

Spain, week between May 11 and May 17, 2020

COVID-19: Phase 1 of the ‘scaling-down’ process, third tranche of guarantees, extension of ERTE temporary layoffs, potential delay in the application of VAT directives and of DAC6, and measures to support the cultural sector

For another week running, Garrigues summarizes the key issues that companies need to be aware of over the coming days. In relation to **corporate law and commercial contracts**, we run through the effects of the pieces of legislation approved during the state of emergency for winding up and the right to withdrawal at commercial companies. Together with the new provisions on exports and the third tranche of ICO guarantees.

In the **labor and employment** arena, notably an agreement was reached for extending ERTE temporary layoff procedures due to force majeure at the negotiating table between the government, employers and workers’ representatives, which, in the absence of confirmation by the council of ministers on Tuesday, extends the measure until June 30.

The **tax** elements needing to be considered this week are that May 15 is the end of the time period for applying to AEAT for acknowledgment of rights to the tax benefits associated with events of exceptional public interest; the depreciation of inherited real estate assets, with a view to the 2019 personal income tax filing season; and very particularly, that the European Commission has proposed, as a result of the health crisis, postponing application of the VAT directives on e-commerce and of DAC6.

Notable in the area of **litigation** are the *Scaling-down plan in the sphere of the justice system*, with a staggered return to work for public officials and recommencement of the procedural time periods foreseeably in three weeks. Moreover, a few civil courts have already started to schedule hearings to be held remotely in non-essential proceedings.

And regarding **insolvency matters**, both debtors and creditors will need to consider the recent approval of the Revised Insolvency Law.

A reminder is needed in relation to **administrative law** that the Inter Ministerial Committee on Medicine Prices has now delivered two decisions on determining the sale price of certain types of hygiene products for prevention of contagion.

Added to all of this is the recent approval of a package of measures to support the **cultural sector**, one of the worst hit by the COVID-19 crisis.

Corporate law / commercial contracts

1. Winding up and right of withdrawal at commercial companies. During the state of emergency various pieces of legislation have been published affecting the corporate bodies of commercial companies. Some of the key new provisions impact issues related to winding up and the right of withdrawal of shareholders or members. We run through the new legislation that companies must be aware of in relation to the various grounds for winding up, as a result of the measures adopted in royal decree laws 8/2020, 11/2020 and 16/2020. We also analyze how the right of withdrawal of shareholders at capital companies and members of cooperative companies has changed. For further information, see [here](#).

2. Export controls. Royal Decree 494/2020, of April 28, 2020 amends the control regime for foreign trade, and, among other measures, provides the Inter-Ministerial Regulatory Board on Foreign Trade in Defense and Dual Use Goods (JIMDDU) with greater functions, having the authority also to establish, on an exceptional basis, mechanisms for verification, monitoring and cooperation in relation to goods exported in certain transactions even with the involvement of the government of the importing country. For further information, see [here](#).

3. Third tranche of guarantees. The terms and conditions have been determined for the third tranche of ICO guarantee facilities for loans provided to companies and the self-employed, for promissory notes bought and sold on MARF (Spanish alternative fixed income market) and for counter guarantees provided by CERSA. The May 9, 2020 edition of the Official Gazette -BOE- published the decision by the Secretary of State for Economy and Business Support with the resolution by the council of ministers on May 5, 2020 in this respect. See [here](#) for further information.

4. State aid. The European Commission has expanded the Temporary Framework for authorization of state aid in the form of recapitalization and subordinated debt measures. On May 8, 2020 it announced **a second amendment** to the Temporary Framework **adopted on March 19, 2020**, as amended **for the first time on April 3, 2020**, in which the framework is extended by allowing aid to be authorized in the form of recapitalization or subordinated debt to any non-financial companies needing it. See [here](#) for further information.

Labor and employment

Companies are planning the return to workplaces and tackling phase 1 of the scaling-down process involving an easing of restrictions and the reopening of certain activities. Government, employers and the workers' representatives have reached an agreement for an extension of ERTE temporary layoff procedures due to force majeure.

1. Order published for easing certain restrictions under phase 1 of the plan for transition to the new normality. The [order](#) sets out the conditions for relaxing certain restrictions and reopening various activities in the areas of the country that are allowed to move to phase 1, including retail establishments and premises, terraces of restaurant establishments and hotels and tourist accommodation establishments.

It also requires a number of hygiene and prevention measures to protect workers and prevent clusters of people, and states that, wherever possible, working from home must be encouraged for workers who can perform their work remotely.

