GARRIGUES

COMPANIES FACING THE COVID-19 CRISIS

Special newsletter - Ninth edition

Spain, May 18 to May 31

New guarantee facility, extension of ERTE temporary layoff procedures, effects of the crisis on transfer pricing, return to judicial activity and 'shields' for businesses

Garrigues analyzes the most important new legislation that companies need to be aware of in the coming days in the various areas of business law. The new ICO guarantee facility, the extension of ERTE temporary layoff procedures and the restrictions on the distribution of dividends at companies that have used these procedures, the explanatory guidelines of the Public Employment Service (SEPE) and the General Social Security Treasury, the instructions of the Ministry of Health for the performance of diagnostic tests or phase 2 of the scaling-down process are some of the matters that need to be watched at the moment. Added to this is the resumption of judicial activity and the holding of remote trials, the effects of the economic situation arising from COVID-19 on the analysis, pricing and documentation of controlled transactions or the possible tax reform. In addition, the new features of the Revised Insolvency Law, recently approved, and the possible shields for directors of companies in distress.

Corporate law / Commercial contracts

1. Distribution of dividends. Companies will have to check whether the restrictions under Royal Decree-law 18/2020 apply to them, before distributing dividends, as we explain **here**.

2. New guarantee facility. To watch out for this week are the terms and conditions of the fourth ICO COVID-19 facility which is expected to be approved this Tuesday.

Labor and employment

Lastly, the agreement between the Government, employers' association and labor unions has been published to extend the ERTE temporary layoff procedures due to force majeure, as well as the exemptions from social security payments which also introduces new exemptions from contributions and clarifies the scope of the job retention obligation. The scaling-down timetable continues and the rules for phase 2 have been issued, while implementation of the plans for the return to the workplace commences and instructions are issued for carrying out diagnostic tests for the detection of COVID-19.

1. Publication of the royal decree-law to allow the extension of ERTE temporary layoff procedures due to force majeure until June 30, 2020. **Royal Decree-law 18/2020** allows the ERTE temporary layoff procedures due to force majeure, as well as the exemptions from social security payments to be extended until June 30, 2020 and also defines, inter alia, new exemptions in relation to social security contributions, the scope of the job retention obligation, as well as certain restrictions on the distribution of dividends of companies that have used an ERTE temporary layoff procedure due to force majeure. The provision that dismissals on grounds related to COVID-19 cannot be held justified is also extended until June 30, 2020.

2.SEPE (unemployment authorities) and the General Social Security Treasury publish their guides for applying Royal Decree-law 18/2020. **The Network News Bulletin 11/2020** contains the special provisions for the sending of documents by electronic means to the General Social Security Treasury and SEPE has published **guides** to the procedures for notifying changes in ERTEs and returning to operations.

3. Phase 2 of the scaling-down process comes into force for certain territories and Order SND/414/2020 is published. This legislation eases certain restrictions for territories moving into phase 2. Notable measures include those to ensure protection

of workers at their workplaces, as well as those to avoid gatherings of persons. This legislation also modifies the existing restrictions in relation to trade and services for territories remaining in phase 0.

4. Commencement of implementation of programs for return to workplaces. The scaling-down timetable continues and businesses are gradually phasing in their plans for resuming operations at their workplaces. 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 measures, health monitoring and occupational risk prevention have a central role.

5. The Ministry of Health has issued instructions on diagnostic testing to detect COVID-19 at companies. In those instructions, the Ministry of Health issues its criterion for the performance of tests for the early detection of coronavirus infection, determining when a person is suspected of infection, as well as the specific test to be performed. It is emphasized that the participation of prevention departments at companies is crucial and all clinical diagnosis healthcare centers, services and establishments, regardless of their owners, are required to notify any confirmed cases of COVID-19 that they have discovered following performance of the relevant diagnostic tests.

6. Remote trials have arrived. A few labor courts are beginning to summon the parties to remote hearings.

Restructuring and Insolvency

1. Attention to the entry into force of the Revised Insolvency Law (TRLC) on September 1, 2020. The TRLC was published in the May 7, 2020 edition of the Official State Gazette -BOE-, which introduces provisions that depart from the existing provisions on restructurings and insolvencies. Greater detail is provided **here**. Most of the new provisions of the TRLC come into force on September 1, 2020. Therefore, both business owners 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.

2. 'Shields' for directors of distressed companies. Up to now the exceptional insolvency provisions have provided *shields* for distressed debtors (a moratorium for filing a petition for an insolvency order until December 31, 2020, protection from necessary insolvency proceedings, option to amend an arrangement to avoid liquidation, protection from petitions regarding breach of an arrangement, etc.). In that distribution of *shields*, directors of distressed companies have also received a shield, for example, to avoid their personal liability for the company's debts incurred during the state of emergency.

