

COMPANIES FACING THE COVID-19 CRISIS

Special newsletter – Issue Three

Spain, week between April 6 and April 12 2020

A constant stream of new legislation is being approved that affects businesses. Every week Garrigues provides a summary of the main issues that companies need to take a look at over the coming days. This week we feature the new legislation approved on financial and contractual moratoriums and deferrals, the new labor measures or the VAT exemption and customs duty relief on importations of goods to combat the epidemic, together with the advisability of reviewing and analyzing companies' financial and net worth positions. We also discuss the potential financial liability of the state.

Corporate Law / and Commercial Contracts

1. Foreign investments. The legislation on prior authorization of investments by entities resident outside the European Union or in European Free Trade Association countries has been amended to clarify that it applies to investments made through companies resident in the EU or in European Free Trade Association countries if their beneficial owners are not, to establish quantitative limits and to determine the application procedure for the authorization (see [here](#) for further information).

2. Moratoriums (payment holidays) for loans. The option to request a moratorium (payment holiday) for loans has been broadened to include non-mortgage loans (see [here](#) for further information).

3. Rental of principal residence. Suspension, deferral and moratorium (payment holiday) measures have been approved in relation to rental of the principal residence (see [here](#) for further information).

4. Corporate / commercial contract measures. Measures have been passed that clarify the regime for holding shareholders' and board meetings (to allow these meetings to be held in every case by audio or video call, subject to certain requirements), the time period for the preparation of financial statements and the requirements for altering the proposed distribution of income/allocation of loss contained in the prepared financial statements with respect to that submitted for approval by the annual shareholders' meeting for 2020 (see [here](#) for further information). Additionally, ICAC (Spanish Accounting and Audit Institute) has issued a determination dealing with the time periods for preparation, auditor's verification and approval of financial statements, by reference to the different dates on which the companies concerned will carry this out (see [here](#) for further information).

5. Aid from the European Union. The European Commission has extended and added flexibility to the Temporary Framework adopted on March 19, 2020 to allow Member States to provide State aid for research, testing and production of coronavirus related products, and also to grant greater volumes of aid in the categories already allowed in the original Temporary Framework. The new elements consist of authorizing new types of aid to support research into, and the manufacture of, medical devices to tackle the pandemic and economic aid such as deferral of tax payments, suspensions of social security contributions and wage grants or subsidies for workers (see [here](#) for further information).

Restructuring and Insolvency

The effects and impact of the COVID-19 health crisis and of the state of emergency period declared by Royal Decree-Law 463/2020 (see [here](#)) may vary in type and intensity. This week we focus on the knock-on effects caused by a decline in revenues or failure to achieve financial ratios or covenants in financing agreements.

1. Analysis of compliance with economic and financial covenants. Requests for waiver. As part of their routine analysis of compliance with covenants, companies should include a study of how far any potential breach of them is attributable to the COVID-19 health crisis and, where applicable, how far this could constitute an event of force majeure. In any event, financing

agreements habitually allow companies to ask their financial creditors (banks, funds or bondholders) for a temporary waiver in relation to certain obligations. This usually involves a remedy specified in the agreement itself, and which is used very frequently in practice. Where the request for waiver is made on a one-off basis (for a specific time or period) and additionally is made sufficiently in advance and adequate justification is provided, it is rare for creditors to refuse unreasonably to grant the request. In fact, it is commonplace for requests for waiver to be subject to certain voting majorities, meaning it is not necessary to obtain the express consent of all financial creditors to be afforded, for example, a moratorium for specific compliance with certain ratios or covenants or obligations; or even for any event allowing early termination of those financial agreements not to be applicable (although there are certain obligations which require the unanimous consent of the financial creditors to be waived, such as obligatory repayment, payment of the principal, periodic payment of interest, etc.).

2. Debt refinancing arrangements. Where the company faces problems that are more structural than temporary, the request for waiver is probably not sufficient to surmount its difficulties. A few examples of structural problems are a prolonged lack of liquidity, inability to service financial debt, or fulfill essential investments under the facility agreement, etc. In these cases, a refinancing of the debt may be necessary. The legal refinancing mechanism will vary depending on the class of debt involved. The state of emergency in itself does not amount to an impediment for initiating and completing a standard refinancing process (provided it does not require participation from third parties that is not practicable due to the health crisis).

