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The Spanish insurance sector in the light of the COVID-19 pandemic

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1. Introduction

As from the second week of March 2020, we have witnessed the publication of several laws that seek to address the significant challenges posed by the (health, economic and social) crisis caused by the COVID-19.

In a constantly fluctuating context, with continuous and highly relevant legislative novelties, by means of this note we intend to analyse, in a brief and concise manner (as far as possible), these extraordinary measures and their impact, focusing our attention exclusively on those measures that directly or indirectly impact the Spanish insurance sector.

Therefore, other measures that, while extremely relevant to our economy and our daily lives as citizens, have no impact on the mentioned sector, fall outside the scope of these considerations.

Among these regulations, it is worth noting the various Royal Decrees issued since 14 March 2020 for the purpose of declaring the state of alarm and extending this state of alarm. So far, up to three extensions have been agreed:

(a) Royal Decree 463/2020, of 14 March, declaring the state of alarm for the management of the health crisis situation caused by the COVID-19 (RD of 14 March).

(b) Royal Decree 465/2020, of 17 March, amending Royal Decree 463/2020, of 14 March, declaring the state of alarm for the management of the health crisis situation caused by COVID-19 (RD of 17 March).

(c) Royal Decree 476/2020, of 27 March, extending the state of alarm declared by Royal Decree 463/2020, of 14 March (RD of 27 March).

(d) Royal Decree 487/2020, of 10 April, extending the state of alarm declared by Royal Decree 463/2020, of 14 March, declaring the state of alarm for the management of the health crisis situation caused by COVID-19 (RD of 10 April).

(e) Royal Decree 492/2020, of 24 April, extending the state of alarm declared by Royal Decree 463/2020, of 14 March, declaring the state of alarm for the management of the health crisis situation caused by the COVID-19 (RD of 24 April).

In addition, several Royal Decree-Laws have been approved, of which we can highlight the following:

(a) Royal Decree Law 6/2020 of 10 March adopting certain urgent measures in the economic field and for the protection of public health (RDL of 10 March).

(b) Royal Decree-Law 8/2020 of 17 March on extraordinary urgent measures to deal with the economic and social impact of COVID-19 (RDL of 17 March).

(c) Royal Decree-Law 10/2020 of 29 March regulating recoverable paid leave for employees who do not provide essential services, in order to reduce population mobility in the context of the control of COVID-19 (RDL of 29 March).

(d) Royal Decree-Law 11/2020 of 31 March adopting additional urgent social and economic measures to address COVID-19 (RDL 31 of March).

(e) Royal Decree-Law 15/2020 of 21 April on additional urgent measures to stimulate the economy and employment (RDL of 21 April).

(f) Royal Decree-Law 16/2020, of 28 April, on procedural and organisational measures to address COVID-19 in the area of the Judiciary (RDL of 28 April).

2. Regulation of the insurance activity during the state of alarm

Article 7 of the RD of 14 March contains a limitation on the free movement of people on public roads so movement is only permitted in the situations expressly set out in it (acquisition of foods, pharmaceutical products and commodities, attendance to health-care centers, commute to the workplace, etc.). Among the permitted movements, the RD of 14 March includes the commute to financial and insurance entities.

Therefore, "*insurance entities*" will be able to remain open to the public during the period of the state of alarm. Of course, nothing would prevent these entities from deciding not to offer this service to the public, or from offering it in a non-presential or telematic way. In fact, the vast majority of insurance companies and mediators have implemented teleworking plans and plans to provide services to their customers in a non-presential manner (telephone, e-mail, social networks, Skype, etc.).

3. Impact on active policies

With the entry into force of the state of alarm and the legal mechanisms to tackle the COVID-19 crisis, we are witnessing a situation of uncertainty not previously experienced by insurance companies, policyholders and insured persons. Uncertainty, on the one hand, regarding policy coverage and, on the other hand, regarding new risks not foreseen by the insurance companies.

In this section we will try to explore the impact that the situation generated by COVID-19 and the laws adopted to deal with the epidemic may have on certain types of insurance, although this health and economic crisis will obviously impact on other policies as well.

Surety and credit insurance

There is a major concern about the impact of the adverse consequences of the economic crisis on these types of insurance. The measures adopted to contain the spread of COVID-19 may

result in a failure to meet contractual obligations, as well as in a lack of liquidity for many companies.

Regarding surety insurance, with the entry into force of RD of 14 March, measures were adopted to limit the freedom of movement of persons. Specifically, under Article 7 of RD 14 March, professional activities were maintained except for those cases provided for in Article 10 (containment measures in the field of commercial activity, cultural facilities, recreational establishments and activities, hotel and restaurant activities, and other additional ones) of RD of 14 March.

These measures (and all the legal restrictions taken as a result of the declaration of the state of alarm) may result in the impossibility of fulfilling certain contractual obligations and consequent breaches of contract and activation of surety insurance.

In our opinion, it cannot be concluded that RD of 14 March and subsequent regulations have generated a widespread force majeure situation. It would be necessary to analyze on a case-by-case basis whether the COVID-19 crisis has led to the impossibility of complying with contractual obligations (e.g. the non-receipt of supplies from China essential to comply with a contractual obligation as a result of the total cessation of activity in the Hubei region). Consequently, it would be necessary to determine on a case-by-case basis whether force majeure can be invoked by policyholders in the event of non-compliance and whether the "force majeure" clause usually included in the conditions of surety insurance can be challenged[1].

In this regard, with the entry into force of the RDL of 29 March, which regulates recoverable paid leave, all non-essential professional activity was temporarily prohibited in order to reduce the mobility of the population in the context of the fight against COVID-19[2]. It seems then reasonable to conclude that during the period of validity of the RDL of 29 March, it may have been impossible to fulfil certain contractual obligations in non-essential activities, unless they could be fulfilled through teleworking.

