

COVID-19: POTENTIAL LEGAL IMPACT (LATEST DEVELOPMENTS) (SPAIN)

19 March 2020 | Madrid
Legal Briefings

Since our latest note (see [here](#)) on the impact of the health crisis caused by COVID-19, this e-bulletin explains the potential ramifications of new regulations that have since been passed, particularly Royal Decree-law 8/2020, of 17 March, on extraordinary measures to tackle the economic and social impact of COVID-19 ("**RDL 8/2020**")

[View Spanish version](#)

EMPLOYMENT

The following aspects affect **employment**:

- **Remote working is recommended, but not mandatory.** Companies must adopt the appropriate measures to make this possible, provided that the burden of doing so is proportionate.
In order to foster remote working, it is possible exceptionally for workers to conduct a self-assessment of occupational risks.
- Workers may **adapt their working hours¹ or reduce their working day by up to 100%**, with the corresponding reduction of salary, when they provide evidence that they have duties regarding the care of a spouse or civil partner in the following cases: (i) there is a need for direct and personal care as a result of COVID-19, (ii) the closure of

education and other centres that provided them with care or assistance and (iii) when the person entrusted with the care and assistance of a spouse or family member cannot continue to do so for justified reasons connected to COVID-19.

- **Extraordinary allowance for self-employed workers due to business closure** as a result of the state of emergency, which has a limited time span of one month after the entry into force of Royal Decree 463/2020, of 14 March, which declares the state of emergency to tackle the health emergency caused by COVID-19 ("**RD 463/2020**") or until the last day of the month in which the state of emergency ends.

- Applicable when they suspend their business operations or when their billing in the month prior to the application falls by at least 75% compared to the average billing in the previous six-month period.
- They need to have been signed on to the Spanish Social Security when the state of emergency was declared and they must be up to date with their Social Security payments.
- The allowance shall be 70% of the average contribution bases in the previous 12 months or, if the minimum contribution period has not been reached, 70% of the minimum contribution basis applicable to the special regime for self-employed workers. The allowance received will not reduce future benefits due to potential future business closure.

- **Modifications to procedures for suspending employment contracts and reducing working hours as a result of force majeure related to COVID-19:**

- The following will constitute force majeure: suspension and/or cancellation of business activities, the temporary closure of public premises, restrictions to public transport and the movement of people and goods, supply shortages, contagion among the workforce and the adoption of preventive self-isolation measures decreed by the labour authorities as a result of the state of emergency.

- The term for processing a force majeure request is reduced: the Labour Inspectorate has five days to issue a report on the existence of force majeure and the labour authorities then have a further five days to deliver a decision.
- A company will be released from the obligation to pay contributions for the duration of the suspension of employment contracts or reduction of working hours if it had less than 50 workers on 29 February 2020. If it had 50 workers or more, that contribution payment exemption would be 75%.
- The period for consultations in **procedures to suspend contracts and reduce working hours on economic, technical, organisational or productive grounds related to COVID-19** is reduced to a maximum of seven days. Equally, the time that the Labour Inspectorate has to issue its report is also reduced to seven days.
- Workers affected by suspension of their employment contract or a reduction of working hours may receive **unemployment benefit even if they have not fulfilled the minimum contribution period**. Equally, the time during which they receive this unemployment benefit **will not count** towards the maximum periods during which they are permitted to receive unemployment benefit.
- In order to apply these extraordinary measures, companies must make a commitment to **maintain employment for a period of six months** after their business resumes.
- As for the suspension of terms established by RD 463/2020, the new provision indicates that the suspension does not apply to administrative procedures connected to Social Security membership, payments and contributions.

