

Informative Note

Financial banking developments in relation to COVID-19 and limitations on foreign investment set out in Royal Decree Law 11/2020

1st April 2020

Royal Decree-Law 11/2020, of 31st March, adopting additional urgent measures in the social and economic field to deal with COVID-19

[Royal Decree Law 11/2020 of 31 March](#) adopting urgent supplementary measures in the social and economic field to deal with COVID-19, which comes into force the day after its publication in the Official State Gazette on 1 April 2020, contains a series of measures that complement those already adopted previously by the executive and, specifically, those included in Royal Decree Law 8/2020 of 17th March, some of which it profoundly modifies.

The main measures included in Royal Decree-Law 11/2020 on banking-financial matters are set out below. To facilitate understanding of these measures, and the mortgage debt moratorium, we set out both the aspects included in Royal Decree Law 8/2020 (as amended by Royal Decree Law 11/2020) and the innovations included in Royal Decree Law 11/2020.

Mortgage and non-mortgage debt moratorium for the acquisition of housing and establishment

Articles 7 to 16 of Royal Decree Law 8/2020 already provided for a **moratorium on mortgage debt for the acquisition of a habitual residence in cases where the debtor was in a series of situations of economic vulnerability**. In Royal Decree Law 8/2020, in addition to specifying and clarifying certain aspects of this moratorium, **a moratorium is also contemplated for non-mortgage debtors, and for cases in which what is acquired is not the habitual residence**.

1. Mortgage holder

Royal Decree-Law 11/2020 clarifies - in line with what credit institutions had been interpreting - that the various situations of economic vulnerability provided for therein are in fact circumstances that must occur simultaneously. We briefly recall these circumstances and add some additional mentions included by Royal Decree Law 11/2020:

- a) Unemployment, or in the case of entrepreneurs or professionals, substantial loss of income or substantial drop in turnover. A substantial drop in turnover is understood to mean a drop of at least 40%, and it is clarified that entrepreneurs and professionals are individuals who meet the conditions set out in Article 5 of Law 37/1992 of 28th December (VAT Law).



- b) That the total income of the members of the family unit does not exceed, in the month prior to the application of the moratorium, three times the IPREM (public income index). Cases are established, such as dependent children or disabled cohabitants in which it may be higher.
- c) That the mortgage payment, plus basic expenses and supplies, is greater than or equal to 35% of the net income received by the family unit. It is clarified that the basic expenses and supplies are the supplies of electricity, gas, diesel oil for heating, running water, fixed and mobile telecommunications and the contributions to the community of owners. This income is only considered in relation to the family unit.
- (d) That, as a result of the health emergency, the family unit has suffered a significant alteration in its economic circumstances so that the effort to meet the mortgage burden has been multiplied by 1.3.

A family unit is defined as the debtor, his or her spouse not legally separated or cohabiting, and the children residing in the dwelling, as well as the spouses or registered partners of such children.

It is also noted that the mortgage moratorium will not only cover the habitual residence. From now on, loans for the acquisition of property may benefit from the mortgage moratorium:

- i. The main residence.
- ii. Property used for the economic activity of the entrepreneurs and professionals referred to in the previous article (i.e. entrepreneurs or professionals in a situation of economic vulnerability).
- iii. Dwellings other than the usual one and in a rental situation and for which the mortgage debtor, natural person, owner and lessor of said dwellings, has ceased to receive the rental income since the entry into force of the alarm state or ceases to receive it up to one month after the end of the same.

The moratorium may be requested, presenting the planned supporting documentation, but may be replaced by a declaration of responsibility, although the documentation must be presented within one month of the end of the alarm state.

The application period continues to be extended until 15 days after the end of the validity of the Royal Decree-Law, and the financial entity will proceed with its implementation within a maximum period of 15 days. The duration of the moratorium is set at **three months**. This period is significantly shorter than that announced by many financial institutions, which proposed, in view of the legal silence of Royal Decree Law 8/2020, a moratorium of 6 months.

