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**COVID-19**  
Legal Update



# ESN COVID-19

## Legal Update

Current legal vision in Spain after Royal Decree 463/2020, of March 14th, declaring the state of alarm and the Royal Decree-Law 8/2020 of 17th March of economic measures of the COVID-19.

We analyse, from a legal perspective, all the challenges we are facing in Spain due to the COVID-19.

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# Employment Perspective

[Royal Decree 463/2020, of 14 March](#), declaring a state of emergency for the management of the healthcare crisis caused by COVID-19

Official State Gazette of 14th March 2020

News Alert

As a result of the pandemic caused by COVID-19, on 14th March 2020 the *Royal Decree 463/2020, of 14th March declaring a state of emergency for the management of the healthcare crisis caused by COVID-19* (hereinafter, "**Royal Decree 463/2020**") was published pursuant to which a state of emergency was declared in the whole of Spain for a period of 15 calendar days. This period may be extended.

Royal Decree 463/2020 lays down measures to protect the health and safety of citizens, some of which directly affect the employment and business area, in order to allow employers and employees to continue their activity, taking safety and prevention measures.

However, certain restrictions on the continued provision of employment services are established. Specifically, article 10 of Royal Decree 463/2020 orders the closure of "*stores, cultural facilities, recreational establishments and activities, and hotel, restaurant and catering activities, amongst others*", expressly setting out in its annex the facilities and activities which must temporarily be closed to the public. For example, these include sports facilities, leisure and entertainment centres and hotels, restaurants and catering facilities. In addition, certain activities are allowed to remain open, such as food and drink retailers, pharmacies and others that provide basic necessities.

In addition, Royal Decree 463/2020 has established measures that allow businesses not affected by the abovementioned restrictions to continue operating. In this regard, article 7 restricts the freedom of movement of persons while the state of emergency is in force, and lays down a series of exceptions which include "*travelling to the place of work in order to provide one's services as an employee, professional or employer.*"

In addition, the Government has urged the application of other measures that make it possible for employers to guarantee the health and safety of their employees in the workplace. In this regard, it has encouraged teleworking and it has stipulated that periods of self-isolation or infection



of employees as a result of COVID-19 will be treated as an occupational accident exclusively for the purpose of enabling such employees to receive the temporary incapacity benefit under the social security system pursuant to Royal Decree-Law 6/2020, of 10 March.

Finally, Royal Decree 463/2020 establishes the suspension of terms, together with the suspension and interruption of the periods foreseen in procedural legislation for all courts (laying down certain exceptions linked in general to emergency situations or the protection of fundamental rights) and provides that time periods will start to run again when the legislation is no longer in force or, where applicable, any extensions thereto have expired. It also foresees the suspension of administrative periods. In this regard, if you require advice on court deadlines or dates of hearings etc. please contact us so that we can analyse your specific case.

[Royal Decree 8/2020](#)

Official State Gazette 18th March 2020

News Alert

Despite the fact that Royal Decree 463/2020 does not contain measures expressly aimed at making employment legislation more flexible, on 18th March 2020, **Royal Decree 8/2020** ("Royal Decree 8/2020") was published, in response to the demand for greater flexibility in relation to

the suspension of employment contracts foreseen in the Workers' Statute.

The Royal Decree-Law 8/2020 enters into force on 18th March 2020 and will maintain its valid for a period of one month. Regardless of that a general term is established for the duration of a month (subject to possible extension) it is established that the following measures of a labour nature will remain in force as long as the situation of extraordinary of the COVID-19 last.

The procedure for **suspending an employment contract on economic, technical, organisational or production grounds or as a result of force majeure**, a procedure that is commonly known as an "ERTE" (Temporary Redundancy Scheme), is set out in Royal Decree 1483/2012, of 29th October, approving the Regulation on collective redundancy procedures and the suspension of contracts and reduced working days.

The main new features contained in Royal Decree 8/2020 can be summarised as follows:

- In relation to the **suspension of contracts on the grounds of force majeure**, it is stipulated that this will be justified when *"this is directly caused by losses of activity due to the different government measures taken as a result of Covid-19, including the declaration of the state of emergency, that involve the suspension or cancellation of activities, the temporary closure of premises open to the public, restrictions on public transport and, in general, the mobility of persons and goods, lack of supplies that seriously hinder the ordinary continuation of the activity, or alternatively urgent and extraordinary situations due to the infection of the workforce or the taking of preventive self-isolation measures ordered by the health authority."*

Also as regards employment matters, the Royal Decree foresees the modification of the procedure applicable for the suspension of employment contracts due to force majeure, stating that businesses that wish to adopt this measure:

- must notify their intention to suspend the activity due to force majeure to the Employment Authority together with the report regarding the link between the loss of activity as a consequence of COVID-19 and the supporting documentation;
- within 5 days the Employment and Social Security Inspectorate will issue a report (the Employment Authority chooses whether or not to request the issue of this report);
- and, within 5 days, the Employment Authority will issue a decision authorising or refusing the suspension.

