

COVID-19: Measures on Contracts and Corporate Activity

8 April 2020

1. BACKGROUND

The crisis caused by COVID-19 has led the Spanish Government to declare the state of alarm in Spain. This exceptional situation will be in force until 26 April, but it is likely the period will be extended until mid-May.

In this context, the Government has enacted a number of measures. We briefly summarize below the implications of such measures on contracts and corporate activity. We will keep you informed of additional measures supplementing/amending these.

2. THE IMPACT OF CORONAVIRUS ON CONTRACTS

Is the coronavirus crisis a valid cause to suspend, amend or terminate contracts in force? The short answer to this question is NO. In principle, obligations under contracts in force should be performed. However, it is important to note that where exceptional and/or unforeseeable circumstances arise, Spanish courts acknowledge the possibility to suspend, amend or even terminate contracts the fulfilment of which have become impossible or excessively onerous by applying the force majeure and *rebus sic stantibus* principles. For more information regarding this matter, please click [here](#).

The measures generally provide for a freeze of deadlines to enforce rights. This means for contracts that, with minor exceptions, deadlines to claim have been suspended. This does not mean that claims cannot be filed before Spanish courts, but judicial proceedings shall only move forward once the state of alarm terminates.

Further to the above, is the time limit applicable to a contractual right to claim also suspended? The answer is YES: statute of limitation and expiration periods for all actions and rights are suspended while the state of alarm is in force.

Computation of suspended deadlines will resume upon expiration of the state of alarm. You will find more information regarding the suspension of procedural terms and statutory limitation periods [here](#).

3. INVESTING IN SPAIN DURING THE COVID-19 CRISIS

Can international investors continue investing in Spain during the COVID-19 crisis?

There is no additional restriction imposed on (i) investors from the European Union ("EU") or from countries within the European Free Trade Association ("EFTA"); and (ii) transactions with value below EUR 1 million. However, certain investments the value of which exceeds EUR 1 million carried out, directly or indirectly, by investors outside the EU or the EFTA have been restricted.

The Spanish government has a veto right over such investments when, as a result of a corporate transaction, the investor (i) holds a stake of at least 10% of a Spanish company or (ii) effectively manages the company or controls the investment, in any of the following strategic sectors:

- i. Critical infrastructures (including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, financial infrastructures, and sensitive facilities), as well as the real estate that is key for the use of those infrastructures;
- ii. critical technologies and dual-use products (including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, nanotechnologies and biotechnologies);
- iii. supply of energy and raw materials, as well as sectors related to food safety;
- iv. sectors with access to, and capacity to control, sensitive personal data; and
- v. media.

Moreover, regardless of the sector, investors from countries outside the EU or the EFTA which:

- i. Are, directly or indirectly, controlled by the government of a third country; or
- ii. have invested or carried out activities in safety, public order or public health industries in another member state of the EU; or
- iii. against whom administrative or criminal proceedings have been initiated

may be vetoed by the Spanish Government.

4. CORPORATE ACTIVITY DURING THE COVID-19 CRISIS

The most relevant measures affecting corporate activity during this exceptional period are:

- (a) Remote Board of Directors meetings: even if not explicitly provided for in their by-laws/articles of association, meetings of Board of Directors may take place (i) by

video or phone conference; or (ii) in writing, without holding a physical meeting. These meetings shall be deemed to have taken place at the company's registered address.

(b) Remote Shareholders' Meetings: even if not explicitly provided for in their by-laws/articles of association, Shareholders' Meetings may take place by video or phone conference.

(c) Deadline for drawing up of the annual accounts by the Board of Directors/directors: it is extended until the date falling 3 months after the end of the state of alarm. Obviously, companies can also draw up their annual accounts while the state of alarm is in force.

(d) Deadline for auditing of annual accounts: if the annual accounts were already drawn up before the state of alarm was declared (14 March 2020) or were drawn up while it is in force, the deadline for audit, either mandatory or voluntary, is extended until the date falling 2 months after the end of the state of alarm. Obviously, audit of annual accounts can also take place while the state of alarm is in force.

(e) Deadline for the Shareholders' meeting to approve the annual accounts: it is extended until the date falling 6 months after the end of the state of alarm.

(f) Amendment of the place and time of a Shareholders' meeting already called or revocation of the call: the place and time specified in the relevant call may be amended by the Board of Directors or the call may be revoked, if published before the declaration of the state of the alarm (14 March 2020) for the meeting to take place after such declaration.

If a call is revoked, the Board of Directors must call the Shareholders' meeting again within 1 month following the end of the state of alarm.

Spanish listed companies should in addition take into account the following measures:

(a) Deadline for publication and submission of annual financial reports and annual audit reports: it is now 6 months after the end of the financial year.

(b) Deadline for the Shareholders' meeting to approve the annual accounts: such meeting should take place within 10 months (instead of 6 months) after the close of the financial year.

(c) Holding, attending and voting at Shareholders' meetings: even if not explicitly provided for in the articles of association/by-laws, the Board of Directors may provide for (i) attending and voting the Shareholders' meeting via remote communications; and (ii) holding the meeting anywhere within Spain.

(d) Validity of decisions by the Board of Directors and audit committee adopted by videoconference or conference call: as an exception, this is permitted for the purposes of the publication and submission of annual financial reports and calling of the Shareholders' meeting, even if this is not envisaged in the articles of association/by-laws. The meeting will be deemed to be held at the company's registered office.

5. WHAT IF THE PROFIT DISTRIBUTION FOR 2019 HAS ALREADY BEEN APPROVED BY THE BOARD OF DIRECTORS?

Two alternatives may be followed in this scenario:

- (a) To change the profit distribution, without re-stating the annual accounts: this alternative is only possible where the Shareholders' Meeting had not yet been called prior to 1 April 2020.
- (b) To remove the profit distribution proposal from the agenda of the Shareholders' meeting: if the Shareholders' Meeting had already been called, the Board of Directors may submit a new profit distribution proposal for the approval of a new Shareholders' Meeting to be held (i) within 6 months after the end of the state of alarm (in case of a non-listed company); or (ii) not later than 10 months after the close of the financial year (in case of a listed company).

A third alternative, not expressly set forth in the law, would be to fully re-state the annual accounts. This would entail the automatic revocation of the Shareholders' Meeting call, in case it had already been issued.

Contacts



José María Balañá

Partner, Madrid
T +34 91 349 82 76
josemaria.balana@hoganlovells.com



Enrique de Pablos

Senior associate, Madrid
T +34 91 349 82 39
enrique.depablos@hoganlovells.com



Carlos Beltrán

Junior associate, Madrid
T + 34 91 349 82 39
carlos.beltran@hoganlovells.com

www.hoganlovells.com

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