In anticipation of a situation of non-compliance with public contracts, the RD of 17 March adopted measures in the area of public procurement to mitigate the consequences of COVID-19. Specifically[3], mechanisms are regulated for the suspension or extension of certain public contracts whose execution is rendered impossible due to the situation generated by the COVID-19. In addition, it is foreseen that, in some cases, the contracting public entity will pay damages to the contractor, including the costs of maintaining the guarantee and the insurance policies in force during the period of suspension or extension of the contract.

Regarding guarantees provided to public administrations, it should be remembered that no exclusion is enforceable against the insured public administrations in accordance with the provisions of Article 112 of Law 9/2017, of 8 November, on Public Sector Contracts. However, taking into account the measures adopted in the field of public procurement in the RD of 17

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1 Spanish case law has established that, in order to consider that a situation of force majeure exists, the following necessary requirements must be met: (i) an unforeseeable or unavoidable event must occur; (ii) this event must render the performance of the obligations of the contract impossible (for reasons beyond the control of the party); and (iii) a causal relationship must exist between the unforeseeable or unavoidable event and the impossibility of performance.

2 Once the restriction on non-essential professional and work activities had been lifted, Order SND/340/2020 of 12 April was published, suspending certain activities related to intervention work on existing buildings where there is a risk of COVID-19 infection for people not related to that activity. Thus, the labour and professional ban on intervention works in existing buildings is maintained (except for urgent repairs and surveillance tasks) until the state of alarm ceases or until a new order is published.

3 See Article 34 of RD of 17 March.

March, in our opinion a wave of seizures by public administrations or public sector entities does not appear to be foreseeable.

As for guarantees provided between private parties, under these circumstances it does not seem reasonable either to expect a wave of enforcements for breach of contract during the state of alarm. In any case, in the private sphere, the exclusion of force majeure will be enforceable, where appropriate according to what we have just explained, by the insurance companies.

In credit insurance we are facing an even greater risk for insurance companies. The economic crisis and the lack of revenue for many companies (both SMEs and large companies) could lead to a large scale insolvency situation. The success of the de-escalation plan announced by the government on 28 April will be decisive, which will not affect all sectors equally. As for possible rejections, it will be necessary to analyse the exclusions of each policy (catastrophes, political risks, pandemics, epidemics, etc.) in order to determine the coverage of a potential claim.

Finally, it is important to note that, in anticipation of the adverse situation in the credit insurance market and thanks to the impulse of the Spanish Association of Insurance and Reinsurance Institutions (UNESPA), the Insurance Compensation Consortium (*Consorcio de Compensación de Seguros)* has been authorised by the RDL of 21 April to carry out reinsurance activities in the field of credit and surety insurance, which implies public support in these highly relevant insurances, similar to what happened in 2008 and is happening in other neighboring countries.

Payment protection insurance in case of temporary incapacity and in case of unemployment

Within the legal framework provided to mitigate the impact of the COVID-19, measures have also been taken in the area of labour and social benefits that may impact on payment protection policies. Specifically, in those that cover the situation of unemployment and temporary incapacity.

On the one hand, with regards to measures addressing temporary incapacity, the RDL of 10 March provides in its Article 10 the following (emphasis added):

> *"1. In order to protect public health, periods of isolation or infection of workers caused by the COVID-19 virus shall be considered, exceptionally, as a situation assimilated to an accident at work, exclusively for the economic benefit of temporary incapacity of the social security system".*

As Article 10 itself states, the above consideration is exceptional and has exclusive effect for the economic benefit of incapacity of the Social Security system. Therefore, we understand that this consideration does not extend to other areas outside the Social Security system in which temporary disability may have an impact, such as, for example, insurance policies protecting payments for temporary incapacity.

Furthermore, it is relevant to know whether the temporary disability coverage would include, on the one hand, leave due to isolation and, on the other, leave due to infection with COVID-19. Obviously, this analysis must be made on a policy-by-policy basis, but it seems foreseeable that a leave due to isolation cannot be considered as temporary disability since it does not imply an alteration in the state of health. On the contrary, it seems reasonable to understand that a temporary disability is considered to be a sick leave in the event of infection with COVID-19.

On the other hand, regarding payment protection insurance in case of unemployment, the RDL of 17 March imposes a series of measures to make the temporary activity adjustment mechanisms more flexible in order to avoid layoffs (see Articles 22 and following of the RDL of 17 March), which will have an impact on the risk assumed by insurance companies in payment protection policies in case of unemployment situations.

In essence, it is expected (i) that contract suspensions and reductions in working hours that have a direct cause in business interruption as a consequence of the COVID-19 will be considered as force majeure; (ii) to speed up the processing of employment regulation procedures, both due to force majeure and economic causes; (iii) the granting of the right to contributory unemployment benefit to affected workers even if they do not have the minimum period of contributory employment; and (iv) that the time during which the unemployment benefit is perceived is not counted for the purpose of exhausting the maximum periods of unemployment benefit perception established in the applicable regulations.

In view of the above measures, around 500,000 Spanish companies have submitted temporary employment regulation (ERTE) applications and, as a result, unemployment benefits will be granted to a large number of workers (the latest published statistics indicate that over 3,000,000 workers have already been affected by an ERTE).

These circumstances may have a very relevant impact on unemployment payment protection policies. Although the definition of "*unemployment*" included in each policy should be analysed, it seems foreseeable that in a vast majority of policies "*unemployment"* will be deemed to include the fact of being affected by an ERTE.

