

COVID-19: POTENTIAL LEGAL IMPACT (SPAIN)

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Legal Briefings

In recent days, different measures have been adopted to counter the exceptional situation generated in Spain by COVID-19, including Royal Decree 436/2020, of 14 March, which declares the state of emergency to tackle the health emergency caused by COVID-19 ("**RD 463/2020**"). The situation is highly complex and rapidly changing; as a result, so as to provide clients with clear and up-to-date information that they might find useful, we have prepared this (non-exhaustive) e-bulletin on the situation's potential impact on the different areas of business.

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EMPLOYMENT

The following aspects should be highlighted:

- In general, employees still have an **obligation to go to work¹ unless:**

- they are on sick leave;
- they have been allowed to work from home²;
- they have tested positive for COVID-19, in which case they put on leave from work due to accident;
- they are officially in quarantine or contagion in respect of COVID-19.
- If companies are especially impacted by the situation and suffer loss of production and are **unable to provide their services as usual**, Spanish law fundamentally offers two processes:

- Suspension of employment contracts or reduction of working hours on objective grounds (economic, technical, organisational or productive) or force majeure;
- Collective termination of employment contracts on objective grounds (economic, technical, organisational or productive) or force majeure;

For the above purposes, **force majeure** includes: i) suspension or cancellation of all activities indicated in RD 463/2020; ii) urgent or extraordinary circumstances caused by the spread of COVID-19 among staff members or the adoption of measures entailing preventive isolation, for which proper evidence must be provided; iii) lack of supplies that severely prevent the performance of normal business or that cause the suspension of certain employment activities as a result of COVID-19.

- The **suspension of terms and proceedings** mentioned in the Litigation and Insolvency section will not affect collective disputes and the safeguards to fundamental rights and freedoms.
A number of Autonomous Regions have begun to suspend conciliation and mediation proceedings – prior to court hearings – although on the basis of certain differences in criteria.
- It is expected that the **extraordinary measures** that will soon be adopted by Spain's Council of Ministers will mitigate and alleviate the situation faced by companies and their employees. Specifically, these measures will: i) provide support to workers, employees

self-employed workers, families and groups most at risk; ii) relax mechanisms aimed at temporarily reducing the workforce (ERTE) to avoid redundancies, and iii) bolster economic activity to guarantee liquidity in the face of the connected financial crisis. It will therefore be necessary to stay abreast of developments in this regard as and when they occur.

INSURANCE

From an insurance perspective, a number of covers will be affected by the situation caused by COVID-19.

- **Healthcare, travel cancellation and event cancellation policies** have biggest exposure to the current situation. The Spanish insurance sector association (UNESPA) has guaranteed coverage under its healthcare policies. As for travel and event cancellation policies, this will depend on the terms and conditions and exclusions in each contract.
- In companies' normal business activities, **cover against loss of profits and, on occasions, credit and surety insurance cover** may help to confront the crisis. When loss of profit is part of a property insurance, it is generally associated with a physical damage; however, in some cases coverage is triggered in the event of closure or the inability to enter insured installations due to orders from a local authority.
- In the case of **credit or surety insurance**, whether or not they are triggered will depend on the specific definition of default risk covered, so the assessment must be made on a case-by-case basis.
- Other **policies such as third party liability or even D&O liability** may be triggered by company decisions made in the context of contingency plans or measures adopted to protect workers or third parties. In this context, it cannot be ruled out that claims may be filed against companies for personal damage due to exposure to COVID-19.
- In Spain, **extraordinary risks** are generally excluded from cover in commercial policies and are covered by the *Consortio de Compensación de Seguros*, or CCS). Does a state of emergency (*estado de alarma*) constitute an extraordinary risk? The Regulation of Extraordinary Risks (Royal Decree 300/2004) lists the circumstances included under the CCS cover, both in the case of natural risks and political risks. Pandemics and epidemics are not on that list. Indeed, art. 6.k) excludes from cover damage produced by covered risks if "losses are classified by the Spanish Government as a national calamity or

catastrophe due to the magnitude or severity thereof". Loss of profit – associated with a covered event – is included in the list of CCS cover; it would certainly be effective for the CCS cover to include loss of profit resulting from the economic standstill caused by COVID-19, and this is what certain collectives have been calling for. However, it must be borne in mind that this risk was not provided for and surcharges over insurance premiums payable to the CCS must respect the principles of insurance practice.