On the other hand, in the cases of suspension due to force majeure, if the company, on 29 February 2020, has less than 50 employees, the Social Security Treasury ("*Tesorería de la Seguridad Social*") will exempt the company from the payment of the employer's contribution stipulated in Article 273.2 of the consolidated text of the General Social Security Act ([Ley General de la Seguridad Social](#)), as well as from the payment of contributions for joint collection. If there are 50 or more employees registered with the Social Security authorities, the exemption from the obligation to pay contributions will be 75% of the company's contribution.

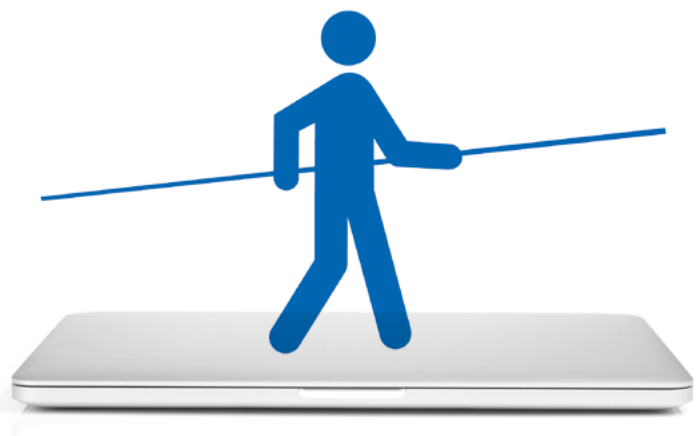
- For all other activities that are indirectly affected, companies may suspend their contracts for **economic, technical, organizational and production reasons**, a procedure that will be streamlined and made more flexible in the following manner:

- an employees' representative committee must be formed, the maximum period for forming the same being reduced to 5 days.

a) In the event that there is no legal representation of the workers, this committee shall be made up of the most representative trade unions in the sector to which the company belongs and shall be entitled to form part of the negotiating committee for the applicable collective agreement.

b) If this representation is not formed, the committee will be made up of three workers from the company itself (elected in accordance with Article 41.4 of the [Workers' Statute](#)).

- This procedure requires the opening of a period of consultation with this committee, which is reduced from 15 to 7 days.
- Finally, within 7 days the Employment and Social Security Inspectorate will issue a report (the Employment Authority chooses whether or not to request the issue of this report);





As with suspensions based on force majeure, the grounds for suspending employment contracts must be supported by sufficient reasoning.

Moreover, in relation to any temporary suspensions of employment that may take place, the following additional **measures** are established:

- Access to contributory unemployment benefit is allowed for all employees affected by the suspension, even if they have not paid contributions for the minimum period of employment required.
- The time during which this benefit is paid will not be taken into account for the purpose of using the stipulated maximum periods for receiving the benefit.

In order to facilitate **teleworking**, the requirements concerning the evaluation of occupational risks are made more flexible and it is possible for an employee to carry out a self-assessment themselves (for these purposes, a questionnaire is attached to the Royal Decree that each employee can complete).

In addition, protection is given to the right to **adjust the employment conditions** and reduce the working day (up to a 100%) of those employees who, because of circumstances related to COVID-19, show that they must care for persons who require their presence due to reasons of age, illness or disability, closures of educational institutions or others who provide care or attention to those who require the same, and to prevent or avoid the transmission of COVID-19.

With regard to **self-employed workers**, Article 17 of Royal Decree Law 8/2020 establishes that those whose activities are suspended in accordance with the provisions of Royal Decree 463/2020, - or whose turnover in the previous month for which the benefit is requested is reduced by at least 75% compared to the average turnover for the previous six-month period - shall be entitled to the extraordinary benefit for cessation of activity regulated by Royal Decree Law 8/2020. In addition, they must meet the following requirements: (i) be affiliated and registered, on the date of the declaration of the state of alarm, in the Special Social Security Regime for Self-

Employed Workers or Autonomous Workers; (ii) accredit the reduction of their invoicing by at least 75%, in relation to that made in the previous semester and (iii) be up to date with the payment of Social Security contributions.

Finally, Decree-Law 8/2020 establishes that the Ministry of Finance ("*Ministerio de Hacienda*") shall provide the budgetary appropriations required for the proper implementation of the extraordinary measures established.

It is also essential to stress that employment safeguards are also established by making the applicability of extraordinary measures in the employment sphere conditional on '*the commitment of the company to maintain employment for a period of six months from the date of resumption of activity*'.

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# Litigation Perspective

Procedures and deadlines suspension because of the state of alarm.

On Saturday night, the Official State Bulletin ("*Boletín Oficial del Estado*, BOE") published the [Royal Decree 463/2020 of 14th March](#), which approved the state of alarm throughout the country. You can find it in the attached link.