INSURANCE

From an **insurance** perspective:

- In companies' normal business activities, companies affected by the suspension of certain activities would now be able **to trigger the cover**, albeit depending on the specific terms of each policy.
- In the case of **credit or surety insurance**, in the case of **export credit**, RDL 8/2020 authorises an extraordinary line of credit of up to €2 billion from the Reserve Fund for International Expansion Risks, which is available to SMEs that have already undergone or are in the process of international expansion.
- In relation with policies such as **third party liability or even D&O liability**, the extraordinary measures that the Spanish Government takes can have a clear impact on

these covers; e.g. measures affecting private law entities – including RD 8/2020 – affect, among other things, the duty of directors and officers to wind up a company if certain circumstances established by law or the articles of association are present. In that specific case, the legal deadline for calling a general meeting is suspended until the state of emergency ends and, additionally, corporate officers are released from liability for the company's debts generated during the state of emergency if the event triggering the obligation to wind up the company emerges during that period.

INSOLVENCY

The additions from the perspective of **insolvency** are:

According to article 43 RDL 8/2020:

- companies and people facing financial difficulty due to the current situation and that are in insolvency during the state of emergency do not have an obligation to file for insolvency, according to article 5 of the Spanish Insolvency Law;
- the commercial courts will not process applications for credit-forced insolvency petitions filed during the following two months or until two months have elapsed after the end of the state of emergency;
- if the insolvency petition is filed by the company or person itself within that two-month timeframe due to the exceptional circumstances caused by COVID-19, that petition would be admitted with preference, even if an insolvency petition has been made previously by a creditor;
- companies or persons who have already filed for pre-insolvency, ex article 5 bis of the Spanish Insolvency Law, will not have to file for insolvency until the end of the state of emergency even if the four-month term established in that article has elapsed.

CORPORATE, TAX

The following should be highlighted from the perspective of **corporate law**:

- **Meetings of the board and general shareholders meetings ("GSM").** Even if a company's articles of association do not expressly allow for this possibility, meetings of the board and other collegiate governing bodies (e.g. commissions and committees) can be held by videoconference (provided that it is possible to identify the attendees via image and audio in real time). Resolutions can also be passed by those bodies in writing, without a physical meeting, provided that this is requested by the chairperson or at least two members. In both cases it is understood that the meeting is held at the company's corporate domicile.

Any meetings that were due to be held after the state of emergency was announced, but that were called beforehand, can be cancelled or rescheduled by resolution passed by the management body, which must be published on the company's website or in the BORME (Companies Registry Journal) 48 hours prior to the date on which the meeting was due to be held.

- **Suspension of terms, obligations and rights**

- **Drafting and approval of the annual accounts.** The term of three months from closing of the financial year given to companies to draft their annual accounts has been extended to three months beyond the end of the state of emergency. The deadline for auditing those companies that have already drafted their annual accounts is also pushed back to two months after the end of the state of emergency. As a result, the deadline for approving the annual accounts will be three months from the date on which they are ultimately drafted pursuant to the above paragraph. In other words, if the state of emergency ends on 1 April 2020, companies will have until 1 July to draft their accounts and until 1 October 2020 to approve them.
- **Wind up.** If before or during the state of emergency a company is in a position requiring its mandatory wind-up, the directors do not have an obligation to call a GSM until the state of emergency has ended and they will not be liable for the company's debts generated during the state of emergency.
- **Exit rights.** Shareholders cannot exercise their exit rights during the state of emergency.
- **Registry entries.** The term of expiry for filings, precautionary annotations, comments, marginal annotations and other registry entries that are cancellable due to the passing of time are suspended.

- **Duty to file for insolvency.** Debtors that are insolvent do not have an obligation to file for insolvency until the state of emergency comes to an end. Debtors that have notified the court that negotiations have been opened with creditors in accordance with the provisions of article 5 bis of the Spanish Insolvency Law will not be subject to that obligation either, even if the term for doing so has expired.
Judges will not process mandatory insolvency applications filed during the state of emergency or during the two months following its end. If voluntary insolvency applications are filed, they will be given preference, even if they have been submitted at a later date.
- **Specific rules applicable to listed companies.** The following measures will apply to listed companies in the EU throughout 2020:

- **Deadline extensions.** The annual financial report and audit report can be published up to six months after closing of the financial year. That term will be extended by four months to publish interim management statements and the half-year financial report.
- **Remote board and general meetings and resolutions.** The annual shareholders meeting can be held within the first 10 months of the financial year.
The board may call the GSM to be held electronically and to have remote voting (subject to the terms established in articles 182, 189 and 521 of the Spanish Companies Law - the Ley de Sociedades de Capital). A GSM may be held anywhere in Spain. If the notice of the meeting had already been published before 18 March 2020 (i.e., entry into force of RD 8/2020), any of these measures may be announced in an additional notice which must be published at least five calendar days before the GSM.
If the measures imposed by the public authorities make it impossible to hold the GSM in the location established in the notice and it cannot be held electronically or using remote voting:

- If the GSM would have been held validly at that location, a decision can be made to go ahead with the meeting on that same date but at a new location within the same province, setting a reasonable timeframe for attendees to travel there.
- If the GSM could not be held, a notice can be sent changing the date of the GSM - which shall have the same agenda and be subject to the same publicity requirements as the GSM that has not been held - at least five days before the date initially set for the meeting. The latter notice of meeting may establish that the GSM will be held electronically provided that the attendees are offered the possibility of (i) attending electronically; (ii) being represented by the chairperson of the general meeting via remote communication; and (iii) voting in advance via remote communication. In these cases, it is understood that the GSM is held at the corporate domicile, irrespective of where the chairperson is located.

In the case of meetings and resolutions of the board (and audit committee insofar as this body has an obligation to inform the board previously), they will be valid if held and passed electronically provided that the board members have the means necessary for attending and voting on resolutions electronically and the board secretary is able to identify the members. Remote electronic meetings of the board are considered to take place at the company's corporate domicile.

Tax. RDL 8/2020 clarifies a number of questions raised as a result of the previous provision regarding the potential suspension of terms to file tax returns and self-assessments. It has confirmed that the state of emergency does not affect the terms for doing so and that tax payers continue to have an obligation to file their tax returns and self-assessments as before.

CONTROL OF FOREIGN DIRECT INVESTMENTS (FDI)

Suspension of the rules governing the liberalisation of foreign investments. In order to mitigate the threat of Spanish listed and unlisted companies being acquired by foreign investors, Law 19/2003, of 4 July, is amended to suspend the provisions governing the liberalisation of certain direct foreign investments in Spain (which are as a result subject to the authorisations regime established in that law).

This measure affects investments in the sectors listed below made by residents from non-EU and non-EFTA states when they come to hold a shareholding interest equal to or greater than 10% or, as a result of the transaction, come to take part in the management or control of the Spanish company:

- critical infrastructure (energy, transport, water, health, communications, media, data processing and storage, aerospace, defence, electoral or financial and sensitive facilities) and land and property that are key for their use;
- critical technology and dual use products (those - including software and technology - that have a civilian use but that can also be used for the manufacture of nuclear weapons or other explosive nuclear devices);
- supply of fundamental inputs (energy, raw materials and security of the food supply);
- sectors with access to sensitive information;
- the media; and
- other sectors that the Spanish Government decides might have an impact on public safety, public order or public health.

Provisions are also included to suspend the rules of liberalisation in the case of specific investors, irrespective of the sector involved, if:

- the investor is directly **or indirectly** controlled by the government of another state;
- the investor has made investments or has taken part in sectors that affect public safety, public policy or public health in another member state; and
- action has been brought against the investor in another state on grounds of having engaged in criminal or unlawful conduct.

This exception to the liberalisation rules is indefinite and will be in effect until lifted by the Council of Ministers. Investments made without the required prior authorisation will be invalid and legally void until they have been properly legalised.

In addition, breach of the restrictions constitutes a very serious offence, which would lead to a fine (which could amount to the sum of the transaction) and public or private reprimand.