- In any event, we must be aware that, in this situation, the interpretation of private contracts may be affected by any governmental decisions taken.

The answer to whether or not a policy covers a specific situation will depend, essentially, on the wording of that policy. It would therefore be advisable to review the wording of policies and, if necessary, request advice to ascertain the true scope of cover or need for notification.

LITIGATION AND INSOLVENCY

The following aspects should be highlighted:

- **Ongoing legal proceedings.** The Royal Decree declaring a state of emergency in Spain has suspended scheduled legal proceedings and procedural deadlines. The suspension will not, however, prevent urgent legal proceedings from going ahead, or others that would otherwise cause irreparable damage (e.g. requests for urgent injunctive relief).
- **Suspension of statutory limitations.** The Royal Decree declaring a state of emergency has also suspended statutory limitation periods and expiration periods applicable to actions or rights for the duration of the state of emergency.
- **Impact on the enforcement of commercial contracts.** The immediate consequences of administrative measures aimed at curbing the spread of COVID-19 may well have an impact on the normal progress of commercial relations. Specifically, as stated above, parties to contracts might (i) claim force majeure (if it is objectively impossible to fulfil their contractual obligations); (ii) argue that an extraordinary change in circumstances has taken place (triggering MAC or hardship clauses) meriting an amendment to the mutual contractual obligations; or (iii) bring court or out-of-court action aimed at ensuring the satisfaction of their rights under the contract (e.g. enforcement of guarantees).
- **Distress.** Given the potential for payment default, it is highly likely that cash stress will lead to actual or imminent insolvency or capital impairment. In any of those scenarios it may be necessary to adopt certain structural measures, to extend financing or to refinance debt to avoid widespread payment default and a raft of pre-insolvency notices.

- **Liability of directors or officers.** In the above scenarios it is important for corporate officers to place the interests of the company before their own personal interests to avoid civil or criminal liability.

CORPORATE, FINANCING AGREEMENTS AND TAX

- In general, an analysis should be conducted in **all commercial contracts** as to the **potential or risk of terminating the contracts or modifying their essential terms**.
- Different grounds may be claimed, including force majeure, unforeseeable inability to perform the contract on the original terms or material adverse change (whether by applying MAC clauses included in contracts or the hardship (*rebus sic stantibus*) principle).
- In particular, in the case of transactions where closing is pending the fulfilment of conditions precedent (i.e., **transactions between execution and closing**), there is a **risk of termination - and the transaction ultimately not achieve closing** - for good cause and with no compensation payable to any of the parties on those grounds.
- In the case of **transactions or contracts under negotiation**, it is important to closely consider the inclusion of MAC clauses and their wording, taking into account the unpredictable impact of a situation that is, on the other hand, already existent and known to the parties during the negotiations and when the contract is ultimately signed.
- As for **corporate governance and, specifically, the annual general meetings of shareholders and meetings of a company's collegiate bodies**, given the current situation it is particularly important for companies to have the possibility to hold meetings electronically.
- Spain's Stock market regulator, the *Comisión Nacional del Mercado de Valores* or CNMV, has expressly announced that "*the boards of listed companies are afforded maximum flexibility to adopt measures and solutions to help safeguard people's health and prevent the spread of the virus - even though they are not expressly provided for in their articles of association, meeting rules or in meeting notices - provided that those measures guarantee that members shall be able to exercise their information rights, their right to attend and vote at meetings and equal treatment among those with the same standing*".

The CNMV has also recognised the lawfulness of general meetings fully held by electronic means.

- Although yet to be announced, it is expected – as has occurred in other countries – that companies will be permitted to push back the date of their AGMs.
- In the case of the **capital markets**, any **prohibitions or restrictions imposed by market regulators must be taken into account**. For example, the CNMV recently approved a prohibition on "short selling" in respect of certain Spanish listed companies.
- Particularly in the case of **financing agreements**, in order to determine the degree to which MAC clauses would apply to each specific case, a case-by-case analysis would have to be conducted on the impact on the status of the business, the activity and on the assets of the obligors as well as their ability to fulfil their obligations under the financing agreements.
- From the perspective of **tax**, as well as recurrent advice on any legal measures ultimately adopted, it will be necessary to analyse the tax impact of potential contract terminations and payments ultimately made as a result. It should also be taken into account that the state of emergency declared has frozen the terms of all administrative proceedings (including tax proceedings), as well as statutory limitation and expiry periods in relation to tax.