The bulk of the rule is aimed at regulating issues that will affect us as citizens during this period. However, there are a number of provisions that both we (legal professionals) and you (subjects seeking judicial protection) are interested in:

Since the publication of the Decree and until the state of alarm is lifted, the suspension of proceedings and procedural deadlines has been agreed in all jurisdictions and for the whole Spanish territory, thus eliminating the uncertainty that had been created after the news issued by the General Council of the Judiciary Branch (Consejo General del Poder Judicial, CGPJ) and the different positions taken by the Courts (Second additional provision). Therefore, there will be no trials, hearings, nor will there be a time limit for answering lawsuits, appeals and/or injunctions.

The exceptions to the suspension are urgent judicial proceedings, which are basically limited to urgent criminal proceedings (habeas corpus, guards, proceedings with

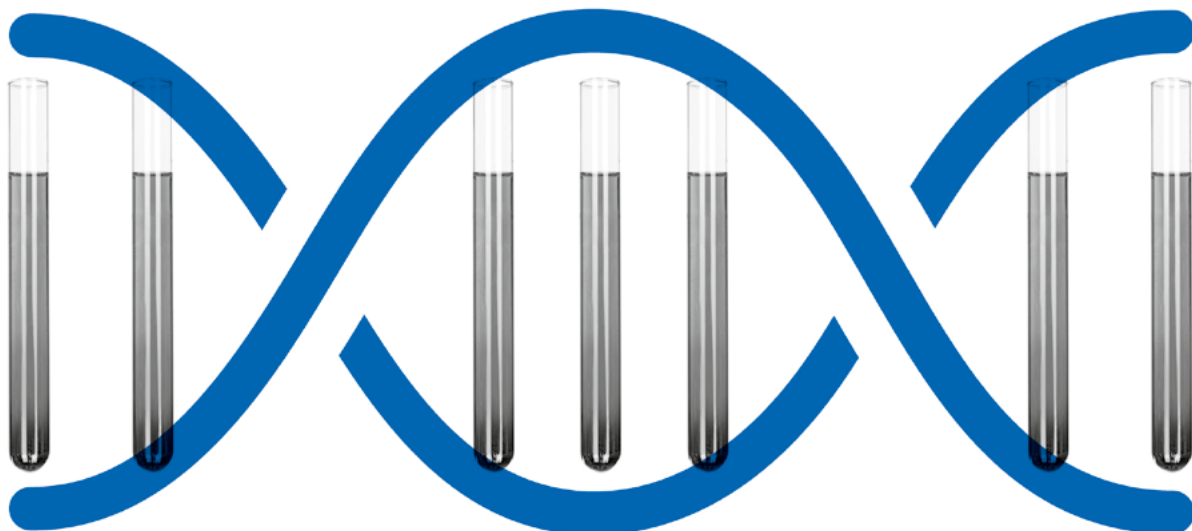
detainees, prison surveillance, precautionary measures, etc.). In the rest of the jurisdictional orders, the exceptions envisaged are those relating to fundamental rights and the protection of minors, and in the social order, procedures in matters of collective conflict or in matters of fundamental rights.

It is provided that in any order, a judge may agree to the practice of the procedural actions he considers necessary to avoid irreparable harm to the defendant.

Once the state of alarm has ceased to exist, the suspension and interruption of procedural deadlines will be lifted, and the calculation will be resumed.

Likewise, in the administrative field, trials are also suspended and the deadlines for the processing of proceedings are interrupted. The calculation of the deadlines will be resumed at the moment the RD or its extensions lose their validity, as the case may be. The above will apply to the entire public sector as defined in [Law 39/2015 of 1st October](#).

As in legal proceedings, the competent body may, by means of a reasoned decision, agree to the measures of organisation and instruction strictly necessary to avoid serious damage to the rights and interests of the interested party in the proceedings and provided that the interested



party agrees, or when the interested party agrees that the period should not be suspended.

This provision shall not affect proceedings and decisions where they relate to situations closely linked to the facts justifying the state of alert.

Finally, the RD provides (DA 4<sup>a</sup>) that the periods for the exercise of actions (whether they are of prescription or expiry) will be interrupted during the validity of the RD and, where appropriate, its extensions. In other words, during the period of validity of the state of alarm, the actions are not precluded nor must the periods for the future exercise of actions be interrupted.

However, this period should not be understood as a period of procedural inactivity but as a period of intense work to ensure that when the state of alarm is lifted, we are in the best position to defend your interests. We are therefore at your disposal to advise you on any matter you may have and in which we can help you.

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# Public Law Perspective

## Suspension of public contracts whose execution becomes impossible as a result of the COVID-19 crisis (Article 34 of Royal Decree-Law 8/2020)

Article 34 of Royal Decree-Law 8/2020, of 18 March, regulates the measures adopted by the Government in the area of public procurement to mitigate the consequences of COVID-19, which are applicable to contracts entered into throughout the **Public Sector**. The measures adopted are as follows:

### 1. Public service and supply contracts for the provision of successive services

In its first paragraph, Article 34 deals with the suspension of **public service and supply contracts for successive performance** "the performance of which becomes impossible".

In order for the suspension to operate, the **contractor must make a request to the contracting authority**. The request must state the following:

- the reasons why the performance of the contract has become impossible.
- the staff, premises, vehicles, machinery, installations and equipment assigned to the execution of the contract at that time.
- the reasons that make it impossible for the contractor to allocate the means mentioned to another contract.