2. Planning and bringing into operation of return-to-workplace programs continues. The [list of ten keys](#) prepared by the Labor and Employment Department provides a graphic summary of the keys to a successful return to workplaces, in which hygiene, health monitoring and occupational risk prevention have a central role.

3. Agreement for extending ERTE temporary layoff procedures due to force majeure at the negotiating table. In the absence of approval by the council of ministers and resulting publication in the Official State Gazette -BOE-, the legislation will extend the ERTE temporary layoff procedures due to force majeure until June 30 in addition to extending and amending the provisions on relief from social security contributions, job retention clauses, or the misnamed "prohibition on dismissal".

4. Conciliation bodies start resuming their activities. Some mediation, arbitration and conciliation bodies have started issuing and notifying instructions and guidance to start resuming their services.

Tax

1. Events of exceptional public interest. An application for prior acknowledgment by the Spanish tax agency is needed to claim the tax credit for advertising and promotional expenses to promote events of exceptional public interest. The time limit for applications for that acknowledgement ends on May 15. In [this commentary](#) we recall the characteristics of this tax credit and how to apply for it.

2. 2019 personal income tax filing season. To determine income from real estate capital, depreciation of the real estate assets may be deducted as an expense. This depreciation is mainly calculated by reference to the actual acquisition cost of the building. The tax authorities and a few courts and tribunals have been interpreting that this actual acquisition cost only relates to the expenses and taxes associated with the acquisition where the buildings are inherited or were received by gift whereas others have concluded that the value at which the building in the gift or inheritance was reported does form part of the cost price. The 2019 Renta Web program calculates the depreciation expense automatically without taking this value into consideration. We analyze the issue [in this commentary](#).

3. VAT directives on e-commerce and DAC 6. Implementation of the VAT directives on e-commerce requires work on adapting management and monitoring procedures by economic operators and member states. Similarly, DAC 6 requires exchanges of information to be made which, in the transition period, affect cross-border arrangements that occurred on or after June 25, 2018. The health crisis has prevented states and operators from dealing with these matters within the time limits, so the European Commission has proposed postponing the entry into force of the VAT Directives and of the requirement to file and exchange information under the DAC. See our [alert](#), describing this issue, and the proposed new time periods.

Litigation and arbitration

1. Scaling-down plan in the sphere of the justice system.- The Ministry of Justice has approved a scaling-down plan, published in the Official State Gazette -BOE- on May 9, 2020, charting a staggered return to work for public officials and workers and recommencement of procedural time periods foreseeably in three weeks. See [here](#) for further information.

2. Civil courts schedule remote hearings in non-essential proceedings. Even though the suspension of time periods and judicial activities under RD 463/2020, of March 14, 2020 declaring the state of alarm, its successive extensions, and the decisions delivered by the CGPJ (General Council of the Spanish Judiciary) remain in effect, a few civil courts have already started scheduling dates for hearings to be held remotely in non-essential proceedings. According to the delivered decisions, it is planned to hold these hearings on Zoom.

A reminder is needed here that RDL 16/2020, of April 28, 2020, on procedural and organizational measures to confront COVID-19 in the sphere of the justice system, allows hearings to be held remotely, while the state of emergency is in place and until three months after it has ended (view our alert on RDL 16/2020 [here](#)).

3. Calculation of time periods for procedures at the Constitutional Court. The procedural and organizational measures decided in RDL 16/2020 are not directly applicable to activities within the sphere of the constitutional court, for which reason **the Constitutional Court delivered a decision** on May 6 2020, published in the May 8, 2020 edition of the Official State Gazette -BOE-, on the calculation of time periods for procedures at that court. According to that decision:

- The time periods and time limits for procedures in progress, when the suspension of time periods was decided as a result of the state of emergency ([see here](#)) will recommence from day one, which will be the first business day following the date the suspension of procedures is lifted.
- The time periods for lodging new appeals will start to run on the business day following the date the suspension of procedures is lifted.
- The ordinary regime on business days and times is kept in place, so there will be no business days in the month of August for the purpose of lodging appeals for protection of constitutional rights against judicial and administrative decisions, except for any procedures not allowing delay.

4. Criminal liability of companies in relation to rise in technical insolvencies. Every day we are seeing figures that without any doubt are cause for concern on the high number of companies heading for technical insolvency as a result of the drop in their revenues over the past two months. Although a company's technical insolvency or bankruptcy should in principle be tackled in a commercial insolvency proceeding (*concurso de acreedores*), it should be borne in mind that a few types of conduct by companies in the period running up to the insolvency proceeding or while the company is involved in one could create the risk of a criminal offense that companies cannot afford to overlook. This risk is not confined to the specific individuals engaging in the conduct, instead it may also carry criminal liability for the legal entity where the potential loss to creditors occurred. See [here](#) for further information.

