

Spain, week between May 4 and May 10, 2020

#### **COVID-19: Reopening to the public of establishments, effects of RDL 16/2020 on procedural, insolvency and tax matters, labor measures in preparation for de-escalation and news on administrative procedures**

The reopening to the public of certain types of businesses and services is at the top of companies' agendas this week. Garrigues also analyzes important issues to be considered by companies following publication of Royal Decree-Law 16/2020, of April 28, 2020, in relation to **procedural matters**, and also from the standpoint of **restructurings and insolvencies** and **tax law**.

In the **labor and employment** area, a reminder is needed of the essential elements to be considered for employees' return to work, along with the debate over the potential extension of labor measures beyond the state of emergency.

On the subject of **administrative law**, the government lawyers have unified their interpretation on sanctioning procedures in the state of emergency and the handling of certain procedures has resumed. This week's newsletter also runs through all the new provisions having an effect on the legislation governing companies' corporate bodies and analyzes the corporate income tax effects of renegotiating finance lease contracts.

#### **Corporate law / Commercial contracts**

**Legislation governing corporate bodies.** The various pieces of legislation published during the state of emergency, together with statements by registrars and by the CNMV, have created a new exceptional regime governing the corporate bodies of commercial companies, which makes it necessary to structure this new legislation, by summarizing the measures and their implications depending on the body concerned and dividing them into listed and unlisted companies. We provide [here](#) a chart summarizing all the applicable legislation in each case.

#### **Restructuring and insolvency**

As a result of the COVID-19 crisis, the Spanish government has passed, through royal decree-laws, a number of provisions introducing extraordinary rules impacting the habitual balance between debtor companies' rights and the rights of their creditors. Over-protecting certain types of debtor companies, without making any distinction between viable and other debtors, may end up having a considerable effect on their creditors in the chain of payments, particularly on operational creditors. Following Royal Decree-Law 8/2020, of March 17, 2020, last week came the turn of Royal Decree-Law 16/2020, of April 28, 2020 (view our Alert [here](#)). We highlighted a few components of this decree-law:

**1. Duty to request a voluntary insolvency order disabled.** This duty has been formally disabled until **December 31, 2020**. Directors should not lower their guard, however, because this does not mean that they cannot incur liability for causing or aggravating insolvency for the company.

**2. Losses for 2020 not included to determine the ground for winding up.** Losses for fiscal year 2020 will not be included for the purposes of the duties incumbent on directors in the event of a ground for winding up by reason of losses. This does not limit the duty to petition for an insolvency order where required.

**3. Protection of debtors against a necessary insolvency filing.** Until **December 31, 2020**, in principle, no petitions for necessary insolvency orders filed by creditors against the debtor will be admitted for consideration.

**4. Diminished guarantees of solvency to operational creditors.** The measures to protect debtors could seriously affect creditors (financial and particularly operational creditors) because the new measures do not, in principle, make any distinction between viable and unviable debtors. Creditors still have legal remedies available to protect them, although they must use them with care and foresight.

**5. Incentives for injection of fresh money by shareholders.** It is sought to attract shareholders to providing their companies with cash, with an incentive related to improving the ranking of their claims against the company with respect to the ranking they would normally receive. In fact, they may have been given a seniority ranking (by being ranked as an ordinary claim or even as a secured post-order claim) that is considerably higher than the ranking they would normally be given as a subordinated claim (junior to other claims for collection, without collateral and without any voting rights). There are various ways to fund those injections of fresh money, however, and, the way they are structured may have a very different outcome in relation to the seniority ranking gained by shareholders' fresh money. As a result, careful attention is needed.

## Labor and employment

With a view to the de-escalation process, there is a whole range of essential elements to be considered for the return to work. Moreover, the government has published rules on the reopening to the public of certain businesses and services. Additionally, the gradual removal of employees from ERTE collective layoff procedures due to force majeure, and alongside this, the debate over the potential extension of their effects, are again at the top of the agenda.

**1. Ten key elements to be considered for the return to work.** With a view to commencement of the process for a gradual recovery of activity, the Labor and Employment Department has published a **list of ten keys** summarizing in a very visual format the keys to successfully completing the return to work process in legal and practical terms. The document also provides access to the main guidelines and recommendations that have been published in relation to these issues, along with an interactive map to help find information relating to the autonomous communities.

**2. Ministerial order published on the reopening of retail businesses and restaurants.** **Order SND/388/2020** contains the conditions for the reopening to the public of retail establishments and premises, and for the activities of professional services where their activities had been suspended, with the exception of any measuring over 400 square meters, and any that qualify as a shopping mall or shopping park, or any that are in either of these types of establishments and do not have direct or separate entrance from the outside, on condition that they satisfy a number of requirements, namely: a prior appointment system, the required physical separation and a special time slot for people over 65.

In relation to the activities of hospitality and restaurant businesses, it determines that these may conduct their businesses through home delivery services and through the collection of takeaway orders by customers, which are not allowed to be consumed inside their premises.

