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Section 1
Law of Obligations and Contract

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Articles

From the Black Swan, to the Snowball. Risks of Covid-19 Pandemic for Consumer Credit Scores in the Lack of a Harmonized Regulatory Intervention

Antonio Davola*

Abstract

In light of the harmful and wide-ranging effect of the coronavirus pandemic, many governments in the European territory and on the global framework rushed to introduce forms of financial support for those groups that are susceptible to be economically affected by the current situation in order to limit the economic fallout of the pandemic. Still, and in spite of the significant level of

* Adjunct Professor, Post-Doc Researcher, Luiss Guido Carli University.

regulatory intervention, no major normative change addressed the area of consumer spending and consumer credit. Considering the expected length of the phenomenon, and its impact on the economy and employment, the management of consumers' economic exposure and of unpaid debt is though meant to emerge as a major consequence during and after the expiration of the pandemic: in particular, significant risks are related to the consequences that the deterioration of consumers' exposure caused by the COVID-19 and the pandemic-related factors is likely to have on their credit scores (and, subsequently, in terms of outcome of future creditworthiness assessments). Scores have a major impact on consumer credit landscape, and badly determined/distorted scores invest both consumers and credit operators: consumers are precluded from accessing credit in a moment of financial distress; banks and other institutions are not able to properly discriminate between the quality of potential borrowers, therefore facing risks of overexposure to losses and unprofitable operativity. In order to prevent a further worsening of the (already distressed) global economic health, it is therefore pivotal to promptly introduce harmonized corrective measures to mitigate the risk of unsought deviation in the credit scoring sector. The research investigates the impact of the events related to the COVID-19 infection on the scoring software's functioning, considering how the pandemic is likely to impact on both macro and microeconomic factors related to consumer behavior and indebtedness. The analysis is then developed in order to provide a set of recommendations for interventions with the aim to preserve algorithms' stability, accuracy and predictive power over the pandemic and during its aftermath.

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1. The absence of intervention in the regulation of credit scoring systems against the effects of Covid-19 pandemic

In light of the harmful and wide-ranging effects of the coronavirus outbreak, many governments in the European territory and on the global framework rushed to introduce forms of financial support for those groups that are susceptible to be economically affected by

the current situation in order to limit the economic fallout of the pandemic.[1] Amongst the various aspects, that have been addressed by regulatory interventions, a common trait is observed in the introduction of measures to financially support families, SMEs, and temporally unemployed workers.

Particular attention has been devoted at reducing some specific expenses as well: as long as consumers' position is concerned, laws enacted worldwide in response to the coronavirus introduced mortgage relief options and deferred payment plans for those houseowners, who were financially impacted by the coronavirus pandemic.[2]

In spite of the significant amount of regulatory intervention, no major normative change addressed the area of consumer spending and consumer credit yet. Even if such occurrence is handily explained – as it has been defended by governmental institutions within and outside Europeans' borders[3] – by the leading interest in prioritizing other definite forms of expenditure (namely, those related to immovable residential properties, or connected to small and medium enterprises' operativity), it goes without a doubt that the pandemic has radically altered traditional modes of consumption in indirect (i.e., affecting some of the factors that determine consumer spend—such as consumer confidence, unemployment levels, or the cost of living) and direct forms.[4] Covid-19 radically reshaped consumers' behavior with regards to future spending and – significantly – repayment of previously stipulated loans.

Considering the expected length of the phenomenon, and its impact on the economy and employment, the management of consumers' economic exposure and of unpaid debt is therefore likely to emerge as a major consequence during and after the expiration of the pandemic.

This is further exacerbated when the fact, that access to consumer credit has risen as a major resource of support for small expenditures in the last years, is taken into account: considering both instalment and revolving credit, the European consumer credit market has experienced consistent year-on-year growth since 2013, following the Global Financial

[1] For an overview of the main initiatives, cfr. Blavatnik School of Government, University of Oxford, *Coronavirus Government Response Tracker* https://www.bsg.ox.ac.uk/research/research-projects/coronavirus-government-response-tracker.