With an eye on the United Kingdom and some of the measures approved there, suggestions are beginning to be made that it might be appropriate for directors to have a more sophisticated and broader system of protection, both in terms of time (beyond the state of emergency) and substance (that decisions to try to render the business viable, for example, by entering into more debt, are not judged as detrimental). Some subscribe to the view that "optimized" protection system could also be extended to counterparties that are related to distressed companies, so as to avoid the possibility of agreements reached with them in a certain time frame being subsequently analyzed with hind-sight bias.

They are interesting proposals which should not, in any event, cause us to lose sight of the main issue: in difficult times, the primary *shield* to mitigate the liability of directors of distressed companies is good business judgment and prior advice which considers all the circumstances, reinforces the strengths and mitigates the weaknesses of the operation or transaction in question.

3. Clarification of the scope of the penalty of disqualification in insolvency proceedings. The stigma associated with insolvency proceedings is hard to avoid. Anticipation, a good communication plan and a well-defined legal strategy usually mitigate the negative effects of that stigma. On a daily basis we find that aligning creditors with the same messages and expectations makes it easier for the company's management to carry out its plan. The greatest stigma is usually associated, not with the liquidation itself of the debtor company in insolvency proceedings, but rather its "fragmented" liquidation due to closure of the company – as opposed to "unitary" liquidation, in which the company can be kept alive, as a going concern, by transferring it free of debts to a third party.

On the subject of this stigma and the negative effects for directors, it has been debated whether companies that are directors of other companies which end up in insolvency proceedings, are barred from continuing to carry on their activity after being disqualified in the insolvency proceedings of the company they managed. Recently, upon the publication of the Revised Insolvency Law (**here** we explain 15 keys regarding this new regulation), it has been clarified that the disqualification in insolvency proceedings does not extend to the companies which were directors of the insolvent company. Those director companies can continue to carry on their activity in the normal manner because the disqualification and, where relevant, the restriction on engaging in trade will be reserved (as already occurred in practice) for individuals. This is of particular importance for the companies investing in private equity funds.

Tax

1. Transfer pricing. The economic situation caused by the health crisis may affect the analysis, pricing and documentation of controlled transactions; some of the aspects that may be affected are intra-group financing, how controlled transactions are carried out, priced and documented, or the advance pricing agreements concluded with the tax authorities. All of those questions are analyzed in **this commentary**.

2. Tax reform. Despite the economic situation, there is still talk of approval in the short term of the "Google tax" and "Tobin tax"; and some speculation has appeared over a potential corporate income tax and personal income tax hike or over a reform of inheritance and gift tax and wealth tax, to make these taxes uniform across autonomous communities. Lastly, we have also been hearing about a potential new "tax on large fortunes". In our **commentary**, we briefly run through the comments that have been published on these subjects.

Litigation and Arbitration

1. Scaling-down plan in the sphere of the justice system . The Justice Ministry, the General Council of the Spanish Judiciary (CGPJ), the public prosecution service and the autonomous communities have decided that the justice system will remain in phase one of the scaling-down plan that started on May 12, as we reported **here**. Further information on that scaling-down plan may be found **in this alert**.

2. The General Council of the Spanish Judiciary (CGPJ) has approved a set of general criteria for the preparation of plans for a return to judicial activity by the governing chambers of the high courts and the National Appellate Court. The Permanent Commission of the General Council of the Spanish Judiciary (CGPJ) has established general guidelines and recommendations, notably as follows:

- Under previous decisions, despite the state of emergency being in force, submissions initiating and forming part of procedures may be filed, and notices may be served in non-essential procedures, although the time periods will not start running until their suspension has been lifted.
- In the reorganization of the timetable of scheduled hearing dates, it will be attempted to keep the procedural activities that have already been scheduled, and give priority to the preferential status of certain proceedings, and suspended scheduled hearings.
- Once judicial activities have resumed, it is recommended to combine face-to-face hearings with other remote hearings, depending on the technology that is available and the circumstances of the case (number of participants, type of evidence to be taken, etc.), and it is left to the court to decide in each case.
- In relation to converting the vacation period between August 11 and August 31 into business days, it is recommended to: (i) restrict as far as possible the hearings scheduled for those dates, except for urgent cases; (ii) give notification of the scheduling of hearings to be held on those dates, preferably, by June 15, 2020 at the latest; (iii) reduce the number of notifications with time periods expiring on those dates to the absolute minimum necessary.

The full document may be viewed **here**.

3. Risk of a criminal offense when testing employees or taking other measures to detect the presence of COVID-19 at the workplace. With the scaling-down and easing of lockdown, companies are adopting and considering implementing a range of measures to detect which employees are or have been exposed to SAR-Cov-2 with the aim of ensuring that their work activities are carried on in minimum hygiene, health and safety conditions. A few even did so when the disease was at its height, to meet basic needs. These measures range from reorganizing workplaces' operations and spaces and supplying personal protective equipment (PPE), to carrying out health surveys, tests (quick, PCR or serological tests) or taking body temperatures at workplaces. Incorrect management of the collection and processing of the data obtained in these activities may lead to various types of liability, which may include criminal liability or even affect the company itself. Further information, **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.

Check our special section

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