



CECA MAGÁN
ABOGADOS

COVID-19

MAIN COMMERCIAL LAW IMPLICATIONS

Corporate and contractual consequences

20 March 2020

On 14 March, the Government declared the state of alarm by means of Royal Decree 463/2020, in order to take the necessary measures towards the management of the healthcare crisis caused by COVID-19.

As we find ourselves in an exceptional circumstance, uncertainties may arise as to **how to proceed in both the corporate and contractual areas.**

CORPORATE ISSUES

Suspension of the exercise of the SHAREHOLDER'S WITHDRAWAL RIGHT

Regardless of any legal or statutory cause, in capital companies the shareholders **may not exercise their right of withdrawal until the end of the state of alarm** or any of its extensions.

Call of the GENERAL SHAREHOLDERS' MEETING during the state of alarm

In the event that a General Shareholders' Meeting had been called prior to the declaration of the state of alarm and the date of the meeting were subsequent to the declaration of the state of alarm, **the management body may change the place and time set for the meeting** or, where appropriate, may **withdraw the agreement to call the meeting** by means of an announcement published at least forty-eight (48) hours in advance on the company's website and, if the company does not have a website, in the «Official State Bulletin».

If the management body agrees to withdraw the meeting of the General Shareholders' Meeting, it shall reconvene the meeting within the following month from the date on which the state of alarm has ended.

CORPORATE ISSUES (I)

Attending the General Shareholders' Meeting and the Board of Directors by means of videoconference

Article 40 of Royal Decree Law 8/2020, of 17 March, on urgent extraordinary measures to deal with the economic and social impact of COVID-19 establishes that, during the state of alarm, **meetings of the management bodies** of associations, civil and commercial companies, the governing council of cooperative business and the board of foundations **may be held by means of videoconference** in order to ensure the authenticity and bilateral or plurilateral connection in real time with image and sound of those attending remotely, even when the above is not provided for in their articles of association.

Likewise, the **resolutions of the Board of Directors may be adopted by written vote without a meeting**, provided that the Chairman of the Board of Directors agrees to do so and at least two (2) of its members request it.

However, the abovementioned measure is not foreseen for the General Shareholders' Meetings in non-listed companies and, for this reason, its general regime applies: (i) the use of means that certify the identity of the shareholder who wishes to intervene by telematic means; (ii) its prior regulation in the articles of association; and (iii) give written notice to the management body of their intention to intervene by this means.

DISSOLUTION of companies during the state of alarm

In the event that during the effectiveness of the state of alarm the term of duration of a company as provided in its articles of association is reached, **the company shall not be fully wound up until two (2) months have elapsed since the end of said state of alarm.**

If prior to the declaration of the state of alarm or during its effectiveness there is a legal or statutory cause for the dissolution of the company, **the legal period for convening the General Shareholders' Meeting shall be suspended until the end of the state of alarm.**

Finally, if the legal cause for the dissolution of a company takes place during the state of alarm, the management body shall not be liable for any liabilities incurred during that period.

CORPORATE ISSUES (III)

Extension of the term for the drafting and approval of the ANNUAL ACCOUNTS

According to Article 40.3 of Royal Decree Law 8/2020, of 17 March, on urgent extraordinary measures to deal with the economic and social impact of COVID-19, **the three-month term from the end of the fiscal year for the management body to draw up the annual accounts is suspended until the end of the state of alarm, and shall be resumed for a further three (3) months from that date.**

In the event that the management body has already drawn up the annual accounts for the previous fiscal year, the term for its accounting verification, if the audit is mandatory, shall be understood to be extended by two (2) months from the end of the state of alarm.

As a result of the foregoing, **the Ordinary General Shareholders' Meeting shall be held to approve the annual accounts within three (3) months from the end of the period for its drafting.**

Telematic attendance of the Notary Public at the General Shareholders' or Board of Directors' Meetings

If under the provisions of Article 203 of the Companies Act the management body or the shareholders with sufficient share capital have required the attendance of a Notary Public at General Shareholders' Meetings, **the Notary Public may attend and take minutes of the meeting by means of remote communication in real time** and which adequately ensures compliance with the notarial duties.