The contracting entity must respond within five calendar days. In the event of silence, the request will be considered rejected. **Of course, the refusal, implicit or explicit, to suspend the contract may be subject to appeal, which raises a number of questions.** Firstly, the time limits for appeals provided for in Royal Decree 463/2020, declaring the state of alert, must be borne in mind. Furthermore, the refusal of the contracting authority obliges the supplier to continue with the execution of the contract, even if the negative decision of the contracting authority is appealed, unless precautionary measures are decreed to the contrary. Finally, considering the more than possible delay in lodging an appeal, the object of the appeal must be a request for increased compensation, since it is likely that by that time the circumstances that



made the performance impossible have ceased, so that the request for suspension would be meaningless.

If the suspension is granted, it entails an **obligation for the procuring entity to compensate the contractor for damages** actually suffered during the period of suspension. In particular, the following:

- The **salary costs actually paid by the contractor to the employees assigned on 14 March 2020 to the ordinary execution of the contract, during the period of suspension.**
- The costs of **maintaining the final guarantee** during the period of suspension of the contract.
- Expenses for **rent or maintenance** costs for machinery, installations and equipment relating to the period of suspension, directly assigned to the execution of the contract, provided that the contractor proves that these means could not be used for other purposes during the suspension of the contract.
- The expenses corresponding to the **insurance policies** provided for in the tender rules and linked to the object of the contract that have been taken out by the contractor and are in force at the time of the suspension of the contract.



The payment of these indemnities excludes any other compensation provided for by law in the event of the suspension of the contract.

Another public procurement measure considered in this section is the **automatic extension of contracts** when, on the **expiry of a contract, a new one has not been formalised** as a result of the paralysis of the procedures derived from the declaration of the state of alarm, which affects all contracts, even when, due to their bidding and awarding date, they are not regulated by the current Public Sector Contracts Law (Ley de Contratos del Sector Público).

## 2. Contracts for supplies and services that are not of a successive nature

Article 34 also refers to **supply and service contracts that are not of successive performance**. In this case, when the contractor has incurred in a delay as a result of the COVID-19 or the measures taken by the various Administrations to combat it, and provided that he offers guarantees of compliance with the contract within an **additional period, the contracting entity will grant him an extension for its execution**. Under no circumstances may delay penalties be imposed upon the contractor or the contract terminated for this reason.

## 3. Works contracts

In this case, the contract is also **suspended until the contracting authority is satisfied that the extraordinary circumstances that make impossible its performance have ceased**. The procedure for declaring the suspension is essentially the same as that described above for service and supply contracts, so it is up to the contractor to request the suspension, providing the reasons and supporting documents that justify the costs that the suspension will entail. The contracting authority may grant the suspension within five calendar days, and it shall be considered rejected if there is no response from the contracting authority within this period, which shall be subject to appeal under the terms already expressed.

Contracts in which the completion of the work coincides with the period from 14 March to the end of the state of alarm may also be extended at the request of the contractor.

**The indemnifiable expenses are the same as in the case of the service and supply contracts** and the payment of these expenses excludes the possibility of requesting any other compensation provided for by law in the event of the suspension of the contracts.

The singularity of the regulation, in the case of the works contract, is given by the fact that the recognition of the compensations is conditioned to the fulfilment of a **double requirement** that, in practice, can make it difficult to obtain the recognition of the compensations due to the difficulty of gathering the corresponding documentation:

La singularidad de la regulación, en el caso del contrato de obras, viene dada por el hecho de que el reconocimiento de las indemnizaciones esté condicionado al **cumplimiento de un doble requisito** que, en la práctica, puede hacer difícil obtener el reconocimiento de las indemnizaciones por la propia dificultad de reunir la documentación correspondiente:

- a) That the **contractor and all subcontractors, suppliers and providers of the same are up to date with the payment of their labour and social obligations** as of 14 March 2020.
- b) That the main contractor is **up to date with payments to its subcontractors and suppliers** on the same date.

## 4. Concession contracts for works and services

In this case, the available measure consists of **recognising the right to the economic rebalancing of the contract**, either by extending the term of the contract to a maximum of 15 % of the original term, or by revising and modifying the economic clauses of the contract that determine the remuneration of the concessionaire. The starting point here is not the suspension of the contract, which in many cases would be impossible, given the nature of the service, but the reduced number of users due to the restrictions imposed by the state of alarm and, therefore, the reduction in the tariffs received by the concessionaire.

Again, the application of the **concessionaire and the recognition of the contracting authority are required**, although without the procedural detail established in the previous cases, but the procedure and deadlines described previously could be considered applicable to concession contracts. However, more detail on this point would have been desirable in order to avoid conflicts in its interpretation.

In any case, **if the rebalancing is recognised, it will compensate for the loss of revenue resulting from the lower number of users and the increase in costs incurred** and, in particular, additional salary expenses.