Policies covering non-payment on housing rent

The RDL of 31 March sets out a series of initiatives addressed to families and vulnerable groups with regard to housing rentals. Among others, it provides:

i. The extraordinary extension of up to six months of house rental contracts that expire up to two months after the end of the state of alarm.

ii. The suspension of up to six months in the eviction procedures for people experiencing social or economic vulnerability as a result of the effects of the expansion of COVID-19. This period will start to run from the date on which the suspension of all terms and procedural deadlines is lifted due to the end of the state of alarm.

iii. The temporary and extraordinary deferment of rent payments to legal entities by tenants in a situation of economic vulnerability.

iv. The granting of rental subsidies for families on economic vulnerability situation.

These measures will have a major impact on insurance policies covering the non-payment of housing rent. While, on the one hand, rent subsidies could mitigate the impact of rent, the rest of the measures, especially the suspension of eviction procedures, could lead to an increase in unpaid rent covered under the aforementioned policies.

Loss of profit coverage

The entry into force of the RD 14 of March and the RDL of 29 March has had and still has a direct impact on damage insurance policies covering loss of profit. On the one hand, the RD of 14 March included measures that have led to the suspension of the opening to the public of certain retail premises and establishments. On the other hand, the RDL of 27 March meant, as mentioned, the prohibition of all non-essential professional activities.

Will profit losses resulting from the closure of premises and establishments be covered? Again, it is necessary to analyze each policy, but we shall take into account that, in a vast majority of polices, the coverage of loss of profit is conditioned to a previous material damage (the number of policies issued covering business interruption not resulting from previous material damage is negligible). Therefore, the loss of profit resulting from the entry into force of RD 14 of March and RDL of 29 of March would be covered under those policies in which the coverage does not depend on a material damage (moreover, it should be noted that most of them exclude business interruption due to infectious/contagious/transmissible diseases).

Meanwhile, in the USA, claims have already been reported by policyholders claiming that COVID-19 has caused direct material damage and therefore, loss of profit should be considered covered. However, the basis for these claims does not seem to be extrapolated to Europe and, in particular, to Spain, where, in our opinion, the virus cannot be solidly considered to be direct material damage.

Cyber risk policies

The measures adopted in this new legal framework aimed in the field of mobility restrictions have resulted in remote working increasing exponentially. This means a proportional increase in the risk covered by cyber-risk policies. Employees' systems and networks at home may not have the same level of protection and security as in their workplace, thus increasing the chances of any of the insured cyber incidents occurring: data breach, cyber-attack, alteration of the computer system, etcetera.

D&O policies

As anticipated, the COVID-19 health crisis is already being followed by a major economic crisis. We can already see how the health crisis has had a strong impact on the stock markets. This exceptional situation is leading company directors and managers to take decisions that in the future may be subject to liability/accountability actions.

In addition, the lack of turnover of many SMEs (and even large companies) during the state of alarm could, in future, result in the declaration of insolvency proceedings. As a result, the risk of claims and losses under D&O policies is increasing.

Healthcare policies

Although a strong impact of the COVID-19 crisis on health care policies was expected, we shall take into account that the treatment of the vast majority of those infected has been assumed by the public health system. In any case, by virtue of Article 12 of RD of 14 March, privately owned health centers, services and establishments were made available to the Ministry of Health. Therefore, insurance companies, to a lesser extent, are providing healthcare to their policyholders.

Life insurance

This is one of the insurance types with the greatest impact due to two determining factors: the high mortality of COVID-19 and the heavy losses on the stock markets. This undoubtedly presents a major challenge to the solvency and capital strength of insurance companies.

With regard to the analysis of coverage, life insurance policies generally include coverage for death from any cause, so COVID-19 death would be covered.

Travel policies

With regard to travel assistance, policies that include coverage for assistance due to illness will provide assistance to those infected by COVID-19 in foreign countries (although it is common to find exclusions for pandemics/epidemics in these policies).

As for travel cancellations, they will be subject to conditions, but in general the policies do not include "any cause" cancellation coverage, so it is to be expected that expenses incurred that are not directly refunded by the organizer or the service provider, such as the airlines themselves, will not be covered.

Contingency policies (event cancellations)

Another type of insurance in which the COVID-19 crisis is having and will have an even greater impact is the contingency policies that cover event cancellations. At a national level, we can highlight that the UEFA EURO 2020 European Football Championship (scheduled to be held in Bilbao) has been postponed to 2021. On the other hand, the summer season in Spain is loaded with concerts and music festivals.

Cancellations of all these events could cause significant losses to insurers if insurance policies included cancellation coverage for epidemics or pandemics (it is possible that only references to past experiences such as Zika or Ebola were included). These losses would be mitigated in case of possible postponement of insured events.

4. Impact on the regulatory field

4.1 Proceedings before the directorate-general for insurance and pension funds ("DGSFP")

According to the third additional provision of the RD 14 of March, as of its entry into force on 14 March 2020, the terms are suspended and the deadlines for the processing of proceedings by public sector entities, which naturally comprise the DGSFP, are interrupted. These deadlines will only be resumed when the RD 14 of March (or its extensions) ceases to be in force.

Consequently, and on the basis of the foregoing, the terms are suspended and the deadlines for the processing of ongoing proceedings before the DGSFP are interrupted for the duration of the state of alarm.

The aforementioned third additional provision refers to the suspension of terms and the interruption of deadlines. But, what is the difference between these concepts?

In general, it is considered that when an interruption occurs, the original term starts again in its entirety at the moment when it is resumed. On the other hand, in the case of suspension,

once it is resumed, the entire original term does not start again, instead only the remaining time at the moment of suspension must be counted.