[2] E.g. the Italian Government, with Art. 54 of the d.lgs. March 17, 2020, n. 28, postponed up to 18 months mortgage rate payments for individuals impacted by Covid-19. For an overview of different actions brought in at national level, a significant number of research projects are currently monitoring economic impact as well as responses of governments around the world: see International Institute for Democracy and Electoral Assistance (IDEA), *Government responses to Covid-19*, http://constitutionnet.org/; United Nations Conference for Trade And Development, *Coronavirus (COVID-19): News, Analysis and Resources*, https://unctad.org/en/Pages/coronavirus.aspx; European Council, *Report on the comprehensive economic policy response to the COVID-19 pandemic*, 9 April 2020, www.consilium.europa.eu.

[3] Cfr. C. Roberts, *The next COVID-19 crisis: The coming tidal wave of evictions. The curve that won't flatten*, 1 May 2020, www.sfcurbed.com; Z. Tidman, *Coronavirus: Italy suspends mortgage payments amid lockdown. Entire country is in state of quarantine over virus,* 10 March 2020, www.independent.co.uk; J. Atkin, *S&P: How will mortgage payment suspensions related to COVID-19 affect European RMBS?*, 16 March 2020, www.mortgagefinancegazette.com.

[4] K. Jones, *How COVID-19 Consumer Spending is Impacting Industries*, 22 April 2020, www.visualcapitalist.com.

Crisis and the European recession, arising as an important source of revenue for the retail banking sector.[5]

In 2019, under normal conditions, the default rate for consumer loans has been extremely low (oscillating between 2% and 3% of the cases) and, despite all pre Covid-19 projections conceded that delinquencies should have continued their descending trend in 2020,[6] if no intervention is made the situation will soon overturn, causing major detriment to consumers and lending institutions.

In the absence of any uniform mandatory act, consumer credit institutions in Europe rearranged their business strategy autonomously, elaborating solutions to support their clients and implementing payment holidays regime, forbearance, deferral and suspension for debt obligations according to each Member States' indications.[7] In a recent statement, the European Banking Authority acknowledged the relevance of moratoria systems and welcomed them as effective tools to address short-term liquidity difficulties.[8] Still, no uniform strategy has been deployed, and no modification has been made regarding pre-existing rules on credit institutions prudential requirements.[9]

Consumers whose, in the past, benefitted from loans or other forms of unsecured credit are primarily affected by the lack of protection determined by the current regulatory uncertainty: not only debtors are forced to burden the weight of the various restrictive measures related to the lockdown (which prevent them, for example, from resuming their work), but they need to save the necessary resources to face imminent expenses at their disposal; this causes a contextual reduction in their spending power, and an ability to comply with agreements with consumer credit companies they originally entered into.

In addition, adverse effects do not only concern the pandemics' immediate repercussions on consumers' spending and repayment capacity: long-term effects that may derive from the exasperation of their debt position involve their ability to access to credit in the future as well.

In particular, significant risks are related to the consequences that the deterioration of consumers' exposure caused by the Covid-19 and the pandemic-related factors (reduction of working capacity and other adverse economic contingencies) is likely to have on their credit scores, and, subsequently, in terms of outcome of future creditworthiness assess-

[5] V. Deloitte, *The Future of Credit. A European perspective*, Spring 2019, www2.deloitte.com.

[6] M. Komos, *2020 Predictions: Consumer Credit, Balance and Delinquency Rates*, 23 December 2019, www.transunion.com; in some of the most affected EU countries – such as Italy – the default rate was even lower, amounting to 1.7% in 2019: see Assofin-Prometeia, *Nel primo trimestre 2019 crescono ancora i flussi di credito al consumo erogati alle famiglie. In frenata i mutui immobiliari*, 19 June 2019, www.crif.it.

[7] For an overview, see Allen&Overy, *Covid-19 – Coronavirus measures implementing forbearance, deferral and/or suspension for debt obligations*, 30 April 2020, www.allenovery.com.

[8] See EBA, *Guidelines on legislative and non-legislative moratoria on loan repayments applied in the light of the COVID-19 crisis*, EBA/GL/2020/02.

[9] See *Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.*

ments. Any variation will, in fact, have a major impact on consumer credit landscape in the future.