### 5. 3. Application of the above rules to contracts concluded in the so-called *excluded sectors*

Section five of Article 34 specifies that the above rules also apply to **contracts in force at the time this Royal Decree-Law comes into force that are entered into by public sector entities under Law 31/2007**, of 30 October, on procurement procedures in the **water, energy, transport and postal services** sectors or under the provisions of Book I of Royal Decree-Law 3/2020, of 4 February, on urgent measures transposing various European Union directives into Spanish law.

### 6. Contracts to which the suspension regulated in Article 34 does not apply

Finally, Article 34 (6) provides that paragraphs 1 and 2 of this provision shall in no case apply to the following contracts:

- Contracts for health, pharmaceutical or other services or supplies, the object of which is linked to the health crisis caused by COVID-19.
- Contracts for security services, cleaning or maintenance of computer systems.
- Contracts for services or supplies necessary to ensure the mobility and security of transport infrastructures and services.
- Contracts awarded by public entities that are listed on official markets and do not obtain income from the General State Budget.

### 7. Necessity of implementing the rules described

This is certainly a set of standards that will need to be specified or clarified by the competent administrations. In particular, to **determine the rules applicable to certain situations that have begun to occur in practice, such as public contracts whose performance is materially possible but which, as a result of the crisis, have had to be greatly reduced, for example by leaving only very small on-call or maintenance services**. In such a case, the contractor will face similar and even greater losses than those it would incur in the event of absolute impossibility of performance. Therefore, the solution in such a situation must be inspired by the rules described above, with the modifications required by each situation.

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# Tax Perspective

Following the first series of tax measures adopted by the Government on 12th and 14th March, with the entry into force of Royal Decree Law 7/2020 and Royal Decree 463/2020, on 17th March Royal Decree Law 8/2020 on urgent extraordinary measures to deal with the economic and social impact of COVID-19 (**RDL**) came into force.

This Royal Decree includes an article especially dedicated to the suspension of deadlines in the tax area, as well as various additional, transitory and final provisions.

Specifically, article 33 establishes an extension until April 30 th, 2020, of the deadlines for tax payments resulting from settlements made by the Administration, or those that are in the enforcement period and have been notified by a recovery order; deadlines for deferral and instalment agreements; deadlines related to auctions and the awarding of assets; and deadlines for responding to summonses, seizure proceedings and making claims in tax application proceedings that were not concluded by the time the RDL comes into force (March 17).

In administrative proceedings of urgency, the execution of guarantees on real estate will not be carried out from the entry into force of the RDL until 30th April 2020.

Likewise, the aforementioned procedures will be extended until May 20th, 2020, when they are communicated as from the entry into force of the RDL, unless the one granted by the general rule is greater.

The period between the entry into force of the RDL and April 30 th shall not be considered for the purposes of prescription, expiry or maximum duration of the procedures for the application of taxes, penalties and reviews.

Likewise, the period for lodging economic-administrative appeals or claims against tax acts, as well as for appealing through administrative channels against the resolutions issued in economic-administrative proceedings, will not commence until the end of said period, or until notification has been given, if the latter has taken place after that time.

As a result of the above, the suspension of administrative deadlines provided for in Royal Decree 463/2020 will not apply.



Likewise, these provisions will apply to procedures that were initiated prior to the entry into force of this RDL.

Finally, deeds formalizing contractual novations of loans and mortgage credits produced under this RDL will be exempt from the gradual quota for notarial documents under the Tax on Property Transfer and Documented Legal Acts.

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# Commercial and Contractual Perspective

With the aim of facing and mitigating the economic and social consequences derived from the COVID-19, the Spanish Government has published in the Official State Bulletin dated March 18<sup>th</sup>, 2020, the Royal Decree-Law 8/2020, of March 17<sup>th</sup>, on extraordinary urgent measures to face the economic and social impact of the health crisis. The aforementioned Royal Decree-Law has a direct impact on almost all sectors of society, which we will now discuss from a **commercial perspective**.

Without going into an analysis or a technical assessment of the content of the Royal Decree-Law, as this is not the object of this urgent alert, it is necessary to point out that many of the measures are still very generic (for example, with regard to the criteria applicable to financial operations that will have the guarantee of the State) and some are not completely clear (as is the case of the sectors with access to sensitive information - personal data - in which foreign investment is subject to prior administrative authorisation).

It will be necessary to be very attentive to the development of the rule by the Government and the different Ministries concerned. Eversheds-Sutherland Nicea will report on the developments and details of these provisions.

## Measures to support workers, families and vulnerable groups

These measures affect not only consumers and users, but also those companies supplying basic services such as water, energy or telecommunications.

- **Guarantee of water and energy supply to vulnerable consumers (art. 4).** During a period of one month from 18<sup>th</sup> March 2020, it is prohibited to suspend the supply of water, natural gas and electricity to those vulnerable consumers or those at risk of exclusion, even in the event of non-payment. Likewise, it establishes extensions of the social bond and suspends the validity of certain articles relating to the systems for updating regulated prices.
- **Guarantee in the maintenance of electronic communications services and broadband connectivity. (art. 18).** While the state of alarm is in force, the suspension of the electronic communications service is prohibited even in those cases foreseen in the contract. The service may



only be interrupted for reasons of the integrity and security of electronic communications networks and services. It is therefore understood that non-payment may not be a reason for suspension of the service.