On 20 March 2020, the Subdirectorate General of the Consultative Services of the State's Advocate General, in response to a query regarding the interpretation of this additional provision of Royal Decree 14 March, clarified that the periods referred to in the said provision were suspended (but not interrupted) at the time of the declaration of the state of alarm, and that the periods "*will resume for the remaining period once the state of alarm ceases, whether initial or extended, and under no circumstances should the term start over from zero*"

The third additional provision contains two exceptions to this suspension of terms and interruption of deadlines:

(a) The relevant authority may, by means of a reasoned decision, adopt any strictly necessary organizational measure in order to avoid serious damage to the rights and interests of the interested party in the proceedings and provided that the interested party agrees, or when the interested party agrees that the deadline is not suspended.

(b) This shall not apply to proceedings and decisions relating to situations closely linked to the facts justifying the state of alarm.

Obviously, in many proceedings brought by individuals, it will be in their interest to ensure that these proceedings are not suspended, but that deadlines are met and that the corresponding administrative decision is issued (for instance, in the case of applications for the registration in the register of mediators, non-objection requests to the acquisitions of significant holdings, etc.). In these cases, the DGSFP may decide, by means of a reasoned decision, not to suspend the proceedings, in order to avoid a serious harm to the administered party. Since the DGSFP is empowered to agree the non-suspension, entities may request this non-suspension and try to convince the administration that suspension will cause them serious harm, and that this can only be avoided if the proceeding continues until it is resolved.

Finally, it is worth noting that the RD of 14 March remains silent on whether it is possible to begin an administrative proceeding before the DGSFP during the state of alarm, but we understand that it is possible to initiate an administrative proceeding at the request of an interested party. However, once the request has been submitted, the treatment to such proceeding will be the same as for ongoing proceedings (*i.e.* the proceeding will be automatically suspended, unless the DGSFP agrees otherwise by means of a reasoned decision).

4.2 Authorization to the DGSFP to decide on the extension of deadlines

Article 24 of RDL of 21 April enables the DGSFP, by means of a resolution and following a previous report by the Advisory Board on Insurance and Pension Funds, to agree on the extension of certain terms and deadlines in the area of the organisation and supervision of insurance and reinsurance companies, pension plans and funds (as well as their management and depository institutions) and insurance and reinsurance distributors.

4.3 Authorization to the Insurance Compensation Consortium ("CCS") to carry out credit and surety reinsurance activities

The Preamble to the RDL of 21 April clarifies that credit insurance and surety insurance contribute to the achievement of the objectives of guaranteeing the continuity of the development of economic transactions and providing security for commercial operations since they serve, respectively, to guarantee the collection of sales or services and the fulfilment of legal or contractual obligations. Therefore, Article 7 of the aforementioned RDL 21 April authorizes the CCS to carry out credit and surety reinsurance activities.

Thus, with the prior approval of its Board of Directors, the CCS may accept in reinsurance, under the basic conditions set forth in the regulation, risks assumed by private insurance entities authorized to operate in the credit and surety insurance branches that request it and that subscribe or adhere to the corresponding agreement with the aforementioned public business entity.

5. Procedural impact

5.1 Ongoing judicial procedures

Under the second additional provision of the RD of 14 March, as of its entry into force on 14 March 2020, and without prejudice to the exemptions contained in the regulation, procedural terms are suspended and all deadlines provided for in procedural laws for all jurisdictional orders are suspended and interrupted. These terms will only be resumed upon the expiry of the state of alarm (or its extensions).

In this case, this additional provision refers to both the suspension and the interruption of the deadlines, and therefore there has been some debate over the weeks as to what should happen to these deadlines (whether they would be resumed or restarted). This issue, however, has recently been clarified by the RDL of 28 April, which provides that the deadlines that would have been "suspended" under this additional provision shall be considered from the beginning. RDL of 28 April introduces another novelty, which is that it indicates that the *dies a quo* will be the next working day in which the corresponding procedure is no longer suspended (and not the cessation of the alarm state).

As we anticipated, a number of exceptions to this suspension and/or interruption have been set out in the RD of 14 March:

(a) Regarding criminal jurisdiction: the suspension and/or interruption does not apply to habeas corpus proceedings, to proceedings entrusted duty courts, proceedings with detainees, protection orders, urgent prison surveillance proceedings and any precautionary measures relating to violence against women or minors. It may also be agreed by the competent judge or tribunal to carry out those judicial actions which, because of their urgent nature, cannot be postponed.

(b) With respect to all other jurisdictional orders: the interruption does not apply to: i) the procedure for the protection of the fundamental rights of the person provided for in Articles 114 *et seq*. of Law 29/1998, of 13 July, regulating the Contentious-Administrative Jurisdiction, nor to the processing of the judicial authorizations or ratifications provided for in Article 8.6 of the aforementioned law; ii) collective conflict proceedings and proceedings for the protection of fundamental rights and public freedoms regulated by Law 36/2011, of 10 October, which regulates the labour

jurisdiction; iii) judicial authorizations for non-voluntary confinement on grounds of mental disorder provided for in Article 763 of the Civil Procedure Act; iv) the adoption of protective measures or provisions for the protection of minors as provided for in Article 158 of the Civil Code.

Thus, in general, provided that the above exceptions do not apply, any deadline that had begun at the time the RD of 14 March came into force (deadlines to file a statement of defense, an appeal, to challenge a liquidation of interest or costs, to make allegations, etc.), has been interrupted until the suspension of the procedure ceases.

Likewise, any hearing scheduled within the effective duration of the state of alarm (preliminary hearings, trials, etc.) has also been suspended, having to wait for the corresponding court or tribunal to decide on the new date for such hearing.