Consumer scores are widely used tools to describe individuals or groups in order to predict, on the basis of their data, behaviors and outcomes: scores use information about consumer characteristics and attributes by means of statistical models that produce a range of numeric scores, and they proliferate in day-to-day interactions.[10] In particular, credit-scoring systems are used to evaluate individuals' creditworthiness for access to finance. Credit scores are implemented by both institutional operators and emerging P2P lending platform: a positive credit score represents an essential means for access to credit, and therefore as a tool for individual and social development.[11]

Through ICTs, social media analysis, wearable devices and app tracking, quantitative and qualitative data are collected to improve consumers' profiling: explored data (usually acquired by a third party operating as a data broker) range from consumption habits to buying preferences, and more in general scan the social ecosystem of individuals as proxies to evaluate their solvency expectancy.

By creating a virtual image of the applicant's personality, these tools jointly use hard and soft data; they profoundly affect the assessment methodologies, going past the mere historical analysis of consumers' economic resources and transactions.[12]

In the US, proper management of the credit scoring processes during the pandemic has been identified by the main leading score modelers (*Vantagescore*, *FICO*) as a priority in order to preserve the stability of the financial system: the three major Credit Reference Agencies (CRAs), Experian, Equifax and TransUnion put in place a special "emergency payment freeze" to ensure that any payment holiday agreement determined by the Covid-19 effects does not modify their clients' score.[13]

The payment freeze strategy is aimed at reaching a twofold goal: on one side, not to impair consumers by worsening their credit score; on the other side – on a precautionary note – to preserve the quality of existing data, and to prevent scoring algorithms from encapsulating transiently biased data that might distort their performance even after the pandemic.

[10] In the US only, roughly 140 scoring algorithms are implemented for a wide range of services, and the most advanced of them can elaborate up to 8.000 individual variables. Cfr. Lexis Nexis, *Alternative Credit Decision Tools: Auto & Credit Lending. White Paper,* 2013, www.risk.lexisnexis.com.

[11] Q. Hardi, Big Data for the Poor, 5 July 2012, New York Times; A. Mcclanahan, Bad *Credit. The Character of Credit Scoring*, in *Representations*, 2014, vol. 126, iss. 1, 31-57; T. Berg, V. Burg, A. Gombovic, M. Puri, *On the Rise of FinTechs – Credit Scoring using Digital Footprints,* in *FDIC – CFR Working Paper Series*, 2018, 4, 3.

[12] M. Hurley, J. Adebayo, *Credit Scoring in the Era of Big Data*, in 18 *Yale J.L. & Tech.*, 2018, 148, 176; see previously A. Davola, *Technological innovation in creditworthiness assessment*, in *Open Review of Management, Banking and Finance*, 2019.

[13] J. Atkin, *Credit scores will be protected during Covid-19 pandemic*, 31 March 2020, www.mortgagefinancegazette.com.

Except for the application of payment freeze programs, credit bureaus did not disclose any other change to their methodology during the pandemic yet: they consider the scores able to perform properly "even in this exceptional situation".[14] CRAs defended that changing the credit scoring model to improve the scores of those undergoing the financial difficulties of the pandemic would ultimately destabilize the entire credit industry, making it no longer a valid indicator of credit worthiness and leading potential lenders into major uncertainty.[15]

In the meanwhile, European consumer advocacy groups tried pushing a payment freeze proposal at the EU level; against this view, the current upfront position is that suspending the reporting of negative credit information during the pandemic would ultimately hurt consumers, especially considering that the negative effects of the economic situation can be mitigated by means of alternative supporting measures enacted by the Member States governments. As a consequence, the European Banking Authority (EBA) merely called on financial institutions to act in the interests of consumers, observing that, as a general principle, measures to alleviate pressure on consumers should not have negative implications for their credit rating.[16]

Indications that EBA provided for facing the Covid-19 effects, though, does not entail prescriptive any force and, as a consequence, credit bureaus are not required to update or otherwise modify their credit score models.

It shall be noted that, in addition to the specific contingencies that the Covid-19 pandemic is bringing up, that consumer debt across the EU already faces a significant (and still ongoing) expansion since 2008 financial crisis, which originated a growing condition of over-indebtedness[17] for a substantive number of consumers in the Union.[18]

Many factors have been identified as sources of over-indebtedness phenomena in Europe. Amongst them, some drivers are endogenous to consumers' personal conditions and attitudes towards credit: individuals' financial illiteracy and subsequent inability to manage finances correctly,[19] together with psychological biases and mental shortcuts that affect

[14] Cfr. N. Kayser-Bril, *Credit scores algorithms keep operating normally even as everything else doesn't*, 15 April 2020, www.algorithmwatch.org.