- **Guarantee in the provision of the universal telecommunications service (art. 19).** As long as the state of alert remains in force, the provider of electronic communications services is obliged to guarantee the provision of the universal telecommunications service.

- **Suspension of portability (Art. 20).** During the state of alert, limitations are imposed on commercial campaigns concerning the portability of fixed or mobile telephone numbers. Also, during this period, all fixed and mobile number portability operations that are not in progress will be suspended, except in exceptional cases of force majeure.
- **Interruption of the period to return products while the alarm situation is in force. (Article 21).** The period for returning products purchased in person or online is temporarily interrupted, suspending in the latter case the period in which consumers who have made purchases outside the commercial establishment can exercise their right of withdrawal.

### Measures in the financing field to ensure the liquidity of companies and avoid situations of insolvency (articles 29-31):

In the area of credit, the Government approves a series of measures both to grant guarantees for the existing financing and to provide new financing through the Spanish finance body Instituto de Crédito Oficial (ICO), including additional insurance coverage for exportation.

In particular, the Ministry of Economic Affairs and Digital Transformation ("Ministerio de Asuntos Económicos y Transformación Digital") will approve guarantees of up to 100 billion euros for funding granted by financial institutions to companies and self-employed workers to meet their solvency needs, the details. These guarantees will be established by agreement of the Council of Ministers.

With respect to new financing, the State will extend the ICO's net debt limit for the granting of new ICO financing lines through the intermediation of financial institutions in the short, medium and long term for larger companies. The details of these lines will be approved by the ICO through its decision-making bodies.

Extraordinarily, and for a period up to 18th September 2020, the Spanish State, through CESCE, S.M.E., will grant additional guarantee lines of 2,000 million euros for the new financing of working capital required by unlisted export companies that have been internationalized or are in the process of internationalization, provided that i) they do not respond to financing needs for situations prior to the current crisis, ii) are in a situation of bankruptcy or pre-bankruptcy, iii) have incidents of non-payment with public sector companies or debts with the Administration, registered prior to December 31st, 2019.

The Royal Decree clarifies that the deeds formalizing the contractual modifications of loans and mortgage credits derived from these measures will be exempt from the documented legal acts tax ("*Actos Jurídicos Documentados, AJD*").

All the above is complemented with the measures on the mortgage moratorium for primary residences which establish a suspension in the payment of instalments for mortgage debtors who are in a situation of special vulnerability and whose income is reduced (which includes a prohibition on the early maturity of the loan and on claiming payment of these instalments through the filing of a foreclosure proceeding while the moratorium lasts) and with the measures to be adopted in collaboration with the private sector to support small and medium sized companies ( PYMEs) in the Accelera Plan through RED.ES.

Finally, in this section, the Fund for Technical Provisions ("*Fondo de Provisiones Técnicas*") associated with the Red Cervera R+D+I is modified to allow the financing of business R+D+I projects of SMEs and mid-cap companies, by means of aid instrumented through loans managed by the Industrial Technology Development Centre (Centro para el Desarrollo Tecnológico Industrial, CDTI).

### Other flexibility measures in the commercial area

The following measures have been adopted for non-listed companies (Article 40):

- Meetings of the administrative bodies are allowed to be held by videoconference as well as in writing and without a session, even though this is not provided for in the company's bylaws.
- Suspension of the three-month period from the end of the financial year for drafting the annual accounts, as well as any other additional documents that may be required, until the end of the alarm state, and then for a further three months from that date.
- Extension of two additional months from the end of the alarm state for the verification of the annual accounts that had already been formulated on the date of the declaration of the alarm state.
- The general Board Meeting must approve the accounts within three months of the end of the period for drawing up the accounts.

- If the ordinary general Board Meeting has been called for the purpose of holding the meeting during the state of alarm, the administrative body may call it again within the month following the end of the state of alarm.
- Notaries required to attend a general Meeting may do so by telematic means.
- Suspension of the exercise of the right of separation of shareholders until the end of the state of alarm.
- Suspension of the term to call the Board Meeting to dissolve the company or remove the cause of dissolution and absence of liability of the directors for debts incurred during that period.

On the other hand, for listed companies, and during the year 2020, the following measures have been adopted (art. 41):

- The obligation to submit the financial and audit report may be accomplished within six months after the end of the financial year.
- The Ordinary General Meeting may be held within the first ten months of the financial year.
- The Board of Directors may provide, when calling the general meeting, for attendance by telematic means.

Likewise, and with regard to the Commercial Registry (article 42), it is resolved to suspend the period of expiry of the registry entries, with the calculation of the periods resuming on the day following the end of the state of alarma.

On the other hand, while the state of alert is in force, the debtor who is in a state of insolvency is not obliged to apply for a declaration of bankruptcy (art. 43).