Restructuring and insolvency

The approval of the Recast Insolvency Law (TRLIC) is set to bring certain changes in relation to restructurings and insolvencies. Both debtors and creditors need to familiarize themselves with it. Moreover, some of the new provisions introduced by RDL 16/2020 (others have already been analyzed [here](#)) provide companies with legal instruments that will help them to better adapt to the COVID-19 crisis:

1. Window opened for amending refinancing agreement with no time restrictions. For a year running from the declaration of the state of emergency, companies with a refinancing agreement in force validated by a court in the previous twelve months are allowed to make amendments to that agreement (or conclude a new one) and file it again for court validation with the associated advantages (creditor cramdown and anti-clawback shield). Moreover, it provides the following additional protection measures for businesses: (a) for seven months after the beginning of the state of emergency no petitions for declarations of breach of the original agreement will be admitted; and (b) the debtor will be allowed to elect the judicial notice of negotiations (commonly known as the “pre-concurso” notice) to shield itself against enforcements.

2. Temporary re-introduction of the chance to amend arrangements with creditors. For a year running from the beginning of the state of emergency, any debtors with arrangements with creditors in effect have the chance to amend those arrangements if they do not expect to be able to comply with them. RDL 16/2020 allows the debtor to benefit from nine months’ protection running from the declaration of the state of emergency in which petitions for declarations of breach of the original arrangement (or twelve months’ protection against creditors’ petitions for commencement of liquidation) will not be admitted. In these periods, the debtor will have priority for filing a proposal for amendment of its arrangement with creditors, and will also be able to use the rules on majorities in effect when the original arrangement was approved.

3. Higher seniority for fresh money provided by the shareholders of a company in insolvency. The injection of new money by the company’s shareholders is being encouraged by the government (a few of the measures are analyzed [here](#)) with legal measures that raise the seniority that claims of persons connected to the debtor have had until now. Namely, where financing from shareholders is funneled through an arrangement with creditors, that financing may have the highest seniority (post-order claim or specially privileged claim) provided certain conditions are met and the arrangement is breached not later than two years after the declaration of the state of emergency.

4. Auctions freed from judicial oversight. Auctions of assets and rights will have to be held out of court (unless they relate to productive units, in which case they may be judicial or non-judicial) if they are part of insolvency proceedings opened (or being substantiated) within the year following the declaration of the state of emergency. This will imply the use of different mechanisms and public notice procedures to the ones used for the electronic auctions that were being called by the courts (Electronic Judicial Auctions Portal in the Official State Gazette). With the change towards non-judicial auctions, it will be important to increase monitoring of the auction to ensure that it is held and completed in the shortest possible space of time.

5. Attention needed to entry into force of Revised Insolvency Law on September 1, 2020. The May 7, 2020 edition of the Official State Gazette -BOE- published the Revised Insolvency Law, introducing provisions that depart from the existing provisions on restructurings and insolvencies. Further details may be viewed [here](#). The bulk of the new provisions in the Revised Insolvency Law will come into force on September 1, 2020. Therefore, both debtors and creditors must expect and prepare for potential insolvency scenarios and pay attention to finding which rule best suits their needs so that can act accordingly.

Administrative

Requisition of property, mandatory obligations and other measures. The Inter-Ministerial Committee on Medicine Prices has now delivered two decisions (the latest published on May 5, 2020) to determine the sale price of certain hygiene products to prevent COVID-19 contagion, under the procedure for determining the maximum retail sale price for certain medical types of medical devices and products needed to protect the health of the population under Order SND/354/2020, of April 19, 2020. See [here](#) for further information.

Intellectual property

Measures to support the cultural sector. **Royal Decree-Law 17/2020**, of May 5, 2020, approving measures to support the cultural sector and tax measures to confront the social and economic impact of COVID-19, contains a whole range of initiatives to support the world of culture against the economic effects of the pandemic. The ten key elements to consider are summarized [here](#).

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Garrigues, a multidisciplinary team of specialists facing COVID-19

The worldwide health alert triggered by coronavirus is generating a great deal of uncertainty among companies, affecting all aspects of their activity. Since the crisis took hold, Garrigues has been at the disposal of its clients, with multidisciplinary teams specializing in all practice areas in the countries in which it is present. These are also the teams responsible for supervising the contents of this Special section, in which we provide information on all legal developments in relation to the coronavirus crisis, on proposals made by social agents, agreements, decisions, orders, etc.; in short, all the relevant information which companies need to be aware of.

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