[15] MoneyFit, *What Is The Impact Of Covid-19 On Credit Reports And Scores?*, 2020, www.moneyfit.org.

[16] Eba, *Statement on consumer and payment issues in light of COVID19*, 25 March 2020, www.eba.europa.eu.

[17] Whereas the term defines those situations, in which individuals' net resources render them persistently unable to meet essential living expenses and debt repayments as they fall due.

[18] For an early analysis on the topic, see N. Fondeville, E. Őzdemir, T. Ward, *Over-indebtedness. New evidence from the EU-SILC special module*, Research note 4, 2010, www.ec.europa.eu.

[19] A. Lusardi, P. Tufano, *Debt Literacy, Financial Experiences and Overindebtedness*, in NBER Working Papers 14808, 2009; A. Lusardi, O. Mitchell, *The Economic Importance of Financial Literacy: Theory and Evidence*, in *Journal of economic literature*, 2014, vol. 52, iss. 1, 5-44; M. Gentile, N. Linciano, P. Soccorso, *Financial advice seeking, financial knowledge and overconfidence – Evidence from the Italian market*, in *Quaderni di Finanza Consob,* March 2016, vol. 83; N. Linciano, P. Soccorso, D. Di Cagno, L. Panaccione, G. Nicolini, M. Ploner, C. Lucarelli, G. Brighetti, E. Cervellati, E. Rinaldi, R. Viale, Riccardo D. Martelli, B. Alemanni, G. Agrusti, G. Ferri, C. Giannotti, C. Cruciani, U. Rigoni, *Challenges in Ensuring*

consumers' decisions and predictions about borrowing[20] are the most common reasons behind poor credit management.

Yet, leading determinants for the expanding level of indebtedness across EU are exogenous as well: over-indebtedness is due both to macroeconomic factors (the post-crisis global economic downturn, persisting inequality, marginalization and financial exclusion of low-income social groups and geographic areas, differentiated access to essential services such as healthcare and education)[21] and to specific phenomenon pertaining to the credit market (lack of transparency of lenders' terms and conditions, irresponsible lending strategies, and systemic exploitation of consumers' information asymmetry).[22]

It goes without saying, that adverse effects arising from systemic over-indebtedness do not affect consumers only: the persistent exposure of banking institutions to Non-Performing Loans (NPLs) or Unlikely-To-Pay (UTP) obligations hinders their ability to promote an efficient circulation of economic resources on the market.[23]

The urgency to curtail the factors producing over-indebtedness originated a profound rethinking of the regulatory strategies for preventing and resolving unsustainable debt situations.[24] In particular, the need of avoiding undisciplined, ineffective, abusive or non-

Financial Competencies: Essays on How to Measure Financial Knowledge, Target Beneficiaries and Deliver Educational Programmes, in *Consob Working Papers*, 2017, n. 84.

[20] L. Andreloni, D. Vandone, *Risk Of Overindebtedness And Behavioural Factors,* in C. Lucarelli, G. Brighetti (eds.) *Risk Tolerance In Financial Decision Making*, Palgrave Macmillan, 2010; H. Shefrin, *Beyond Green and Fear: Understanding Behavioral Finance and the Psychology of Investing,* Harvard Business School Press, 2000; J.R. Agnew, L.R. Szykman, *Asset Allocation and Information Overload: The Influence of Information Display, Asset Choice, and Investor Experience*, in *The Journal of Behavioral Finance*, 2005, vol. 6, n. 2; S. Viale, B. Mousavi, B. Alemanni, U. Filotto, *The Behavioral Finance Revolution. A New Approach to Financial Policies and Regulations*, Elgar, 2018.

[21] World Bank, *UFA2020 Overview: Universal Financial Access by 2020,* 2019, *www.worldbank.org*; A. Demirgüç-Kunt, L. Klapper D. Singer, S. Ansar, J. Hess*, The Global Findex Database 2017: Measuring Financial Inclusion and the Fin-tech Revolution,* World Bank*,* 2018, *passim*; A. Patwardhan, *Financial Inclusion in the Digital Age*, in *Handbook of Blockchain, Digital Finance, and Inclusion*, Elsevier, 2018, 1, 58.

