; it adopts more ambitious targets, such as increasing the level of preparation for reuse and recycling of municipal waste; and it sets out the basic requirements in terms of extended producer responsibility.

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European Green Bond Standard. During the second quarter of 2021, a legislative proposal is likely to be implemented to establish an EU Green Bond Standard, the reference of which will be the activities classified as environmentally sustainable under the Taxonomy Regulation.

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Ecolabel for retail financial products. In the last quarter of 2021, the European Commission is expected to adopt a decision on applying an ecolabel to retail financial products, defining the environmental requirements they must meet. They will be based on the provisions of Regulation (EC) 66/2010, on the EU ecolabel

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Energy

New renewable energy regime. The new remuneration framework through an auction mechanism, as well as the targets of the National Energy and Climate Plan for 2021-2030, will require new calls for tenders with a capacity of approximately 3,500 MW in 2021. [Read more.](#)

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Grid access and connection to electric power plants. The Spanish Markets and Competition Commission is expected to approve the Circular on access and connection, which, together with the approval of *Royal Decree 1183/2020* and the development of new online platforms of grid managers, will result in the entry into

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force of the new procedure for electric power plants to access and connect to electrical facilities.

Electronic administration



Implementing regulation on electronic administration: 2021 is expected to bring the implementing regulation of *Act 39/2015* and *Act 40/2015* in the context of electronic administration. Their provisions on the electronic power of attorney registration, electronic registration, the registration of appointed public employees, the general electronic access point of the administration, and the single electronic file will become effective on April 2, 2021.

For additional information on the contents of this document, please contact Cuatrecasas.

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