It also clarifies a doubt frequently raised by financial institutions: how the moratorium should be documented: it is made clear that neither an agreement between the parties nor any novation is necessary, but that it must be formalised in a public deed and registered in the property register. Given that Royal Decree Law 11/2020

A novelty is also established for the benefit of financial institutions: the consent of registered intermediate creditors will not be required, even if they do not consent.

The moratorium will entail:

-The suspension of the mortgage debt, which is now clarified to have a period of three months, and the non-application of the early maturity clause. The deadline may be extended by agreement of the Council of Ministers. Given that this period is so short that many financial institutions were already overcoming it, it would not be strange if it were finally extended.

During the last few days, doubts have arisen among financial institutions as to whether the "suspension" referred to in the legislation implies an extension of the final maturity of the term, or whether the increase of the debt would be allowed by keeping the final maturity date immovable. Our understanding, after analysing the set of provisions included by Royal Decree Law 11/2020, is that the extension of the final maturity date seems to be the preferred alternative by the legislator.

-No ordinary interest or moratorium during the suspension.

Regarding guarantors, Royal Decree Law 8/2020 already provided for the following benefits:

-Right to be excused. Even if this right has been waived, guarantors, guarantors or mortgagees in a vulnerable situation cannot be claimed without first claiming against the principal debtor.

-The same measures provided for mortgage debtors will apply to guarantors and sureties in relation to their main residence. Royal Decree 8/2020 does not specify exactly what the effects of this measure are on guarantors and their habitual residence, nor has Royal Decree Law 11/2020 specified exactly this measure.

The moratoriums will be communicated to the Bank of Spain including a series of data about the affected debtors, daily, and the amounts affected by the moratorium that would have been due will not be considered as not due.

Finally, it should be noted that the moratorium established in Royal Decree Law 8/2020 and modified by Royal Decree Law 11/2020 implies a gradual exemption from Stamp Duty in relation to the notarial deeds that document the modifications agreed with the financial institutions, as well as a reduction of registration and notarial fees.

2. Non-mortgage secured loans

Royal Decree Law 11/2020 also provides for the possibility of a moratorium on all types of loan or credit agreements without a mortgage guarantee entered into by a natural person in a situation of economic vulnerability, with a regime similar to that of the suspension of obligations arising from mortgage loans, the fundamental characteristics of which are as follows:

The following special calculation rules are established to determine when the potential beneficiary is in a situation of economic vulnerability:

- (i) With regard to the requirements for the application of the moratorium, if the potential beneficiary of the non-mortgage moratorium already benefits from a mortgage moratorium, the moratorium shall not be taken into account when determining whether the thresholds (c) and (d) indicated in the conditions referred to in paragraph 1 above are exceeded.
- (ii) If the beneficiary has not taken out a mortgage loan, but has to make a periodic payment of rent for his main residence, and/or any type of financing without a mortgage guarantee from a financial institution, the amount of these payments shall be taken into account when calculating the thresholds indicated in conditions c) and d) mentioned in paragraph 1 above.
- (iii) If the potential beneficiary is faced with a single non-mortgage loan and does not have to pay a regular rent for his main residence, only that non-mortgage loan shall be taken into account for the purpose of determining whether he is in a state of financial vulnerability.

The suspension may be requested up to one month after the end of the alarm state, not 15 days, and will also take effect in the absence of any agreement, although the extension of the period will have to be recorded in the register of movable property, if applicable.

The term of the extension is set, as in the case of mortgage loans, at 3 months, which may be extended by agreement of the Council of Ministers. It is also expressly stated that the duration of the contracts will be extended by 3 months.

The guarantors or sureties to whom the suspension of the obligations arising from non-mortgage credit agreements applies shall be entitled to be excused despite having renounced it contractually.

The Bank of Spain shall be notified of the moratoriums, including a series of data on the debtors affected, on a daily basis, and the amounts affected by the moratorium that would have been payable shall not be considered as having fallen due.

Measures related to SGIPYME loans, the Secretary of State for Tourism and credits granted by Autonomous Communities and Local Entities

Loans granted by the General Secretariat for Industry and SMEs (SIGPYME) will be subject to the following measures:

- (i) Loans granted by the SGIPYME that are pending at the time of the declaration of the alert state shall have a deadline for the provision of guarantees of 2nd November 2020.
- (ii) Beneficiaries of industrial project loans granted by SIGPYME may request modifications to the repayment schedule for a period of 2 years from the declaration of the alarm status.