PUBLIC LAW, ENERGY AND WATER, TELECOMMUNICATIONS AND PHARMACEUTICAL SECTORS

PUBLIC PROCUREMENT

RDL 8/2020 establishes a set of measures to prevent the possible negative impact on employment and companies as a result of the potential suspension of public contracts, preventing public sector companies from terminating them.

- In the case of **public services contracts and continuous supply contracts**, RDL 8/2020 provides that they can be suspended if performing them is impossible as a result of the state of emergency or measures adopted by the Government, the Autonomous Regions or local authorities due to COVID-19. **Suspension** will only apply when the procuring authority, upon receipt of a request from the contractor, understands that the contract cannot be performed, in which case it will issue a decision within five days of the contractor's request (lack of response will constitute a denial of the request).
- RDL 8/2020 establishes the following **items are eligible for indemnification**: salary expenditures paid by the contractor, expenses connected to the maintenance of a definitive performance bond, expenses connected to the rental or maintenance of machinery, installations and equipment, provided that evidence is provided that they have not been used for different purposes, and the expense of insurance policies established in the terms and conditions and connected to the scope of the contract.
- As for **services and supply agreements**, it is possible for the procuring authority to extend the initial term or then-current extension of the contract when the contractor delays in performance as a result of the measures adopted by the public authorities due to COVID-19. The extension will be the same as the time lost as a result of the measure adopted by the public authority; the contractor may also request a shorter extension.
- In the case of **construction contracts**, a contractor may request to suspend the contract if it is impossible to continue performing the work; the suspension would last from the event that makes it impossible to continue performing the contract until it is possible to resume the work. The contractor would have to apply to the procuring authority for the suspension and the latter would then have five days from the application to issue its decision (lack of response will constitute a denial of the request).
- The following **expenses shall be eligible for indemnification**: salaries that the

contractor has effectively paid to workers engaged for the ordinary performance of the contract during the period of suspension, expenses incurred in maintaining the definitive performance bond during the period of suspension, expenses connected to the rental or maintenance of machinery, installations and equipment, provided that the contractor provides evidence that they have not been used for purposes other than performance of the suspended contract and the amount is less than the cost of terminating those contracts for the rental or maintenance of machinery, installations and equipment, and the expense of insurance policies established in the terms and conditions and connected to the scope of the contract, which the contractor has taken out and that remain in force when the contract was suspended.

- In the case of **works concessions and services concession contracts**, RDL 8/2020 does not establish that they can be suspended. It allows for the restoration of the financial equilibrium of the contracts, whether by extending the contracts' initial term by up to 15%, or by modifying their pecuniary clauses.
- It should be pointed out that RDL 8/2020 applies to **public procurement in special sectors** subject to Law 31/2007, of 30 October, on public procurement processes in water, energy, transport and postal services sector and to Book I of Royal Decree-law 3/2020, of 4 February, on urgent measures that transpose into Spanish legislation certain directives of the European Union with regard to public procurement in certain sectors; private insurance; pensions funds and schemes; tax and tax disputes.

Finally, the following contracts are **excluded** from the scope of application of RDL 8/2020:

- Medical, pharmaceutical and other service and supply contracts the scope of which are connected to the public health crisis caused by COVID-19.
- Security, cleaning and IT systems maintenance contracts.
- Services and supply contracts necessary to ensure the mobility and security of infrastructure and transport.
- Contracts awarded to those public entities listed on the official markets and that do not obtain income from the General State Budget.

ENERGY AND WATER

Guaranteed supply of water and energy to vulnerable consumers

RDL 8/2020 includes the following measures that extend the supply of essential public services to vulnerable collectives, in particular water, natural gas and electricity; the regulated prices of bottled liquefied petroleum gases and the last resort tariff rate for natural gas are also frozen.

- In relation to **water, electricity and gas**, the supply of domestic drinking water is considered an essential service, which must be guaranteed. As such, during the month following the entry into force of RDL 8/2020, the water supply to vulnerable consumers cannot be cut off for breach of contract; consumers are considered to be vulnerable in line with electricity regulations. This measure also applies to consumers of natural gas and electricity.