[22] *Ex multis* I. Ramsay, *From Truth in Lending to Responsible Lending,* in G. Howells, A. Janssen*,* R. Schulze (eds.), *Information Rights and Obligations,* Ashgate, Dartmouth, 2005, 47-65; Y. Kong, M. Tampuri, P., Opoku Boadi, *Digital Financial Inclusion: The Star Strategy Approach to Policy Formulation*, in *International Journal of Management Sciences and Business Research* , 2018, 1, 120-129.

[23] F. Bassan, *Unlikely to pay regulation and management, the new challenges*, in *bancaria.it*, 2018, 3, 63-64; V. Makri, A. Tsagkanos, A. Bellas, *Determinants of non-performing loans: The case of Eurozone,* in *Panoeconomicus*, 2014, 61, 2, 193-206; E. Montanaro, *Non-Performing Loans and the European Union Legal Framework*, in M. Chiti, V. Santoro (eds.), *The Palgrave Handbook of European Banking Union Law*, Palgrave, 2019, 213.

[24] United Nations, Inter-Agency Task Force for Financial Development, *Towards responsible borrowing and lending*, 2016, https://developmentfinance.un.org/towards-responsible-borrowing-and-lending; European Coalition on Responsible Credit, *Principles of Responsible Credits,* 2006, https://www.responsible-credit.net/; United Nations Conference on Trade and Development, *Principles on promoting responsible sovereign lending and borrowing*, 10 January 2012, www.unctad.org. As for Member States' initiatives, a major intervention was operated in Italian's insolvency legislation by means of the enactment of the Law on over-indebtedness in 2012 (orig. *Legge 27 gennaio 2012, n. 3. Disposizioni in materia di usura e di estorsione, nonche' di composizione delle crisi da sovraindebitamento*) and the introduction of the Code of corporate crisis and insolvency (*Codice della crisi d'impresa e dell'insolvenza,* d. lgs. 2019, n. 14), which will enter into force in September 2021. See E. Pellecchia, L. Modica (eds.), *La riforma del sovraindebitamento nel codice della crisi d'impresa e dell'insolvenza*, Pacini, 2020.

cooperative behavior on the part of both creditors, led to the introduction of new bodies of law advocating in favor of responsible lending conducts (and, therefore, promoting a major shift from the previous "responsible borrowing system")[25] and promoting supporting strategies for consumers' and SME's crisis management.

Despite the undoubted relevance of such advancements, the path towards a new paradigm for lending is, though, still developing;[26] in the lack of a specific intervention, the effects of the current pandemic are therefore susceptible to further exasperate the fallacies of the EU credit market, and to lead to a new wave of over-indebtedness across Europe. In order to prevent this occurrence, a prompt investigation of the Covid-19 effects' on credit scoring system is pivotal.

2. Covid-related risks for the credit scoring system

Credit scoring systems exploit different and heterogeneous types of (hard and soft) data related to consumers:[27] in the elaboration of the score, information on clients' payments history, proprietary assets, type of credit used in the past, as well as regarding their presence on different social media platforms, purchase rate for specific products, data obtained by GPS tracking, habitual relationships and encounters, simultaneously concur to increase the creditworthiness assessment's predictive power;[28] this way, previously unknown meta-variables – i.e. sets of decisions that can traced to specific aspects of the applicant's personality and consumption attitude – can be identified, and conditions for access to credit re-determined.[29]

In a concerted effort to grasp the implications of these tools for consumers' protection, legal scholars, data scientists, and economists, devoted significant attention at pointing out potential advantages and risks arising from the massive usage of these algorithms for conducting the creditworthiness assessment: opacity and robustness of algorithms, the complexity of their reverse engineering, potential disparate impact, misuse of biased processing and dataset and implications for the due process principle are just some of the

[25] U. Reifner, *Responsible Credit in European Law*, in *The Italian Law Journal*, 2018, vol. 4, n. 2, 426; J. Minnaar, *Over-Indebtedness: Roles and Responsibilities of All Actors*, 2 March 2011, www.cgap.org.

[26] Cfr. O. Cherednychenko, J.M. Meindertsma, *Irresponsible Lending in the Post-Crisis Era: Is the EU Consumer Credit Directive Fit for Its Purpose?*, in *Journal of Consumer Policy*, 2019, n. 42, 483-519.

[27] S. Cornée, *Soft Information and Default Prediction in Cooperative and Social Banks*, in *Jeod,* 2014, vol. 3, iss. 1, 90; also J. María Liberti, M.A. Petersen, *Information: Hard and Soft*, in *The Review of Corporate Finance Studies*, 2019, vol. 8, iss. 1, 1-41.