### **Movements of capital and economic transactions abroad (Fourth Final Provision):**

The rules summarized below are established for "direct foreign investments", which are defined as those coming from countries that are not part of the EU or the European Free Trade Association, through which (i) a holding of more than 10% of the capital is achieved in the Spanish company or (ii) a presence is obtained in the company's management or administrative body:

- Suspension of the liberalisation of foreign direct investment if it concerns companies in the following sectors (i) critical infrastructure, (ii) technology, (iii) dual-use items, (iv) supply of critical inputs, (v) sectors with access to sensitive information and/or (vi) media.

- Suspension of foreign investment in cases where (i) the investor is controlled by the government of a third country, (ii) he has made investments in sectors or activities affecting security, public order and/or public health in another member state, (iii) an administrative or judicial proceeding has been initiated against him in another state.

All investments referred to in the preceding paragraphs are subject to administrative approval before the investment is made. Investments made without the required authorization will be invalid and may constitute very serious infringements.

The business and corporate world is currently facing the unpredictable consequences of the COVID-19 health crisis. It is foreseeable that many obligations contained in commercial agreements will not be able to be fulfilled within the agreed period as a result of the paralysis caused by the crisis. Companies may be affected in the most varied ways (closure of establishments, interruption of the supply chain, illness of key personnel, etc.). This brief note is by no means intended to cover all possible situations, but simply to draw attention to the most basic legal aspects of the impact that the health crisis can have on contract compliance. The following considerations will require numerous nuances depending on whether the business affected is between entrepreneurs or with consumers and end users.

Specifically, we refer to the possible occurrence of a case of force majeure that could release the party claiming it from the payment of interest and/or compensation arising from a breach of contract within the agreed period. Likewise, the doctrine of the rebus sic stantibus clause could justify a future revision of the contract and even, in extreme cases, its termination without liability for the party alleging it.

The main considerations to be taken into account are the following:

- **Concept of force majeure.** Article 1105 of the Spanish Civil Code refers to force majeure when it establishes that, apart from the cases expressly mentioned in the law and those in which the obligation is so stated, no one shall be liable for facts that could not have been foreseen or which, if they were, would have been unavoidable.

By way of illustration, article 1575 of the Civil Code defines extraordinary fortuitous cases as the following: fire, war, **plague**, unusual flooding, locust, earthquake or other equally unusual events which the contracting parties could not reasonably have foreseen.

More specifically, the Supreme Court demands the following additional requirements for the purpose of considering the occurrence of force majeure:

- The events in question are unforeseeable, because they exceed the normal course of life, or because they are unavoidable, insurmountable or irresistible.
- They are not a consequence of the will of the debtor of the obligation in question.
- That the case of force majeure makes the fulfilment of the obligation impossible.
- There must be a sufficient connection between the case of force majeure and the impossibility of performance of the obligation.

It should also be considered that, as required by the Spanish Courts, the party alleging force majeure must duly prove the existence of such force majeure and demonstrate that it exercised the utmost diligence in exhausting all possible alternatives for the performance of its obligation, whenever the latter is possible.

• **Consequences of force majeure.** In the event of force majeure, the non-performing party will not be liable for damages or payment of interest. In other words, the temporarily unfulfilled obligation will continue to exist, but will be postponed in time, without consequences for the non-performing party, until it is possible to perform it once the force majeure event has ceased.

If, as a consequence of force majeure, the obligation is impossible to perform even in the future, the non-performing party will be released from the payment of damages or interest, although in this case the natural solution would be termination of the contract. It should be made clear that force majeure does not apply to monetary obligations (payment of a sum of money) and is therefore limited to obligations to give or do.

• **Practical recommendations.** For the purpose of determining whether force majeure is present, the party claiming it should take into account the following:

- En primer lugar, hay que revisar detenidamente si en el contrato o condiciones generales aplicables existe una **cláusula** sobre fuerza mayor y, en caso de ser así, analizar su contenido.
- Firstly, it is necessary to carefully review whether there is a clause on force majeure in the applicable contract or general conditions and, if so, to analyse its content.
- Secondly, it must be determined whether it is appropriate or necessary to notify the other party to the contract of the occurrence of the force majeure



cause, giving an explanation of how its ability to perform the obligation is affected (government closure of the establishment, restriction on the movement of goods, interruption of supply, impossibility of personnel to perform the service, etc.).

- Thirdly, it is advisable to document as well as possible (even with electronic correspondence) everything that makes it possible to demonstrate the occurrence of the events that prevent the obligation from being fulfilled and the steps taken to try to resolve them. In other words, to compile a folder with all the documentation that could be useful in the future to demonstrate, in a possible dispute, that the impeding events of the obligation occurred.

Similarly, if the performing party is notified of the existence of force majeure by the non-performing party, the former must determine whether to reply by stating its disagreement, in accordance with the relevant clause of the contract.

• **The *rebus sic stantibus* clause.** We do not refer to a clause contained in the agreements but to a provision implicit in any successive relationship, which has been applied by the Jurisprudence and the practice of the Courts. This provision may be applied in those cases where there has been a supervening alteration of the circumstances of the contract, provided that (i) such alteration has been unforeseeable and (ii) the balance between the parties has been broken, being excessively burdensome for one of them.

