

Protection of affected consumers and users: Relevant measures during the health crisis

The Spanish Government has approved numerous measures to protect the consumers and users affected by the COVID-19 crisis. Excluding those relating to health, these measures can be divided into four large groups:

- Measures aimed at protecting vulnerable consumers.
- Measures to ensure that essential services continue to be provided even in the event of default.
- The freezing of time frames.
- Special conditions for the termination of contracts which cannot be performed due to the crisis, on the grounds of an unforeseeable event.

Consumers considered vulnerable from a legal perspective (albeit there are several definitions according to the case at hand) (i) cannot have their electricity, natural gas or water utility contracts suspended, (ii) benefit from a mortgage moratorium (three months and interest free) and (iii) benefit from a rent-based moratorium, coupled with extraordinary contract extensions and the suspension of eviction proceedings.

All consumers, whether vulnerable or not, benefit from the guarantee that even in the event of default (i) their electronic communications services cannot be cut off, including broadband connectivity (unless due to network security reasons) and (ii) cannot have their electricity, petroleum-based products, natural gas or water supply cut off at their habitual residence for reasons other than the security of supply, citizens and facilities. This right is different to the one afforded to the self-employed relating to the flexibility (amendment of terms) and freezing of payments under electricity, natural gas and petroleum-based product utility contracts.

The freezing of time frames is regulated under the second, third and fourth additional provisions of Royal Decree 463/2020 and Article 21 of Royal Decree-law 8/2020. Administrative and procedural deadlines, statutes of limitations and expiry dates are suspended, most notably the period granted to return products bought by any means. The validity of the regulation freezing the statute of limitations and expiry dates which do not fall within the state of emergency period (fourth additional provision) is questionable.

The termination without penalty of contracts entered into by consumers or users which cannot be performed on the back of the measures adopted during the state of emergency is regulated under Article 36 of Royal Decree-law 11/2020.

This precept affords consumers and users the right to request the termination of such contracts without penalty, provided that they do so within 14 days, in which case the company is able to issue them a review proposal in good faith to restore the parties' mutual interests (for example, credit notes or vouchers instead of a refund). Where this occurs, a 60-day period during which the parties negotiate in good faith begins. Should they fail to reach an agreement by the end of this term, the contract will be terminated and the company obliged to refund the amount paid by the consumer, minus any costs incurred. Said costs shall be broken down and provided to the consumer within a maximum of 14 days unless the parties agree otherwise. However, this idea raises several issues regarding interpretation and applicability:

- Whether it represents an alternative to termination on the grounds of an unexpected inability to perform established under Article 1124 of the Spanish Civil Code and Article 66 bis of the Consolidated Text of the Spanish General Consumers and Users Act (TRLGDCU), or is an additional mechanism. At this stage, we must bear in mind that termination on the grounds of an unexpected inability to perform was already regulated under Spanish law. If it is believed that Article 36 of Royal Decree-law 11/2020 excludes the legal regimen of Articles 1124 of the Civil Code and 66 of the TRLGDCU, it would in fact be a measure to protect the businesses threatened by the COVID-19 crisis (tour operators, hotels, travel agencies, etc.) and not consumers and users due to setting out less favourable – although clearer – terms (based on time frames, the cooling-off period and consequences) than the regulation applicable under ordinary circumstances.
- If we conclude that it represents an alternative mechanism, and that this consumer protection measure does not hinder the exercise of any other right afforded to consumers under other laws (such as Articles 1124 of the Civil Code and 66 of the TRLGDCU), we would then have to analyse whether the 60-day cooling-off period also applies to the legal regimen by default, insofar as the exercise of the right to terminate must always be exercised in good faith and on the grounds of a serious breach. This should therefore rule out the selective and partial application of the aforementioned Article 36 bis (only in the interests of one of the parties, so-called "cherry picking"). Article 66 bis of the TRLGDCU requires advance notice to the company "for performance within an additional period in line with the circumstances", with a few exceptions.
- Regarding the basic premise of the regulation, it is not clear as to whether the inability to perform must be attributed to the measures adopted by the Spanish Government during the state of emergency or also by the authorities of third States on the back of COVID-19 (for example, shortages of stock due to measures adopted in other countries).

- Along the same lines, it is worth questioning whether a strict inability to perform is required (unexpected event of force majeure) or whether an excessive and unforeseen burden or loss of the creditor's interest (vehicle rental in a tourist city during Easter) would suffice, as well as whether such inability should be subjective or objective (travelling to the Canary Islands is legally possible if the flight has not been cancelled, even if the traveller is unable to take it).
- The Royal Decree-law does not clarify the *dies a quo* for the calculation of the term (from when the state of emergency is lifted, given the suspension of expiry dates under Royal Decree 463/2020? or from the entry into force of the Royal Decree-law, or from the subsequent notification of the impediment?) or its form (calendar or working days?), nor what happens if the consumer or user allows the 14-day period to elapse without exercising the action under Article 36 (do they lose the right to terminate or continue to hold the right afforded under Articles 1124 of the Civil Code and 66 of the TRLGDCU?)
- The consequences of termination under Article 36 include a refund "minus any costs incurred, broken down and provided to the consumer".

In short, the RD-law provision is easier to grasp and exercise in practice for the consumer or user than that of the general consumer and user legislation, hence why it is expected to be triggered more. However, this regimen is less favourable to consumers and users than the general provisions insofar as time frame, the company's right to offer vouchers or other solutions which deter termination for 60 days and the calculation of the refundable amount (the company's right to retain any costs incurred). Against this backdrop, it is expected that the lion's share of consumers and users prefer the specific remedy offered by this Royal Decree-law to the risks of alternative interpretation, instead of opting to forgo the "protection" of the Royal Decree-law and to turn to the ordinary protection mechanisms established in the Civil Code and TRLGDCU.

Article 36 also contains specific provisions on consecutive service provision agreements which cannot be performed due to COVID-19, where the payment of any outstanding amounts will be suspended by law and those already paid for services yet to be provided may be retained if the parties agree for the service to be resumed at a later date. Otherwise, such amounts already paid will be refunded.

Lastly, Article 36 sets out a specific provision relating to combined travel tickets.

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