In these circumstances, the role of energy suppliers is even more critical, especially for consumers who are most at risk. Thus, to ensure that electricity discount (bono social) beneficiaries continue to receive the discounts and benefits established in regulations, they will be extended automatically until 15 September 2020 if the two-year term established for those benefits runs out.

- In the case of **liquefied petroleum gases**, the new provision suspends the review of the maximum after-tax retail prices of bottled liquefied petroleum gases for the next three two-month periods to prevent the price of those products rising.
- As for **natural gas**, the application of the methodology for calculating the last resort tariff rate of natural gas and, as a result, for reviewing the variable component, is suspended for the next two quarters.
- The tariff rate established in Resolution dated 23 December 2019, issued by the Directorate General of Energy Policy and Mining, which publishes the last resort tariff rate for natural gas will apply during the suspension.

TELECOMMUNICATIONS

Guaranteed electronic communications and broadband connectivity

RDL 8/2020 includes the following measures that extend **telecommunications services** during the state of emergency:

- Companies that provide electronic communications services must continue to provide the communications services that customers have engaged. As a result, those services cannot be suspended or interrupted for reasons other than to safeguard the integrity and security of the networks and services themselves.

- Certain measures are established to guarantee continuity of the universal telecommunications service. The electronic communications service provider designated to provide the universal telecommunications service will ensure that the elements comprising that service are provided and will keep at least the current beneficiaries, the quality of the set of services making up the universal service, with special reference to (i) functional access to the Internet, and (ii) the affordability of the universal telecommunications service.
- A number of limitations are established regarding the subscription of electronic communications services that require number portability; as a result, the portability of all fixed and mobile telephone numbers that are not already applied for has been suspended other than in exceptional circumstances.

FREEZING OF ADMINISTRATIVE TIME PERIODS

RD 463/2020 suspended deadlines and interrupted terms for proceedings pursued before public sector entities. Royal Decree 465/2020, of 17 March, which amends Royal Decree 463/2020, of 14 March, which declares the state of emergency to tackle the health emergency caused by COVID-19, clarifies the proceedings not affected by suspension:

- Proceedings related to Social Security membership, payment and contributions; and
- tax proceedings: the suspension of deadlines and interruption of terms does not apply to tax terms and deadlines, which are subject to special regulations, in particular, the terms within which to submit tax returns and self-assessments.

In addition, public sector entities are able, by issuing grounded reasons for doing so, to decide to continue administrative proceedings that are underway (i) connected to situations that are closely related to the events that triggered the state of emergency, or (ii) that are essential to protect the general public interest or to ensure the basic operation of services.

PHARMACEUTICALS SECTOR

The Spanish Medicines Agency (*Agencia Española de Medicamentos y Productos Sanitarios*, or AEMPS) has declared that Order SND/233/2020, of 15 March, which establishes certain information obligations in accordance with the provisions of RD 463/2020, applies to Spanish and foreign entities located in Spain that manufacture and/or import any of the products listed in paragraph three of the Order. However, it does not apply to the individuals or entities that are the users of those products, or that use their own production or distribution processes.