Lastly, although unrelated to the RD of 14 March, reference should be made at this point to the agreement reached on Friday 13 March 2020 (and updated on 19 March 2020 and 31 March 2020) by the Court of Justice of the European Union (CJEU) updated several times during the month of March and April, the last update being on 23 April 2020.

In accordance to the aforementioned agreements, the activity of the ECJ will continue, although priority will be given to urgent cases. The time limits for initiating proceedings and lodging appeals will not be affected, so the parties must comply with these time limits (although they may invoke Article 45 of the Protocol on the Statute of the Court of Justice of the European Union). The remaining time-limits for ongoing proceedings, with the exceptions foreseen for urgent proceedings, are extended by one month. Those time limits will therefore end on the day on which they would have expired, but in the following month. It has also been agreed a suspension of all hearings. If sanitary conditions allow it, oral hearings will be resumed as of Monday 25 May 2020.

5.2 Main procedural and organizational mechanisms adopted with regard to the Judiciary

On 13 April 2020, the Permanent Commission of the General Council of the Judiciary agreed, together with the Ministry of Justice, to lift the limitations established on the submission of pleadings through LexNET (e-platform used by *procuradores* to submit writs to the Court by telematic means) or an equivalent system as of 15 April. Thus, as of that date it is possible to file writs in non-essential proceedings.

In addition, on 20 April 2020, the Ministry of Justice issued Circular 2/2020, whereby (i) it is recommended that the court clerks adopt the necessary actions to notify via online the resolutions (both those concluding the proceedings and not) that are issued in the ongoing proceedings (whether they are essential or not); and (ii) while the deadlines continue to be suspended, if the resolution notified results in a specific deadline that is not suspended (because it is one of the cases declared urgent or essential), it is recommended that this circumstance be expressly stated in the resolution.

Finally, on 28 April 2020, the Council of Ministers approved the RDL of 28 April, published in the Spanish Official Gazette (BOE) the day after and which came into force, according to the Seventh Final Provision, on 30 April 2020. This RDL of 28 April includes a series of measures whose ultimate objective is to achieve a progressive reactivation of the normal functioning of the Courts and Tribunals.

These measures are divided into three chapters: the first chapter includes measures of a procedural nature, the second covers measures in the field of bankruptcy and corporate law, and the last chapter includes measures of an organisational and technological nature. We will not carry out a complete analysis of this regulation, but will only mention those measures that are most relevant for our purposes:

- Days falling between 11 and 31 August 2020 are declared as working days for the purposes of all legal proceedings.

- The terms and deadlines foreseen in the procedural laws that would have been "suspended" by the declaration of the state of alarm, will be considered from the beginning. The first day of the calculation will be the next working day after the day on which the suspension of the corresponding procedure ceases to have effect.

- The deadlines for the announcement, preparation, formalization and filing of appeals against judgments and resolutions that end the procedure, provided that they are notified during the suspension of the deadlines set out in RD of 14 March or during the 20 working days following the lifting of the suspension of the deadlines, will be extended by a period equal to that set for their announcement, preparation, formalization and filing.

- A series of procedures will be processed, on a preferential basis, from the lifting of the suspension of the procedural deadlines, until 31 December 2020.

- The hearings, both during the state of alarm and up to three months after its cessation, will held preferably by telematic means.

According to its first transitory provision, RDL of 28 April applies to all procedural actions carried out as from its entry into force, regardless of the date on which the process was initiated.

5.3 Legal proceedings pending to be initiated

Finally, by virtue of its fourth additional provision, both the statute of limitation and expiry periods of all actions and rights are suspended for the duration of the state of alarm. Therefore, since the entry into force of the RD of 14 March, we must add the days of the effective duration of the state of alarm to any statute of limitation or expiration period that is in progress.

Unlike the second and third additional provisions, the fourth additional provision does not refer to the interruption of deadlines, but only their suspension. Therefore, the RD of 14 March paralyzes the term for as long as the cause for suspension lasts (in this case, the state of alarm), and the term is resumed when this cause disappears, both for the statute of limitation and the expiry periods of actions.

6. Corporate law impact: exceptional corporate measures implemented by the RDL of 17 March (following the amendments introduced by the RDL of 31 March)

6.1 Novelties introduced by the RDL of 17 March (following the amendments introduced by the RDL of 31 March)

The RD of 17 March includes a series of additional measures in order to respond to the exceptional economic circumstances caused by the COVID-19. For the present purposes, Chapter V of this RD of 17 March is noteworthy, as it establishes a series of additional measures to, according to its preamble, "*facilitate an appropriate response to this exceptional situation*", through the approval of extraordinary measures applicable to the functioning of the governing bodies of private legal entities and extraordinary measures applicable to the functioning of the governing bodies of listed companies. It is important to bear in mind that the RDL of 31 March has introduced a series of modifications to the wording of Articles 40 and 41 of the RDL of 17 March (articles that introduce the main commercial novelties). Thus, Article 40 of the RDL of 17 March, in its new wording introduced by the RDL of 31 March, establishes a series of exceptional measures applicable to legal entities governed by private law. In particular we would like to emphasize the following:

(a) The first section establishes the possibility that the meetings of the governing and administrative bodies of the associations, of the civil and corporate entities, of the governing council of the cooperative entities and of the board of trustees of the foundations may be held via videoconference or via multiple conference call, provided that (i) all the members of the body have the necessary means, (ii) the secretary of the body acknowledges their identity, and (iii) this is stated in the minutes, which must be sent immediately to the e-mail addresses of each of the attendees. This rule also applies to the delegated commissions and other obligatory or voluntary commissions that any of these entities may have. It is established that the meeting will be understood to be held at the registered office of the legal entity, which may be relevant, among others, for tax purposes.