CORPORATE ISSUES (IV)

Term for compliance with the duty to file the application for INSOLVENCY PROCEEDINGS

If during the effectiveness of the state of alarm, a company is in a state of insolvency and, therefore, cannot regularly comply with its obligations, **it shall not have the duty to apply for the insolvency proceedings to be declared until two (2) months have elapsed from the end of such state.**

Furthermore, during the state of alarm and for two (2) months after its termination, **the judges shall not grant the applications for the necessary insolvency proceedings.** However, if during this period **applications for voluntary insolvency proceedings** are filed, they **shall be admitted for processing with preference**, even if they are of a later date.

Finally, companies which have informed the competent judge that they have entered into negotiations with creditors with a view to reaching a refinancing agreement, an out-of-court settlement or a proposal for an arrangement with creditors should not apply for a declaration of insolvency proceedings either.



ISSUES APPLICABLE TO LISTED COMPANIES

Attending General Shareholders' Meetings and Board of Directors' Meetings in listed companies

In the event that **General Shareholders' Meetings are held in listed companies, the Board of Directors may provide in the call to the meeting for attendance by telematic means and remote voting**, as well as for holding the meeting anywhere in Spain, even though these matters are not provided for in the Articles of Association. If the call to meeting has already been published before the declaration of the state of alarm, the foregoing may be provided for in a complementary notice to be published at least five (5) calendar days before the date scheduled for the holding of the aforementioned meeting.

The Ordinary General Shareholders' Meeting for the approval of the annual accounts may be held within the first ten (10) months of the fiscal year.

In addition, the **resolutions of the Board of Directors shall be deemed effective if adopted by videoconference or multiple telephone conference**, even if this possibility is not foreseen in the articles of association, provided that all the directors have the necessary means to do so and the secretary acknowledges their identity, which shall be recorded in the minutes and in the certification of the resolutions issued. In this case, the meeting shall be deemed to be a sole meeting held at the registered office.



Release and submission of the annual and half-yearly financial report and audit report to the Spanish National Securities Market Commission

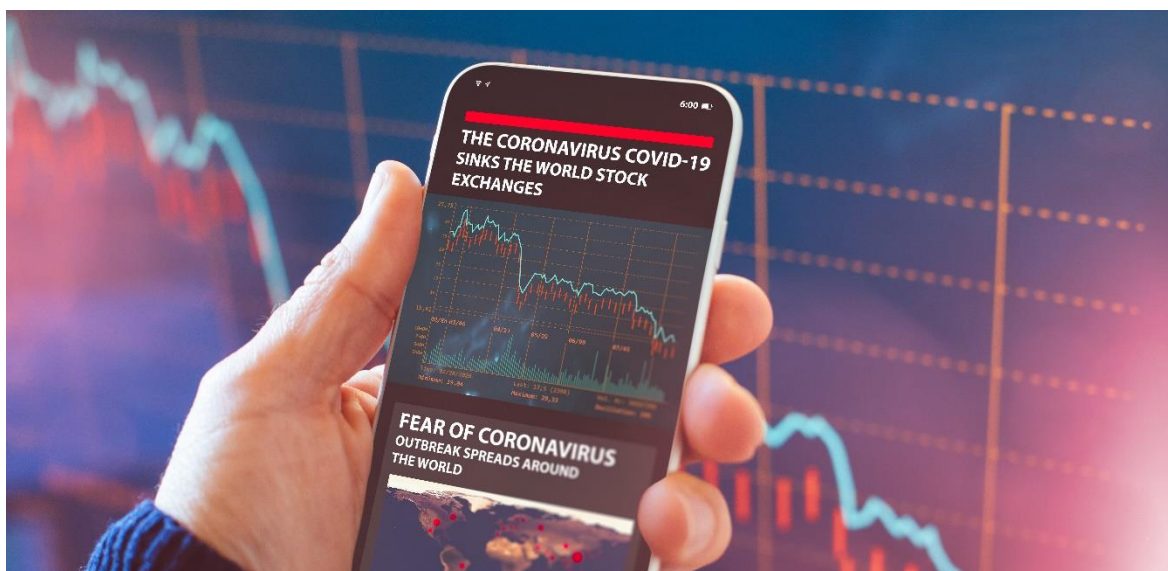
The duty to publish and submit the annual financial report to the National Securities Market Commission («CNMV») and the audit report may be complied with until six (6) months after the end of the fiscal year. **This term shall be extended to four (4) months for the release of the interim management statement and the half-yearly financial report.**