- **RDL 8/2020** includes measures aimed at bolstering the fight against the disease, some of which apply to this sector in relation to **public medicine supply contracts**, which are summarised in the public procurement section above.
In any event, **RDL 8/2020 does not apply to medical, pharmaceutical or other services or supply contracts that are linked to the public health crisis caused by COVID-19.**
- **AEMPS guidelines for the pharmaceutical production and distribution sector in the event of COVID-19 contagion.** As the services provided by manufacturers or distributors of medicines and medical devices are mostly essential as they are currently critical to ensure the proper supply of medicines, medical devices and biocides used as skin antiseptics and disinfectants for clinical and surgical areas, AEMPS has published a series of recommended courses of action in the event of COVID-19 contagion in those entities.
Although the staff working in those entities are not strictly health or medical personnel, as they do not work in a clinical environment where the risk of exposure is greater, AEMPS has issued a number of guidelines to ensure the continuity of the essential activity that they perform.
- **Clinical trials.** AEMPS has published an informative note (4/2020) on the exceptional measures applicable to clinical trials in the context of COVID-19 infection with the aim of safeguarding, as far as possible, the trial, the safety and welfare of patients and the reliability of trial results. It makes a number of recommendations on scheduled in-person testing patients, patient access to trial medication, scheduled monitoring, and the transfer of patients among clinics. These measures may be adopted without authorisation from AEMPS or from research ethics committees. However, any change to the clinical trial protocols must be reported within four months following the end of the COVID-19 crisis.
- **Supply of veterinary medicines.** AEMPS has issued a statement that, as the veterinary medicine sector is strategic to protecting the public food supply, protecting health conditions in livestock businesses and preventing the transmission of diseases to people, the continuity of the manufacture, distribution and supply of those medicines must be guaranteed, as well as the movement of people and the transport of products essential for performance of those activities.

COMPETITION

- **State aid.** On 16 March 2019, the European Commission (the “**EC**”) sent a proposal to the EU Member States for a temporary framework of state aid aimed at supporting the

economy in the context of the COVID-19 outbreak. The proposal aims to tackle the economic problems generated by the health crisis by implementing the following measures made available to the Member States:

- direct grants or tax advantages of up to €500,000 to companies facing liquidity problems;
- subsidised State guarantees on bank loans or investment or working capital loans for companies via subsidised premiums, with reductions on the estimated market rate for annual premiums for new guarantees for SMEs and non-SMEs. There are some limits foreseen on the maximum loan amount, which are based on the operating needs of the companies (established on the basis of the wage bills or liquidity needs); and
- public and private loans with subsidised interest rates, both for investment and working capital loans. These loans must be granted at an interest rate, which is at least equal to the base rate applicable on 1 January 2020 plus the credit risk premium corresponding to the risk profile of the recipient, with different rates for SMEs and non-SMEs. There are also some limits regarding the maximum loan amount, which are based on the operating needs of the companies (established on the basis of the wage bills or liquidity needs).

The EC's proposal also includes a series of measures to ensure that the largest volume of aid channelled through the banking system reaches their customers, whether in the form of greater volume of financing or lower interest rates. Equally, the direct aid granted to banks to offset the damage caused by the current health crisis will not constitute extraordinary public support under the TFEU's normal State aid rules.

Beneficiaries of the aid must prove that they have entered into financial difficulty after 31 December 2019 to ensure that the measures are not used to mitigate financial difficulty unconnected to the present health crisis.

The EC has made a commitment to put the framework in place and to approve the financial support as quickly as possible. On 17 March the EC approved the templates that should be used to notify the public aid under this temporary framework (the press release is available [here](#)).

- **Consumption.** Article 21 RDL 8/2020 establishes the interruption of terms for returning products acquired in person and online for the duration of the state of emergency or any extensions of the same. Terms will resume when RD 463/2020 or any extensions of that provision are no longer in force.
-

FOOTNOTES:

1. Includes the possibility of requesting change of shifts, changes to working hours, flexible working hours, split or continuous day, a change of workplace, change of role, changes to how work is performed or any other change to working conditions provided that this is available in the company or can be implemented in a reasonable and proportionate manner.

RELATED ARTICLES

- [COVID-19 Madrid: Potential legal impact \(16 March 2020\)](#)

[COVID-19: EUROPE](#)

[MORE ON COVID-19](#)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



MIGUEL RIAÑO
MANAGING PARTNER,
MADRID



IGNACIO PAZ
PARTNER, MADRID

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2021

SUBSCRIBE TO STAY UP-TO-DATE WITH LATEST THINKING, BLOGS, EVENTS, AND MORE

Close