Refinancing arrangements, which are usually entered into before a notary, may be regarded as implicitly authorized by the legislation passed for this state of emergency period. The reason is that, by reference to the particular circumstances, a conclusion must be reached as to its "urgency", based on both the Instruction from the Directorate-General for Legal Certainty and Attestation of March 15, 2020, and the Circular of the Permanent Commission of the General Council of the Spanish Judiciary.

There should not reasonably be an impediment to considering that authorized transactions also include any urgent financing (through bridging loans or the issuance of bonds, for example, although not necessarily provided by Spanish financial institutions), together with any financing related to the measures approved by RDL 463/2020 declaring a state of emergency (such as the bank financing facilities with ICO guarantees, on which we provided a few recommendations which may be seen here). The staff at notary's offices will provide the necessary assistance for securing the success of the transaction, because their work has been determined essential by Royal Decree-Law 9/2020, of March 27 (see [here](#) for further information).

3. Corporate restructurings. In the current scenario it may be necessary to complete a corporate restructuring started before the state of emergency period, or start a new process. A few of the uncertainties companies are facing may be dissipated through structural modification transactions such as mergers, carve-outs, spin-offs or transfers of lines of business.

No matter which form is chosen, corporate restructurings require without any exception a prior study of their tax and legal consequences. In all cases, once it has been decided to close a restructuring that is in progress or start a new transaction (merger, carve-out, spin-off or transfer of line of business), treating them as allowed transactions is not a major problem, because they are all subject to peremptory time periods, and these are allowed by the RDL 463/2020. Nor should it prove difficult to support the need to avoid irreparable prejudice if they are not concluded. For this reason, the structural modification transactions (mergers, spin-offs, carve-outs or transfer of lines of business) approved before RDL 463/2020 declaring a state of emergency should be able to be completed and registered to be fully effective as against third parties. Equally, it should be possible to start and conclude without interruption any structural modification transactions that may be performed for reasons related to ensuring the viability of businesses and their underlying activities.

Labor and Employment

1. New legislation in Royal Decree-Law 11/2020. New labor and social security measures have been introduced, which can be seen [here](#). The key new legislation is described below:

a. Moratorium and deferral of contributions

It has been approved for the Social Security General Treasury to grant interest-free six-month moratoriums, to any companies and self-employed workers that so request and meet the requirements and conditions that will be laid down by ministerial order.

Moreover, companies and self-employed workers who do not have any other deferral in effect, may apply for deferred payment of their social security debts for which the stipulated payment period is between April and June 2020, subject to the terms and conditions set out in the social security legislation, and 0.5% interest will be applicable.

b. Application of the obligation to maintain employment to the specific characteristics of the various sectors

The specific characteristics of any companies that have a high level of variation or seasonal changes in employment or a direct relationship with specific events or shows, as occurs, among others, in the scenic arts, musicals, filmmaking and audiovisual fields will be taken into account.

In particular, in the case of temporary contracts, the obligation to maintain employment will not be considered to have been breached where the contract terminates due to expiry of the stipulated term or the completion of the project or service forming its subject-matter or where the activity hired in the contract cannot be carried out immediately.

c. Other exceptional labor and social security measures

Among other measures, an extraordinary subsidy has been created in respect of the absence of activity for household workers and an exceptional unemployment subsidy for temporary contracts that have come to an end, a temporary incapacity benefit is specified for exceptional situations of complete confinement, and the requirements for eligibility for the benefit in respect of halted activities of self-employees are amended.

2. Solemn declaration form enabling journeys to and from work has been published. Order SND/307/2020, of March 30, 2020 has been published, which contains in an annex the solemn declaration form stating that a worker not required to take recoverable paid leave, may continue making journeys to and from work or carrying on their activities as labor union or employer representatives.

Tax

In this second week of April 2020, special attention is needed to the following tax issues:

1. COVID-19: Administrative procedure. Royal Decree-Law 11/2020 has clarified a few doubts that had arisen following Royal Decree 463/2020 that declared the state of emergency and the subsequent Royal Decree-Law 8/2020, in relation to suspension and deferral measures for certain administrative time periods and procedures. Not every doubt has been resolved, however. In our commentary on this subject ([see here](#)) we drew attention to the potential mismatch between the new challenge time periods and the time periods for payment in the voluntary period of contested tax debts.