**3. Interpretation by the Directorate General for Work on application of the suspension and reduced hours measures during the lockdown phase of the state of emergency.** The Directorate General for Work issued, on May 1, 2020, an interpretation regarding the ability to cease applying the ERTE temporary layoff procedures due to force majeure gradually. According to that interpretation, any companies that were applying the suspension or reduced hours measures may end them, fully or partially, with respect to some or all of the workforce, and gradually, as and when the reasons associated with force majeure disappear. Similarly, it will be possible to alter the originally proposed suspension measures and facilitate the transition to reduced hours, which have a lower economic impact on workers and will enable companies to meet the growing supply and demand for their products and services.

**4. The debate continues over a potential extension of labor measures beyond the state of emergency.** The government is currently considering a potential extension of labor measures beyond the state of emergency, which could include both the period of validity of the ERTE temporary layoff procedures due to force majeure, and the exemptions from social security contributions or the measures to be eligible for unemployment benefit.

## Tax

**1. CIT and VAT implications of measures in the corporate and insolvency fields introduced by RDL 16/2020.** Royal Decree-Law 16/2020, of April 28, 2020, introduced measures aimed primarily at speeding up judicial procedures after the state of emergency has ended; including reducing the August vacation period and decreeing that suspended judicial time periods will recommence from day one. Judicial review procedures are among those affected. These procedural measures are not the only ones to be adopted. Measures in the corporate and insolvency fields have also been introduced to allow companies, professionals and the self-employed to stay afloat, among others, by (i) deferring the duty to request commencement of the liquidation phase in certain cases, (ii) extending the time limit for suspension of the duty to petition for an insolvency order until December 31, 2020, or (ii) determining that losses for 2020 do not count for the purposes of the statutory ground for winding up. All these measures have undoubtable corporate income tax and VAT implications [see our commentary](#).

**2. Corporate income tax: finance lease regime.** The current economic situation caused by the health emergency is compelling many holders of finance lease contracts (small and medium-sized companies and the self-employed, mainly) to negotiate an amendment of the terms of their contracts with lessors. In this context, it is necessary to allow a certain amount of flexibility in the corporate income tax treatment of this type of contract for lessees. The fact is, under the finance lease regime defined in article 106 of the Corporate Income Tax Law, for the leased assets to be eligible for accelerated depreciation, the lease payments under the contracts must be constant and incremental. This requirement is impossible to satisfy if, in the current circumstances, for example, an extension of time periods to meet the payments, or grace periods for the payment of interest or the principal, etc. are agreed. Terms of this type will determine, if the applicable rule is applied literally, the need for lessees to make an accounting and tax adjustment, which will result in the lessee having to refund any favorable tax treatment associated with accelerated depreciation until the renegotiation date of the contract.

It therefore seems recommendable, as occurred in earlier crises, to eliminate this requirement temporarily for any contracts in force during the health crisis, in a measure that would work in favor of the cash flow and continuity of many companies that decided to finance their assets with contracts of this type.

## Administrative

**1. Sanctioning regime.** Interpretation of the general government lawyers regarding the definition and determination of the power to handle and decide on sanctioning cases brought in relation to breaches of the restrictions imposed during the state of alarm. The issued report clarifies that the serious infringement defined in article 36.6 of Organic Law 4/2015, of March 30, 2015, on the protection of citizen's safety, involves an instance of ignoring the principle of authority, so to be accused the private party must disobey the request for compliance made to it by an agent. See [here](#) for further information.

**2. Resumed handling of certain procedures.** Additional provision 3 of Royal Decree 463/2020, of March 14, 2020, which declared the state of emergency, allowed exceptions, by reasoned decision, to the general suspension of time limits and time periods for the handling of administrative procedures. Over recent weeks, several administrative bodies have made use of that permission, which has given rise to publication in the Official State Gazette -BOE, of various administrative decisions ordering continuation of certain procedures. See [here](#) for further information.

## Litigation and arbitration

**1. Time periods and judicial activities.** Royal Decree-Law 16/2020, of April 28, 2020, on procedural and organizational measures to confront COVID-19 within the justice system, defined rules on a few elements of the activities of that service as a result of the health crisis; among others, the calculation of procedural time periods when their suspension is lifted, measures relating to the handling of certain procedures, organizational and technology measures, etc. We summarized the most prominent measures in RDL 16/2020 [in this alert](#).

RDL 16/2020 has not lifted the suspension of non-essential procedural time periods and judicial activities ordered by RD 463/2020, of March 14, 2020, which declared the state of emergency, and the decisions delivered by the General Council of the Spanish Judiciary (CGPJ), which, following the successive extensions, is currently valid until May 10. In view of this situation, the resumption of non-essential judicial time periods and activities will depend on the extension or otherwise of the state of emergency, and, when they are resumed, on what conditions will be determined, or whether any other rule or decision will be delivered in relation to them.

**2. Criminal hate-mongering: on discrimination against the sick and individuals at risk to the criminal liability of companies.** A few days ago, following reports in the news of despicable messages involving harassment and discrimination being received by professionals exposed on a daily basis to COVID-19 (healthcare and supermarket workers, etc.), Spanish police force Policía Nacional reminded us that certain types of discriminatory messages towards particularly vulnerable sectors during this pandemic, which, in principle, may be regarded as falling outside criminal law, could actually amount to criminal hate-mongering, an offense able to carry important criminal consequences for both individuals and companies. 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](#)