Likewise, this first section expressly establishes that this possibility of holding the meeting via videoconference or via multiple conference call is applicable to the meetings or assemblies of associates or shareholders, provided that (i) all persons entitled to attend, or those representing them, have the necessary means; (ii) the secretary of the body recognizes their identity; and (iii) this is expressed in the minutes, which must be sent immediately to the e-mail addresses of those attending by these means.

(b) The second section establishes that, during the effective duration of the state of alarm, "*the agreements of the governing and administrative bodies of the associations, of the civil and corporate entities, of the governing council of the cooperative entities and of the board of trustees of the foundations may be adopted by means of a written vote and without a session, subject to the decision of the president, and mandatorily if, at least, two of the members of the body request it. The same rule shall apply to the delegated commissions and to the other obligatory or voluntary commissions that may have been set up*". Therefore, while the state of alarm remains in effect, any private law company (of those listed in the article itself) may hold meetings of its governing and administrative bodies in writing and without a session,

and this may be done without the need for the company's bylaws to provide for this alternative.

Article 40.2 of RDL 17 of March refers, undoubtedly, not only to the board of directors of these entities, but also to the holding of shareholders' meetings. The holding of board of directors' meetings and general meetings through the "written and without session" system has been historically controversial, since Article 248.2 of the Royal Legislative Decree 1/2010 of 2 July, approving the Companies Act (Companies Act), only regulates this system establishing that "*public limited companies (sociedad anónima) may only hold meetings of the board of directors in writing and without a session provided that none of the members of the board object to such a procedure*". Consequently, it appears that, since nothing is said about limited companies (*sociedades limitadas*), this type of company cannot (or, rather, could not) hold meetings of the board of directors in writing and without a session unless it is expressly regulated in its bylaws.

The Companies Act is also silent on the possibility of the general meeting of shareholders being held by means of the written system and without a session, which is why most of the doctrine, including many Commercial Registrars, rejected this possibility. Nevertheless, the General Directorate of Registries and Notaries has already confirmed that the general meeting of shareholders may be held in writing and without a session, provided that this is stipulated in the company's bylaws.

Therefore, with the entry into force of the RDL 17 of March, as long as the state of alarm remains in force, both the meetings of the administrative bodies (any type of administrative body, although it seems that this article makes special reference to the board of directors by referring to the figure of the president) and of any governing body (including the general shareholders meetings, general assemblies, etc.) may be held without the requirement that this alternative is expressly provided for in their bylaws.

(c) Third section of Article 40 establishes that, exceptionally, the annual accounts (ordinary, abbreviated, individual or consolidated) of the companies do not have to be formulated within the term of three (3) months since the closing of the financial year as established in Article 253 of the Companies Act, but may be formulated within three (3) months from the day on which the state of alarm ceases. With this, the Spanish government is trying to alleviate those obligations that, given the circumstances, would be very difficult to comply with or would even be contrary to the compliance with the free movement restriction and the confinement obligations imposed by the RD of 17 March. The RDL of 31 March modifies the third section of Article 40 of the RDL of 17 March, expressly including the clarification that, although it is not mandatory to draw up the accounts within the formulation period established by Article 253 of the Companies Act, the formulation of the accounts carried out within this period will be valid, and the annual accounts may also be submitted for verification by the auditor within the ordinary period, without it being mandatory to avail oneself of the extension provided for in the fourth section of Article 40 of the RDL of 17 March.

(d) Fourth section of Article 40 provides that where the annual accounts of a legal entity had already been drawn up at the date of the declaration of the state of alarm or for the duration of it, the audit of those accounts may be carried out within two (2)

months after the end of the state of alarm (for both voluntary and mandatory audit situations).

(e) Regarding the approval of the annual accounts of legal entities, the fifth section of Article 40, as a consequence of the provisions of the third and fourth sections of the same article, provides that these may be approved within a period of three (3) months after the end of the formulation period.

(f) The sixth section establishes that in the event that the call to the general shareholders' meeting has been made prior to the declaration of the state of alarm, the administrative body may (i) postpone; or (ii) revoke the call by means of a notice published at least forty-eight hours in advance to the meeting on the company's website and, if the company does not have a website, in the BOE. In the event of the revocation of the call resolution, the administrative body must issue a new call within one month since the date on which the state of alarm ends.

(g) The RDL of 31 March has added section 6 bis to Article 40 of the RDL of 17 March, which regulates the possibility that those companies which, on the date of entry into force of the RDL of 17 March, had already formulated their annual accounts:

i. call the ordinary meeting from the date of entry into force of the RDL of 17 March, may replace the proposed distribution of the profits contained in the report with another proposal. If a company makes use of this possibility, the administrative body must justify, based on the situation created by the COVID-19, the substitution of the proposal for the distribution of the profit, which must also be accompanied by a letter from the auditor stating that he would not have modified his audit opinion if he had known of the new proposal at the time of its signature.

ii. had already called the ordinary meeting prior to the entry into force of the RDL of 17 March, the administrative body may withdraw the proposal for the application of the result from the agenda for the purpose of submitting a new proposal for approval by a general meeting, which must also be held within the period legally established for holding the ordinary general meeting. The decision of the administrative body shall be published prior to the holding of the general meeting already convened. In relation to the new proposal, the requirements for justification and the auditor's letter indicated in the previous paragraph, must be complied with. The certification of the administrative body for the purposes of the deposit of accounts will be limited, if appropriate, to the approval of the annual accounts, with complementary certification regarding the approval of the proposal for the distribution of the profit being presented subsequently to the Commercial Registry.