If the requirements referred to in the previous paragraph are met and depending on the seriousness of the alteration or imbalance, the obliged party may choose to terminate the contract or modify it, the latter being more common for the courts to accept. For this purpose, it is advisable to follow the guidelines referred to above with respect to force majeure.

The application of this theory will be particularly useful when the consequences of the present health crisis are prolonged in time (as is likely) and, although they do not justify the release of the liable company from liability, they do make it possible to demand a modification of the commercial conditions of the contract. This has been applied by the courts in some cases in the past and during the financial crisis of 2008..

It is likely that the consequences of COVID-19 will operate as a force majeure or rebus sic stantibus in many commercial

agreements. However, a detailed analysis of the contract in question and of the specific facts applicable will be necessary in order to better defend the interests of the party concerned. Eversheds Sutherland will be pleased to answer any questions you may have in this respect.

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# Mortgage Perspective

Articles 7 to 16 of the RDL establish certain rules aimed at making the payment of mortgage debt more flexible for vulnerable groups as a result of the Covid-19 epidemic.

These measures affect borrowers guarantors and sureties under real estate loan or credit agreements for the **acquisition of a primary residence** in the circumstances defined in Article 8 (unemployed persons, entrepreneurs with substantial loss of income or sales, income below the thresholds established in the rule, when the quota is at least 35% of their income or their family unit has suffered a substantial alteration in its economic situation, as defined in the RDL).

With respect to guarantors or sureties in a situation of economic vulnerability, the RDL establishes the obligation of the lender to exhaust the assets of the principal borrower before executing other guaranties or sureties. The situation of vulnerability of guarantors and sureties must be evidenced as indicated in the RDL.

Borrowers in a situation of vulnerability must **request from the lender** the application of a moratorium on the payment of the debt for the acquisition of their primary residence, which the lender entity must implement within 15 days, notifying the National Bank of Spain of its existence and duration. The rule establishes that these debts **will not be counted for the purposes of risk forecasting**.

The effect of the moratorium is the suspension of the mortgage debt and the non-applicability of the early maturity clauses during the period established therein, as well as the inability of the lender to request payment of instalments. It also implies the suspension of the accrual of ordinary interest and moratoriums.

The law stipulates that anyone who takes advantage of this moratorium without complying with the established requirements or who seeks to place himself in a situation of economic vulnerability in order to benefit from these measures, shall be liable for the damages caused, without prejudice to any other legal responsibilities.

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# Data Protection Perspective

## Employee data in prevention of Coronavirus pandemic

The Spanish Data Protection Agency has issued a legal report clarifying how GDPR applies to processing of data in the framework of preventing the spread of the COVID-19 pandemic and, specifically, establishing public authorities' and employers' legitimation for processing.

With regards to companies, the report clearly establishes employers are entitled to process employee health data (for instance, employee temperature checks or reporting of other Covid-19 symptoms), as well as other data which it may rationally use for preventing the spread of the pandemic (for instance, information on the places where the employee has stayed outside work). And it does so on the basis of a double legitimation:

- On the one hand, employers are entitled in compliance of a legal obligation (article 6.1.c of GDPR) and for performing of a task in the public interest (article 6.1.e) in connection with employers' obligation to care for the health of employees, as set out [in section 14 of the Spanish Health&Safety Act](#).
- This also applies to health data (a special category of data under GDPR) by virtue of article 9.2.b, which permits its processing insofar as *"necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law in so far as it is authorised by Union or Member State law [...] providing for appropriate safeguards for the fundamental rights and the interests of the data subject"*.
- Additionally, employers are entitled insofar as processing be necessary to protect the vital interests of the data subject or of another natural person (its employees in general) according to article 6.1.d of GDPR. And this, again, covers health data article 9.2.c).
- Of course, though legitimized to process data, employers still need to comply with the rest of their obligations under both GDPR (transparency, security,) and employee health & Safety laws. This means in practice that, among other measures:
- Employers will have to design their measures making sure the information they collect is proportional for this purpose.
- **Information on how these data are going to be processed will have to be provided in accordance with sections 13 and 14 of GDPR** (unless previously provided). Leaflets available at the entrance of worksites or emails to employees seem able channels for this).
- **Collecting of data in the course of day-to-day prevention measures (such as temperature checks at the entrance of worksites) should be channelled through the Risk Prevention Service** (whether internal or external); whereas...



- ... if an employee detects a specific risk (himself or another employee showing symptoms) he can (and should) inform not only the risk prevention service but also his immediate supervisor: ([Section 29.2.4<sup>a</sup> of the Spanish Health & Safety Act](#)).

In sum, notwithstanding the enabling nature of this legal report, clearly directed at facilitating the fight against coronavirus, it is recommendable that companies quickly adjust to these requirements to make sure their measures are complying with the law.

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For more information relating COVID-19 please access the following [link](#)

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