PUBLIC LAW: ENERGY, PHARMACEUTICAL SECTOR. DATA PROTECTION

PUBLIC AND ADMINISTRATIVE LAW

- From the perspective of **public procurement**, an analysis ought to be conducted into the potential impact of COVID-19 as grounds for amending the contract, exoneration from breach of the contractual obligations or suspension of the term, and especially, the possibility of requesting the restoration of the financial equilibrium of service concession contracts on those grounds.
In addition, article 16 of the newly approved Royal Decree-law 7/2020, of 12 March, which adopts urgent measures to respond to the economic impact of COVID-19, establishes that a fast-track, emergency process will apply to any contracts required to meet needs connected to protecting the public and other measures adopted by the Spanish Council of Ministers to counter the impact of COVID-19. This means that the procuring authority may award a contract without needing to undergo a procurement process, without being subject to the formal requirements established by law, even those

regarding the existence of sufficient funding, by notifying the Council of Ministers (if involving the Central Spanish Administration) within 30 days.

- With regard to the impact on the **contentious administrative** jurisdiction, RD 463/2020 suspends all procedural terms and deadlines (minus certain exception as pointed out in the Litigation section), which will resume once the Royal Decree, or extensions of the Royal Decree, becomes void (it is initially valid for a period of 15 days, but may be extended).
However, a specific competent body may decide, by properly justified resolution, to impose measures as may be necessary prevent serious harm to the rights and interests of parties to a proceeding provided that the latter agrees or when that party gives its consent to the term not being suspended.
- Furthermore, **statutory limitation and expiry periods** in respect of any actions and rights will be suspended until the state of emergency (or any extensions of the same) comes to an end.
- In the case of **public subsidies**, an analysis should be conducted into the potential impact of COVID-19 as grounds for: (i) modifying the decision awarding the subsidy, (ii) extending the term to complete the subsidised project or activity, (iii) extending the term for justifying the subsidy or (iv) release from liability for reimbursement in the event of breach of the purpose claimed for the subsidy, the terms and conditions or commitments inherent to the subsidy having been granted (such as the generation or maintenance of employment or investment) or the obligation to provide justification.

RENEWABLE ENERGY GENERATION

In the case of **renewable energy**, an analysis should be conducted into the potential impact of COVID-19 (related, among other things, to the delivery of equipment by suppliers, the awarding of permits or the completion of work by contractors) as grounds for release: (i) from the term for completion of the requirements under article 46 of Royal Decree 413/2014, of 6 June ("**RD 413/2014**") in the case of renewable energy plant awarded at auction, or (ii) in relation to the expiry date of access and connection permits pursuant to Eighth Transitional Provision of the Spanish **Electricity Sector Law 24/2013**, of 26 December.

In addition, the **suspension of administrative terms and deadlines established by RD 463/2020** will have a particular impact on the fulfilment of two key deadlines for certain electrical power generation plants:

- On the one hand, **plants awarded specific remuneration** in the allocation procedure for new biomass power plants located in the Spanish peninsula and wind power plants, which was announced by **Order IET/2212/2015, of 23 October**. According to article 15.7 of the Order, those plants had an obligation to **comply with the requirements established in article 46 RD 413/2014** within 48 months counted from 28 March

2016 (therefore, **by 28 March 2020**), which is the date on which Spain's Official Journal (the *Boletín Oficial del Estado*, or BOE) published the decision registering the plants' pre-allocation in the Specific Remuneration Register.

- On the other hand, and in general, it will have an impact on the **obligation of under-construction plants that obtained access and connection rights before Law 24/2013 entered into force** – pursuant to that Law's eighth transitional provision – to obtain a definitive start-up certificate before 31 March 2020 so as to avoid those rights expiring.

In both cases (the requirements of article 46 RD 413/2014 include having achieved definitive registration in the Administrative register of electricity generation facilities and having started to feed power into the grid, which requires a start-up certificate having been obtained beforehand), the **suspension of terms decreed by RD 463/2020 could lead to the respective deadlines being pushed back accordingly.**

Indeed, both a definitive start-up certificate and registration in the Administrative register of electricity generation facilities are administrative processes, the terms of which³ would be affected by the suspension.