It is noted that these modifications, introduced by the RDL of 31 March, are consistent with the communication published jointly by the Association of Registrars and the CNMV on 26 March 2020 (click here to access this communication).

(h) The seventh section provides the possibility for the public notary required to attend the general shareholders' meeting, does so by means of remote communication.

(i) The eighth section prohibits the exercise of the right of separation, even when a legal or statutory cause concurs.

(j) On the other hand, the ninth section establishes that the reimbursement of the contributions to the cooperative members opting out during the effective period of the state of alarm may be extended up to six (6) months after the end of the state of alarm.

(k) The tenth section establishes that in the event that, during the state of alarm, the term of the company specified in the bylaws expires, the dissolution of the company will not have full legal effect until two (2) months after the end of the state of alarm.

(l) Likewise, the eleventh section establishes that in the event that, before the declaration of the state of alarm and during the said state, there is a legal or statutory cause for the dissolution of the company, the legal period for the call by the administrative body of the general shareholders' meeting to adopt the agreement for the dissolution of the company or the agreements which have the purpose of enervating the cause, is suspended until the end of the said state of alarm.

(m) Finally, with regard to the liability regime of the directors, the twelfth section establishes that, should the legal or statutory cause for dissolution have occurred during the period of the state of alarm, the administrators will not be liable for the corporate debts incurred during that period.

The new wording of Article 41 of RDL of 17 March, added by RDL of 31 March, establishes a series of measures to be applied during the financial year 2020 by companies whose securities are admitted to trade on a regulated market in the European Union. These measures are as follows:

(a) The obligation to publish and submit its annual financial report to the CNMV, as well as the audit report of its annual accounts, may be fulfilled up to six (6) months since the end of the financial year. This period shall be extended to four (4) months for the publication of the interim management statement and the half-yearly financial report.

(b) The ordinary shareholders' general meeting may be held within the first ten (10) months of the financial year.

(c) The board of directors may include in the call of the shareholders' general meeting the possibility of attending by electronic means and voting remotely, even though this is not provided for in the company's bylaws. If the call was made prior to the declaration of the state of alarm, this may be provided for by means of a supplementary call (at least five (5) days prior to the date of the meeting).

(d) A series of measures are also established for cases where the measures imposed by the public authorities prevent the general meeting from being held in the place and physical location established in the notice of call and it is not possible to attend by electronic means and/or to vote remotely. These measures are:

    i. if the meeting has been validly constituted in that place and venue, it may be agreed by the meeting to continue the meeting on the same day in another place and venue within the same province, establishing a reasonable period of time for the relocation of the attendees.

ii. if the meeting cannot be held, the holding of the meeting in a later call may be announced with the same agenda and the same publicity requirements as the meeting not held, at least five (5) days prior to the date set for the meeting.

iii. In this case, the administrative body may arrange in the supplementary call for the meeting to be held exclusively by electronic means, i.e. without the physical attendance of the members or their representatives, provided that the possibility of participating in the meeting by each and every one of these means is offered: (i) electronic attendance; (ii) representation conferred on the president of the shareholders' general meeting by means of distance communication and (iii) advance voting by means of remote communication. Any of these means of participation in the shareholders' general meeting may be arranged by the directors even if it is not envisaged in the company's bylaws, provided that it is accompanied by reasonable guarantees to ensure the identity of the subject exercising his or her voting rights. The directors may attend the meeting, which shall be deemed to be held at the registered office regardless of the location of the President of the shareholders' general meeting, by audio or video conference.

(e) As for non-listed companies, it is established that the agreements of the board of directors and the agreements of the audit committee shall be fully valid when they are adopted by videoconference or multiple conference call, even if it is not foreseen in the company's bylaws, provided that all the directors have the necessary means and that the secretary is able to confirm their identity, which should be expressed in the minutes and in the certification of the agreements issued. In such case, the session will be considered unique and held at the place of the registered office.

(f) Finally, the RDL of 31 March has included a third section in Article 41 of the RDL of 17 March. This section establishes that when listed companies apply any of the measures provided for in Article 40.6 bis of the RDL of 17 March, the new proposal for the distribution of profits, the justification of the proposal by the administrative body and the auditor's letter shall be made public, as soon as they are approved, as complementary information to the annual accounts on both the website of the company and the CNMV as "relevant information" or "privileged information", as the case may be.

Regarding Article 42 of the RDL of 17 March, the period of expiry of the registration entries, the preventive notes, the marginal notes and any other registry entries susceptible to cancellation due to the passage of time is suspended. This measure will affect to a great extent those documents that were pending of registration at the date of the declaration of the state of alarm, as well as those acts that must be registered during the validity of the state of alarm. The same article states that the calculation of the deadlines will be reinstated terms will be resumed the day after the end of the state of alarm or, if applicable its extensions.

6.2 EIOPA and DGSFP recommendation on dividend distribution and variable remuneration payment

On 2 April 2020, the European Insurance and Occupational Pensions Authority (EIOPA) published a note containing its recommendations regarding dividend distribution and variable remuneration policies in the context of COVID-19 (the EIOPA Note).

In this note, the EIOPA highlights the essential nature of insurance services and the need to ensure their continuity, safeguarding the insurance sector's ability to continue playing its role as a risk transfer mechanism for citizens and businesses and its capacity to mobilize savings and invest them in the actual economy. EIOPA considers essential that (re)insurers take all necessary measures to continue guaranteeing a solid level of net equity in order to be able to protect their policyholders. As already stated in the first note issued by the EIOPA on 17 March, in the context of the current crisis, all (re)insurers must take measures to preserve their capital position, following very prudent policies of dividend distribution and variable remuneration.