Loans granted by the Secretary of State for Tourism under certain provisions will have interest and amortization payments suspended, without the need for prior application.

Finally, in the case of loans granted by Autonomous Communities and Local Entities to entrepreneurs and self-employed people affected by the Covid-19 health crisis or by measures adopted to alleviate the health crisis, borrowers may request a deferment of principal and/or remaining interest. The deferment cannot be requested when the corresponding public administration has adopted a similar measure.

Amendment of Law 19/2003, of 4th July, on the legal regime of capital movements and economic transactions abroad

Royal Decree-Law 8/2020 recognizes as a certain threat to the Spanish business sector, those acquisition operations by investors resident outside the European Union and the European Free Trade Association, so the fourth final provision of the same, aims to protect and prevent non-EU investors can take control of Spanish entities by taking advantage of the possible temporary fall in shares as a result of the crisis, through the inclusion of Article 7 bis. Suspension of the regime of liberalisation of certain foreign direct investments in Spain in [Law 19/2003 of 4 July on the legal regime of capital movements and economic transactions abroad](#).

For its part, Royal Decree Law 11/2020, modifies Article 7a in two specific respects, which in order to facilitate understanding of the regime, we will note where appropriate.

Thus, the aforementioned Article 7 bis defines what it considers to be foreign direct investments in Spain, after its reform by Royal Decree Law 11/2020, as all those investments as a result of which the investor holds a stake equal to or greater than 10 per cent of the share capital of the Spanish company, or when as a result of the corporate operation, act or legal business, the investor effectively participates in the management or control of said company, provided that one of the following circumstances applies:

a) That they are carried out by residents of countries outside the European Union and the Association for Free Trade.

b) That they are carried out by residents of countries in the European Union or of the European Free Trade Association whose real ownership corresponds to residents of countries outside the European Union and the European Free Trade Association. It will be understood that such real ownership exists when the latter directly or indirectly own or control a percentage of more than 15% of the capital or voting rights of the investor, or when they exercise control, directly or indirectly, over the investor by other means.

Scenario (b) was not included in the initial wording of Royal Decree 8/2020 and involves a variation of the general criterion in the foreign investment rule, which is based on domicile generally, not on the final owner.

The foreign direct investments in Spain referred to in paragraphs a) and b) above are restricted if they are made in the following strategic sectors of the economy:

- Critical energy, transport, water, health, communications, data processing, aerospace, defence, electoral or financial infrastructures and sensitive facilities, as well as those covered by [Law 8/2001 of 28th April](#).
- Critical technologies and dual-use items covered by Article 2.1 of [Council Regulation \(EC\) No 428/2009](#) (artificial intelligence, robotics, semiconductors, cyber security, aerospace, defence, nanotechnology, biotechnology, quantum energy storage and nuclear).
- Supply of critical inputs, energy in particular.
- Sectors with access to sensitive information, such as personal data
- Media.

Foreign investments are also suspended in the following cases:

- When the foreign investor is controlled by the government of a third country
- When the foreign investor has made investments or participated in the activities described as a strategic sector in the previous paragraph.
- When the foreign investor has a case open for exercising criminal or illegal activities.

However, the Government may suspend any other foreign investment not covered by the above cases, when it considers that it may affect public safety, public order and public health.

This type of investment operation is subject to authorisation under the terms of Article 6 of Law 19/2003 and is covered by the Royal Decree-Law which, if carried out without the required authorisation, is invalid and has no legal effect.

The suspension of the regime of liberalisation of foreign investments contemplated in 7 bis, which was initially contemplated as provisional (Royal Decree Law 8/2020 provided for its lifting by agreement of the Council of Ministers), is now outlined as permanent, since the possibility of lifting the suspension has been removed by Royal Decree Law 11/2020.

We hope that these comments will be useful and, in any case, the tax team at [Andersen Tax & Legal](#), is at your disposal to clarify any doubts you may have in this regard.

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