ISSUES APPLICABLE TO LISTED COMPANIES (I)

Prohibition of the incorporation or increase of net SHORT POSITIONS on listed shares

The communication issued by the CNMV, dated 16 March 2020, establishes the **prohibition during a period of one (1) month (from 17 March) to carry out operations on securities and financial instruments that involve the incorporation or increase of net short positions on listed shares.**

However, the following operations are excluded from the restriction: (i) market making activities as provided for under Regulation No. 236/2012 of the European Parliament and of the Council of 14 March 2012, on short selling and certain issues of credit default swaps (Articles 2.1. k and 17); (ii) the formation or build-up of net short positions where the investor purchasing a convertible bond has a delta neutral position between the position in the convertible bond's equity element and the short position taken to cover that element; (iii) where the short position in shares is covered by an equivalent purchase in terms of the proportion of subscription rights; and (iv) where it is made through derivative financial instruments on indices or baskets of financial instruments that do not consist predominantly of securities affected by the prohibition.



CONTRACTUAL ISSUES

SUSPENSION of agreements due to force majeure

In order to assess the existence of any force majeure, it is necessary that the facts be unforeseeable or that, even if they could have been foreseen, they could not have been avoided. For this reason, they must be not only unforeseeable but also inevitable and unavoidable, as required by the case law of the Spanish Supreme Court. It is also necessary that the event in question was not caused by the borrower of the obligation, as in the case of COVID-19, and that there is a **causal link between the result and the event**.

Pursuant to the foregoing, when an event of force majeure takes place, although the borrower **is not exonerated from the subsequent performance of an obligation, the latter is not bound to pay any compensation that might accrue for damages caused while the event of force majeure persists**.

Notwithstanding the foregoing and provided that the event of force majeure prevents the fulfilment of the obligations arising from the agreement, **the parties may suspend the enforceability of the agreement by mutual agreement** and the borrower shall comply with his obligations when the agreed suspension comes to an end.

The aforementioned does not apply when the obligations deriving from the agreements involve the payment of amounts since in these cases the case-law only allows for the temporary non-fulfilment or mere delay in the monetary obligations.

Application of the *rebus sic stantibus* principle

The *rebus sic stantibus* principle may be applied when, due to circumstances beyond the control of the parties, it is absolutely impossible or burdensome for one of them to fulfil its obligations under the agreement.

Thus, if any of the aforementioned circumstances occur, the aforesaid clause may be articulated. However, it does not have the effect of extinguishing the agreement, but rather **allows it to be modified in order to rebalance the obligations between the parties**. However, this **only applies in the case of long-term and consecutive agreements**, such as leasing agreements.

CONTRACTUAL ISSUES (I)

Execution of LONG-DISTANCE AGREEMENTS

Agreements may be concluded **remotely**, for example by electronic means, and in such circumstances shall be fully effective when the consent, the purpose and the cause are met. In this sense, the agreement is **concluded when the offering party is aware of the acceptance or, having sent it to the accepting party, cannot ignore it without breaching good faith**. However, if agreements are concluded using mechanical devices, they shall be concluded as soon as acceptance is given.

Law 34/2002, of 11 July, on information company services and electronic commerce, establishes a series of information obligations prior to carrying out the activity which is the purpose of the contracting agreement and in favour of the recipient, such as the various formalities to be followed for the conclusion of the agreement, whether the provider is going to file the electronic document in which the agreement is formalised and whether it shall be accessible, the technical means which it makes available to identify and correct errors in the entry of data, and the language or languages in which the agreement may be concluded.

In addition, Royal Legislative Decree 1/2007, of 16 November, which approved the revised text of the General Law for the Defence of Consumers and Users and other complementary laws, also establishes the fulfilment of certain prior information obligations with regard to the consumer, such as a description of the good or service to be marketed, identification of the company, the minimum period of the consumer's obligations, the existence of the right of withdrawal and its conditions, among others. The entrepreneur shall also provide the consumer with a copy of the signed agreement on a long-lasting medium.