It should be pointed out, nevertheless, that the suspension only affects the administrative processes themselves; **it does not affect applicants' obligations to submit their applications on time.** This means that the owners of facilities must submit or have submitted a request for an extension for obtaining the start-up certificate or for definitive registration sufficiently in advance of the respective deadlines for doing so; the suspension would only apply after such a request has been submitted.

PHARMACEUTICAL SECTOR

Last week the Spanish Government adopted measures aimed at guaranteeing stocks of medicines, medical devices and other products necessary to protect public health, as we outline below.

However, by declaring a state of emergency, the Spanish Health Minister (article 13 of RD 463/2020) is now authorised to issue any orders necessary to secure stocks and the supply of goods and services necessary to safeguard public health, to temporarily commandeer and occupy industries, factories, workshops, businesses and premises, including private health centres and establishments, as well as any performing business in the pharmaceutical sector. RD 463/2020 also authorises the Health Minister to temporarily requisition goods and demand mandatory service provisions as may be required to protect public health.

On 15 March, the Health Minister issued a number of ministerial orders, including Order SND/233/2020, which instructed all Spanish and foreign companies in Spain that produce and/or import certain medicines and medical devices, or with capacity to produce them, to report within two days on the number of units available and daily production volume of certain medicines (such as COVID-19 diagnosis kits or chlorhexidine) and medical devices (facemasks, gloves, mechanical ventilators ...).

- **The production and supply of medicines.** Companies must try to ensure the continuity of service. The Spanish Medicines Agency (*Agencia Española de Medicamentos y Productos Sanitarios*, or AEMPS) has increased monitoring of the supply of medicines and has called on companies to establish contingency plans to avoid supply shortage; it has also required pharmaceutical companies to report any abnormally high orders. In addition, Royal Decree-law 6/2020, of 10 March, has established (as measures to ensure public health) that, if a medicine, medical device or any product is affected by supply shortages, the health authorities may, in order to best guarantee distribution, order centralised distribution and even limit the prescription and administration of those products to at-risk collectives.
- **Medicine prices.** Royal Decree-law 7/2020, of 12 March, includes a modification to article 94. 3 of the Medicines Law (RDL 1/2015), which allows the Spanish Government to regulate the price of medicines and medical devices that do not require medical prescription (which are freely priced), as well as other products necessary to protect public health dispensed in the Spanish territory. Furthermore, in an exceptional health crisis, in order to safeguard public health, the Inter-ministry Commission for Medicine Prices (*Comisión Interministerial de Precios de los Medicamentos*) is able to set maximum retail prices for medicines and products for the duration of the exceptional situation.
- **Public medicine supply contracts.** Article 16 of Royal Decree-law 7/2020, on public procurement, establishes that contracts required to meet the needs connected to the protection of people and other measures adopted by the Spanish Council of Ministers to counter the impact of COVID-19 will be fast-tracked. In other words, according to article 120 of the Spanish Public Procurement Law, the procuring authority, without having to undergo a procurement process, may order the performance of whatsoever work or service to satisfy the sudden need, or freely contract those services or work totally or partially, without being subject to the formal requirements established by the law, including the existence of sufficient funding, for which it must notify the Council of Ministers (if involving the Central Spanish Administration) within 30 days. In the case of supplies that have already been awarded, modifications may be made to contracts with the aim of giving priority and bringing forward the supply of certain medicines and necessary products.
- **Clinical trials.** Modifications may be made to ongoing clinical trials protocols so that the test does not interfere with the care provided by hospitals, although at the same time protecting the health of test subjects. AEMPS is monitoring the situation and will issue

instructions regarding the tests, the medicines received by patients or monitoring.

- **Scientific congresses and meetings sponsored by pharmaceutical companies have been cancelled.** It is clear that these cancellations can be considered to have been caused by force majeure. Although a case-by-case analysis would have to be conducted, there are valid legal arguments to challenge the application of penalties or the refusal to reimburse reservations paid as a result of cancellations caused by the spread of COVID-19.