2. Personal income tax exemption for dismissals on disciplinary grounds. Administrative and judicial conciliation processes in relation to dismissal have been suspended since the beginning of the state of emergency period. However, conciliation is, according to administrative law doctrine, a necessary requirement for the worker to be entitled to claim the personal income tax exemption. In this commentary ([see here](#)), we recall the main requirements for the exemption and explain the doubts that may arise in this situation.

3. COVID-19: Importation of goods to combat the epidemic. The European Commission has given authorization for the importation of goods to combat the pandemic from countries outside the European Union, and approved a VAT exemption and import duty relief, where the products will be made available to persons affected by, at risk from, or involved in combatting, the outbreak of the disease. In Spain, any operator may claim this relief, if certain requirements are satisfied. In our commentary on the subject ([see here](#)) we outline the requirements and point out the need to extend the exemption to apply also to goods acquired in Spain or in the EU.

Litigation and Arbitration

1. Time periods for performance of contractual obligations. The state of emergency does not, in itself and as a general rule, affect the time periods for performance of contractual obligations, although those performance periods may potentially not be practicable, or it may be necessary to review them, which must be studied in each particular case. See [here](#) for further information.

2. Crime risk for companies. Any companies that are keeping on their production activities might be wondering whether, in view of the risk to health created by the pandemic, they could be incurring any type of risk of a criminal offense.

In the organization of work it is extremely important to obey all instructions issued by public authorities, particularly the health authorities, because failure by the employer to adopt the measures needed to ensure that its activities are conducted with the required health and safety conditions, and also with protection against COVID-19, resulting in the posing of a serious risk to the life, health or physical integrity of workers, may amount to a criminal offense among those in articles 316 or 317 of the Criminal Code.

Even where the absence of protective equipment is due to the inability to obtain them on the market, in formal terms also it may be considered that unlawful conduct has occurred, although it is true that currently there are no judicial precedents, or instructions or recommendations by the public prosecution service or from the labor inspection authority on this exceptional circumstance.

In this context and in view of the extremely unusual nature of this situation, it is crucial for the business owner to use its best efforts which leave evidence that it has done everything possible and within its reach to provide its workers with the necessary measures. And records must be kept of this. In [this article](#) we provide an eminently practical outline of what steps must be taken and what risks are associated with acting otherwise.

3. Shake-up plan by the General Council of the Spanish Judiciary (CGPJ). The CGPJ is preparing a shake-up plan to prepare for the resumption of judicial activity when the state of emergency is lifted. The intention behind the plan is to avoid a collapse of the justice system and speed up resolution of matters which if delayed could have a more adverse impact on economic recovery and on protection of the most vulnerable sectors of society. For the creation of the plan, it has been decided to set up a task force for each jurisdiction to design the measures. Additionally, the CGPJ has warned that procedural reforms and organization measures of all types will be needed to adapt to the new situation. See [here](#) for further information.

Mobility and Transport

1. Mobility. RDL 10/2020, of March 29, 2020 was passed to restrict people's movements as much as possible for the purpose of containing the spread of COVID-19, and as a result, anyone not carrying on activities considered to belong to essential sectors is not allowed to travel for work reasons. The travel allowed by article 7 of RD 463/2020 on the state of emergency is restricted to its minimum expression and only where absolutely necessary.

2. Transport. The industry and transport, and mobility and urban agenda, ministries have issued interpretation notices on RDL 10/2020 clarifying which services must be classed as essential in the industrial sector and in the transport sector. Namely, falling within the category of essential activities are activities for importing and exporting all types of products, goods and supplies, if they have the feature of being key to providing supplies or to fulfilling obligations under international contracts; transport services, for both passengers and goods, together with activities ensuring maintenance of the modes employed to enable transport activities; and the distribution and supply of products acquired online, by phone, or by mail order.

The period of validity, if applicable, of the other mobility and transport measures determined in the state of emergency period has been maintained and extended.

See [here](#) for further information.

Administrative law

1. Financial liability of the state. If all the requirements laid down by the applicable legislation manage to be satisfied, a matter that will have to be studied in each individual case, the public authorities could be facing the obligation to pay damages for the harm that their acts or omissions have caused during the health crisis caused by COVID-19. In the near future a notable rise is foreseeable in the number of claims seeking this type of liability. See [here](#) for further information.

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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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