As regards agreements concluded with consumers, the latter shall have a right of withdrawal which they may exercise during a period of fourteen (14) calendar days, in accordance with the provisions of Article 104 of the aforementioned regulation.

Finally, **the offering party is required to confirm receipt of the acceptance, except where both parties agree and neither of them is considered a consumer, or where the agreement has been concluded exclusively by means of the exchange of e-mails or other equivalent electronic communications**, and these means are not used for the sole purpose of avoiding compliance with this obligation.

CONTRACTUAL ISSUES (II)

Mortgage debt MORATORIUM

Measures are established to seek a moratorium on mortgage debt for the acquisition of the habitual residence of those who are suffering extraordinary difficulties in meeting their payments as a result of the COVID-19 crisis.

The moratorium shall apply to loan or credit agreements secured by real estate mortgages where the borrower is financially vulnerable.

Therefore, once the moratorium is requested, the creditor entity shall proceed to its implementation within a maximum period of fifteen (15) days. The request shall entail temporarily: (i) the **suspension of the mortgage debt** and (ii) the **non-application of the early maturity clause** provided for in the agreement. The creditor entity may not demand the payment of the mortgage fee, nor of any of the concepts that make it up, nor shall interest be accrued. The scenarios of economic vulnerability are provided for by Article 9 of Royal Decree 8/2020 of 17 March.

(1) Los supuestos de vulnerabilidad económica se prevén en el artículo 9 del RD 8/2020, de 17 de marzo.



FOREIGN INVESTMENT ISSUES

Suspension of certain FOREIGN INVESTMENTS

Royal Decree-Law 8/2020, of 17 March, on urgent extraordinary measures to deal with the economic and social impact of COVID-19 amends Article 7 bis of Law 19/2003, of 4 July, on the legal regime of capital movements and foreign economic transactions.

It is thus agreed to **suspend the regime of liberalisation of foreign direct investment in Spain, in certain industries, and insofar as it may affect public order, public security and public health.**

In this regard, investments made by non-EU and non-European Free Trade Association nationals are considered to be foreign investments, provided that the investor holds 10% or more of the share capital of a Spanish company or, as a result of the corporate transaction, legal act or business, has an effective interest in the management or control of the company.

Also, the regime of liberalization of foreign direct investment in Spain is suspended in the following circumstances: (i) when the foreign investor is directly or indirectly controlled by the government of a third country; (ii) when the foreign investor has made investments or taken part in activities in the industries that affect security, public order and public health in another EU Member State; (iii) if administrative or judicial proceedings have been initiated against the foreign investor in another state or in the home state for criminal or illegal activities.

The suspension of the established liberalisation regime shall determine the **submission of the referred investment operations to the corresponding administrative authorisation** in accordance with the procedure to be established by the regulations.

Consequently, **investment operations carried out without the required prior authorisation shall have no legal force or effectiveness** until they are legalised by obtaining the corresponding administrative authorisation. The affected industries are those listed in the Fourth Final Provision of Royal Decree 8/2020 of 17 March.

(2) Los sectores afectados son los recogidos en la Disposición Final Cuarta del RD 8/2020, de 17 de marzo.

PROCEEDINGS BEFORE THE NOTARY PUBLIC AND THE COMMERCIAL REGISTRY, THE PROPERTY AND MOVABLE ASSETS REGISTRY

Execution of transactions before a Notary Public

By means of the Instruction of 15 March 2020 on the implementation of measures that ensure the adequate provision of the notarial public service, the General Directorate of Legal Security and Public Faith established that the notarial public service shall be guaranteed and, therefore, the **notarial offices shall be open to attend**, only, **pressing matters**, being able to reject any proceedings that are not of such nature. Likewise, when signing before a Notary Public, a series of rules shall be observed in order to avoid any kind of contagion.

To this end, at Ceca Magán we suggest to conclude those transactions that are of an urgent nature by means of a policy, when the layout of the agreement allows for partial intervention by this means and avoids the signatories having to travel within Spanish territory. Likewise, it may be decided to formalise the transaction by means of a verbal mandate, and its subsequent ratification by the person duly empowered to prevent the latter from travelling.

If the adopted resolutions that are to be made public involve the granting of powers of attorney, it should be remembered that only general powers of attorney need to be filed with the Commercial Registry, since it is not mandatory to register powers of attorney for litigation or those granted for the performance of specific actions.



