

On 8 July 2015, the Spanish Official State Gazette published the new instruction from the Directorate General of Registries and Notary Offices (DGRN) which contains novelties over the one issued on 12 February 2015 which established the obligation of electronic legalisation of company books for financial years beginning as of 29 September 2013 (the date of coming into force of the Entrepreneurs' Law).

As a result of a contentious-administrative appeal lodged by the Spanish Issuers' Association on 27 April 2015, the Contentious-Administrative Chamber of the Superior Court of Justice of Madrid issued a ruling to temporarily suspend the application of such instruction of February 2015. As a consequence of said suspension, the legalisation system in place prior to the approval thereof – the traditional system of legalisation of company books on paper – will begin to apply again.

As a precautionary measure, the appellants requested the suspension of the execution of the referred instruction on the grounds, among others, that the application of this instruction could result in a serious risk of access to confidential and privileged information by third parties, due to the fact that the instruction failed to implement protocols to avoid unauthorised use of the confidential and/or privileged information, given that the information contained in the Mercantile Register is freely accessible to the public.

In light of this situation, the DGRN has added the following novelties to the system of electronic legalisation of company books:

1. A number of general security measures for the handling of electronic files of company books presented electronically for legalisation have been established:
  - A security and encoded system of files relating to the books for legalisation has been implemented.
  - The files presented in electronic format at the Mercantile Register will be deleted immediately once they have been legalised by the Registrar. In the event of incorrect qualification, these shall be deleted upon expiry of the presentation entry.
  - The Mercantile Register may only issue formal publicity, limited to the information regarding whether the book in question (Logbook or Legalisation Book) has been legalised or whether on the contrary, its legalisation has been denied or suspended.
  - The Mercantile Register shall ensure the electronic transfer of the procedures carried out and the persons involved in such procedures.
2. In regard to the security of the files pertaining to books sent unencrypted:
  - It is established that the Mercantile Register must meet the legal requirements of the Organic Data Protection Law, as the person responsible for the files to be legalised.
  - The entrepreneur must keep computer files of identical content and format as the files of legalised books; and, in the event that as part of a legal procedure the judge should request such legalised books, the entrepreneur must provide the copy of the file legalised at the time along with the certificate issued by the Mercantile Register as proof of legalisation. If, on the other hand, the Mercantile Register should request presentation of the legalised books in paper format, the registrar will attest that the electronic files match the legalised books by generating the same digital footprint.
3. The entrepreneurs are offered the option of encoding the files using symmetric double key encryption:
  - When the entrepreneur wishes to ensure greater confidentiality and security of his files, he may send the files for legalisation in encrypted form using the algorithms indicated in the Instruction.
  - In regard to the books presented in encrypted files, the Mercantile Register shall qualify both the content thereof and that the encryption key generated by the legalisation matches that contained in the list of books presented.
4. The entrepreneurs are given the option to perform the legalisation of books via entities providing certification services:
  - The entrepreneurs may also elect to send the files containing the books to be legalised, using a double key encryption system, public and private, provided by electronic signature certification service providers acting as a trusted third party.
5. The blank legalised books that contain entries from a financial year subsequent to 29 September 2013 and ending before 31 December 2014 that have not been transferred to a new book in electronic format, do not need to be presented again for legalisation. In this case, if the entrepreneurs do not have enough blank sheets to include all the minutes or entries pertaining to financial year 2014, they can request from the Mercantile Register the legalisation of any blank books or sheets that may be necessary.
6. Lastly, the Instruction establishes that the electronic legalisation of the books can be carried out in joint manner (all books in one same act) or separately, with encryption of all or only some thereof.

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations nor should they be considered a substitute for taking legal advice.

© Squire Patton Boggs.