DATA PROTECTION

On 12 March the Spanish Data Protection Agency (AEPD) published a report in which it analyses the emergency generated by COVID-19. The report concludes that the General Data Protection Regulation (GDPR) contains provisions necessary to allow the lawful **processing of personal data** in the event of a widespread health emergency. According to the report, data protection cannot be used to hinder or limit the effectiveness of measures adopted by the authorities, most especially the health authorities, when fighting the pandemic.

Equally, regarding the application of employment and health and safety regulations, the report concludes that employers may, in observance of the regulations and the safeguards established in them, process the data necessary to protect the health of their staff and to prevent contagion within their company and/or places of business.

Finally, the report highlights that, even in a health emergency, data must be processed in accordance with the data protection regulations (GDPR and Organic Law 3/2018 on Personal Data Protection and the guarantee of digital rights), as those regulations have specifically provided for these circumstances and their principles therefore continue to apply. This means that data must be processed lawfully, faithfully and transparently, and subject to purpose limitation (in this case, to protect people's interests in the face of the pandemic), the principle of data accuracy and the principle of data minimisation. In the case of the latter, the report refers specifically to the fact that processed data must be limited exclusively to those required for the purpose sought; i.e. the processing cannot extend to any other data that is not strictly required for that purpose.

COMPETITION

- **Anti-competitive practices.** Competition rules continue to apply in full. Cartel arrangements among companies – whether that be price fixing, supply coordination or market sharing – are still forbidden and are not justified by the current situation (cartels are prohibited even if they arise out of a crisis). Other co-operation agreements between undertakings, such as co-operation agreements to ensure the supply chain, may

however be compatible with antitrust rules. Competition authorities have announced that they intend to be especially vigilant of potential abuses or practices that hinder or increase the price of products necessary for healthcare. In a press release published on 12 March, the CNMC called on the general population to help in detecting anti-competitive practices through resources on the CNMC website. In particular, that CNMC has warned of abusive price fixing or arrangements among competitors affecting products or services necessary for healthcare or related markets (the press release is available [here](#)).

- **State aid.** Aid approved by states to compensate companies for the damage suffered as a result of COVID-19 could constitute state aid, which must be reported and approved by the European Commission. The European Commission is considering relaxing its rules on state aid and to take swifter action. It has already approved, in less than 24 hours, a first aid package to compensate the cancellation of large public events in Denmark as a result of COVID-19. In a press release published on 12 March, the Commission announced that a €12 million aid package announced by the Danish authorities to compensate organisers for damage suffered as a result of the cancellation of large events attended by more than 1,000 people as a result of the crisis is compliant with EU state aid rules. The Commission states that to date it had been the first and only case of state aid reported to the Commission by a member state in relation to COVID-19 (the press release is available [here](#)).

REAL ESTATE

The following potential scenarios should be taken into account:

- In the case of **lease agreements**, and given the restrictions on trade and business in general caused by the closure of premises, stores, restaurants, etc., an analysis should be conducted, from the perspective of both the landlord and the tenant, on the impact of it being impossible to fulfil obligations under the agreement due to force majeure (the Government-ordered closure) and the possibility of claiming this as a potential justification for suspending and/or delaying payment of the rent (which would have to be carefully assessed on a case-by-case basis and take into account proportionality, the balance of reciprocal considerations and obligations, etc.).
- In the case of **construction projects**, COVID-19 could well have an impact on the developers and contractors in the performance of construction work and the potential delay that this could cause to agreed construction schedules, especially if there is a break in the supply chain of materials, labour, and even delays on the part of the authorities when processing permits and licences required for projects to continue.

FOOTNOTES:

1. However, this would be impossible in the case of retail stores and other establishments that have been closed to the public.
2. If companies choose to allow their employees to work as normal but from home, health and safety regulations must still be taken into account. As a result, employees must be given proper training on the use of the technical equipment that they will be using as well as on compliance with health and safety rules in their homes while they work.
3. Established in a month when competence falls to the General State Administration, in accordance with articles 40.2 RD 413/2014 and 132.2 of Royal Decree 1955/2000, of 1 December.

[COVID-19: EUROPE](#)

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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

+34 91 423 4004
miguel.riano@hsf.com



IGNACIO PAZ
PARTNER, MADRID

+34 91 423 4005
ignacio.paz@hsf.com

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