PROCEEDINGS BEFORE THE NOTARY PUBLIC AND THE COMMERCIAL REGISTRY, THE PROPERTY AND MOVABLE ASSETS REGISTRY (I)

Proceedings before the Commercial, Property and Movable Assets REGISTRIES

In connection with proceedings involving the Commercial, Property and Movable Assets Registries, the Directorate General for Legal Security and Public Faith issued the Resolution of 15 March 2020 agreeing on a series of measures following the declaration of the state of alarm. Through this resolution, it was declared that the services provided by the aforementioned registries are public services that shall be guaranteed. The hours of operation have been reduced from 9:00 a.m. to 2:00 p.m. (GMT+1).

Notwithstanding the above and during the state of alarm, **its actions have been modified due to the suspension of the limitation and expiration periods of all proceedings and rights, as well as the entries.** However, the timeframes for telematic legalization of corporate books have not been altered or suspended. Requests for simple notes and certifications shall be made by telematic means only.



May we help you?



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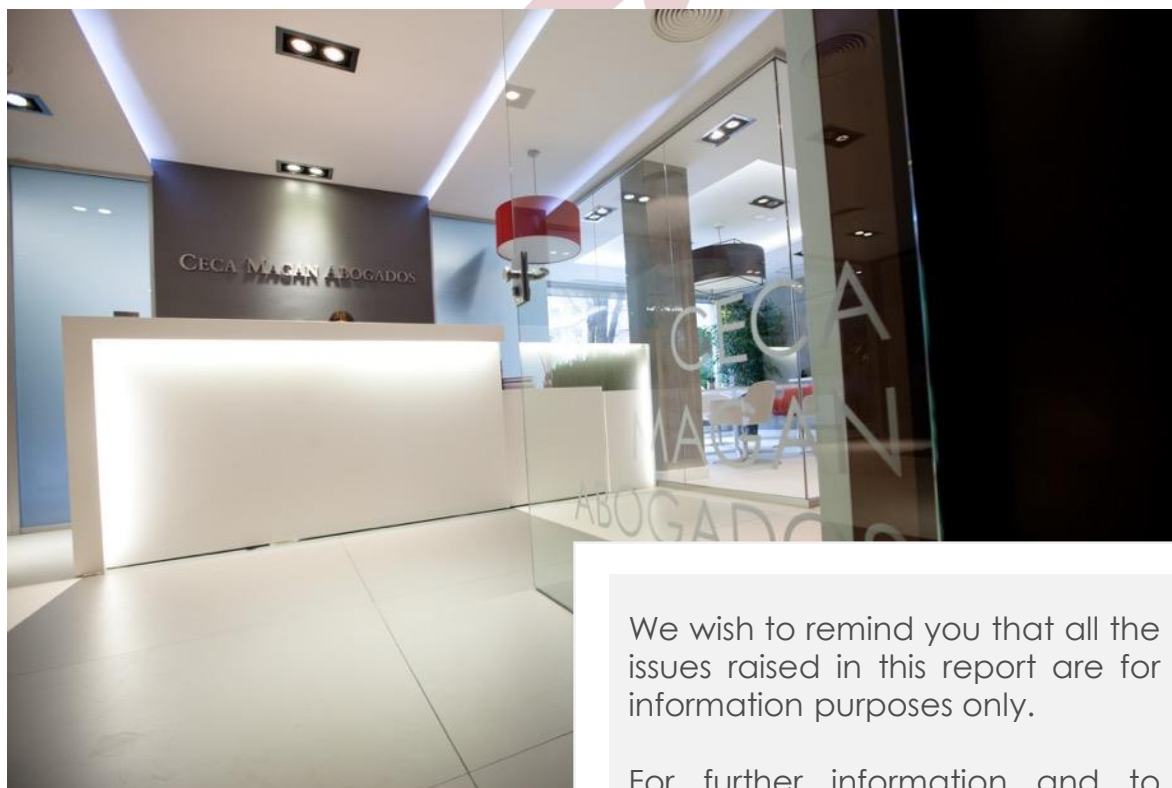
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We wish to remind you that all the issues raised in this report are for information purposes only.

For further information and to request our services, please do not hesitate to contact our experts.

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