The EIOPA Note states that (re)insurers should make an assessment of their solvency needs taking into account the current level of uncertainty about the depth, magnitude and duration of the effects of COVID-19 on financial markets and the economy, as well as the impact of that uncertainty on their solvency and financial position.

Thus, the EIOPA urges (re)insurers to temporarily suspend all discretionary dividend distributions as well as share buy-backs to remunerate their shareholders. According to the EIOPA Note, this suspension should be applied by all (re)insurance groups at consolidated level and also in relation to significant intra-group dividend distributions or similar transactions, whenever these may significantly influence the solvency or liquidity position of the group or one of its companies.

The EIOPA Note also urges the application of these prudent measures with regard to variable remuneration policies. Thus, (re)insurers are recommended to review their current remuneration policies and ensure that they reflect prudent capital planning and are consistent with the current economic situation. In this context, it recommends that the variable remuneration of employees, managers and directors of (re)insurers should be set conservatively and that consideration should even be given to the deferral of the payment of such variable remuneration.

Finally, the EIOPA Note concludes that (re)insurers that are required by law to pay dividends or large amounts of variable remuneration must justify this obligation to the relevant supervisory authority.

In the same sense, the DGSFP, on 7 April 2020, published a note in which they also recommended that insurance companies and their groups subject to supervision should not distribute dividends, assume irrevocable commitments to pay them, or carry out operations that, like share buy-backs, could have a materially equivalent effect, while the direct consequences of the health crisis resulting from the COVID-19 remain.

This recommendation by the DGSFP extends to both the institutions subject to the general solvency regime and the smaller institutions to which the special solvency regime applies.

The purpose of both recommendations is to maintain the financial, equity and solvency situation, as well as the capitalization levels of insurance companies in order to guarantee the stability of the sector, the protection of policyholders' interests and to ensure that they effectively carry out their function of supporting the real economy.

Within the framework of these recommendations, the DGSFP points out that the stress tests carried out in recent years have shown that the Spanish insurance sector is well capitalized and capable of withstanding the impact of the consequences of adverse scenarios. It also points out that this level of capitalization must be preserved in the unprecedented economic

context generated by the current health crisis, by strengthening the insurance sector's financial and equity defense mechanisms.

7. In a nutshell

- The new legal framework has a direct impact on the insured risk and on the coverage of different types of insurance policies. Among others, we find the impact on surety and credit insurance, payment protection in case of unemployment and/or temporary disability, loss of profits, D&O, Cyber Risks, health care, life insurance, travel policies and contingency policies (cancellation of events) to be noteworthy. The impact on each case of the crisis generated by the COVID-19 should logically be analyzed in the light of the specific conditions of the policy covering (or not) a potential claim.

- The terms and deadlines for the processing of ongoing proceedings before the DGSFP are suspended for the duration of the state of alarm, without prejudice to the power of the DGSFP to decide, by means of a reasoned decision, not to suspend them when this is deemed necessary to avoid serious harm to the administered party or when the interested party requests that the term should not be suspended.

- The DGSFP has been authorized to agree on the extension of certain terms and deadlines (in the area of the organization and supervision of insurance and reinsurance entities, pension plans and funds, and insurance and reinsurance distributors) by means of a resolution and following a report by the Advisory Board on Insurance and Pension Funds.

- The CCS has also been authorized to carry out credit and surety reinsurance activities, under the basic conditions set out in the RDL of 21 April.

- As long as the exceptions provided for in the RD of 14 March are not applicable, terms and deadlines provided for in procedural laws for all jurisdictional orders are suspended. Any hearing scheduled within the effective duration of the state of alarm (preliminary hearings, trials, etc.) is also suspended. However, from 15 April 2020 it is possible to file written submissions via online and from 20 April it is also possible to receive notifications of decisions in procedures of a non-urgent or essential nature.

- The RDL of 28 April has approved a series of procedural and organizational measures concerning the Judiciary. Among the most relevant measures, we can highlight that part of the days in August will be considered working days, the restart of the deadlines suspended by RD of 14 March is agreed, an extension of the periods to announce, prepare, formalize and file appeals against judgments notified during the state of alarm or 20 working days after the suspension of the deadlines is granted and the holding of hearings preferably by telematic means from this moment and up to three months after the cessation of the state of alarm is agreed.

- Both the statute of limitation and expiry periods of all actions and rights are suspended for the duration of the state of alarm. Therefore, since the entry into force of the RD of 14 March, we must add the days of the effective duration of the state of alarm to any statute of limitation or expiration period that is in progress.

- The meetings of the governing bodies of the companies may be held by videoconference as well as "in writing and without a session", with no need for these

alternatives to be expressly provided for in the bylaws of these entities. In the case of companies whose securities are admitted to trade on a regulated market in the European Union, the board of directors may provide in the notice of the general meeting for attendance by telematic means and remote voting, even if this is not provided for in the company's bylaws.

- The period for the formulation and approval of the annual accounts is extended so that the annual accounts for the 2019 financial year must be formulated within three (3) months of the end of the alarm state and must be approved within three (3) months of the end of said formulation period (i.e. within six (6) months of the end of the alarm state). In the case of companies whose securities are admitted to trade on a regulated market in the European Union, the period for approval of the annual accounts is extended to the first ten (10) months of the financial year.

- It is recommended by the EIOPA and the DGSFP that dividends should not be distributed until the uncertainty caused by the COVID-19 health crisis disappears, in order to maintain a minimum level of capitalization in insurance and reinsurance companies that guarantees their solvency and the protection of policyholders.

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