[28] *Ex multis,* S. Arya, C. Eckel, C. Wichman, *Anatomy of the credit score*, in *Journal of Economic Behavior & Organization*, 2013, 95, 175-185.

[29] F. Mattassoglio, *Innovazione tecnologica e valutazione del merito creditizio dei consumatori. Verso un Social Credit System?*, Milano, 2018, 39.

aspects that literature underlined as requiring a major regulatory intervention to prevent abuses, unlawful financial exclusion and unfair discrimination of consumers.[30]

In addition, current events related to the pandemic are supplementing previously observed risks with a new, specific contingencies, that were unconsidered by the majority of the analysis: a common ground in credit scoring systems' analysis (and, more in general, in the study of predictive algorithms) lies in the fact that these tools are based on the idea that "*the future is like the* past"; prediction is, as a matter of fact, based on the statistical recurrence of patterns of similar behaviour amongst individuals, or by the same individual over time. This assumption has direct consequences on credit scoring algorithms' design: its main implication is that these technologies are generally unfit to manage s.c. 'black swan' phenomena, that is, events that have no significant precedent in (at least) modern history.[31] The problem with black swan events is straightforward: there are, merely, not enough data concerning previous individuals' reaction to these occurrences to establish an expected pattern of conduct for predictive purposes.

Furthermore, the Covid-19 pandemic is not a provisional event: according to previsions, the cumulated economic effects of the lockdown's immediate and long-term aftermath might have repercussions on the global economy for years.[32]

Due to the joint influence of a) the lack of past data regarding analogous event; and b) the uncertainty surrounding the protractions of the epidemic's effects, the current scenario is likely to profoundly affect scoring algorithm's functioning; this might create a 'snowball effect' investing the credit sector, consumers' and market's stability.

A first, intuitive effect of the pandemic in the absence of a proper regulatory interventions is that, as more individuals miss payments due to economic hardships, their credit score will gradually drop. Even if this could be considered a physiological effect of the economic contraction due to Covid-19, in the lack of a proper re-calibration of scoring algorithms, scores might (contingently) drop exceeding the expected score-to-odds relationship – that is, the functional relationship between the generated score and the expected level of performance: the score thresholds for risk definition (i.e. the expected insolvency rates) were in fact set pre-Covid19. Therefore, for those in need to access credit during the pandemic,

[30] E.g. S. Barocas, A. Selbst, *Big Data's Disparate Impact*, in *California Law Review*, 2016, vol. 104, 671; M. Leese, *The New Profiling: Algorithms, Black Boxes, and the Failure of Anti-Discriminatory Safeguards in the European Union*, in *Security Dialogue*, 2014, vol. 45, iss. 5, 494–511; D.K. Citron, *Technological Due Process*, in *Washington University Law Review*, 2008, 85, 1249; T. Zarsky, *Transparent Predictions*, in *Illinois Law Review*, 2013, 1503, 1512; Id., *Transparency in Data Mining: From Theory to Practice*, in B. Custers, T. Calders, B. Schermer, T. Zarsky (eds.), *Discrimination and Privacy in the Information Society. Studies in Applied Philosophy, Epistemology and Rational Ethics*, vol 3. Springer, 2013, 301-324.

[31] Cfr. for the relation between Covid-19 and black swan theory: B.C: Halliburton, *COVID-19 is a Black Swan*, 19 March 2020, www.forbes.com; see also N. N. Talbeb, Y. Bar-Yam, The UK's coronavirus policy may sound scientific. It isn't., 25 March 2020, www.theguardian.com. *Contra*, D. Cameron, *COVID-19: A white swan, not a black swan*, 31 March 2020, www.rabble.ca.

[32] See G. Caracciolo, F. Cingano, V. Ercolani, G. Ferrero, F. Hassan, A. Papetti And P. Tommasino, *Covid-19 and Economic Analysis: a Review of the* Debate, 2020, www.bancaditalia.it.

scores used in the origination phase might operate on the basis of data that do not reflect their actual risk perspective.[33] The same trend might occur with roll-rate indexes (measuring the percentage of consumers who become increasingly delinquent on their account balances due) and with application scorecards: since the average risk threshold of the population (especially for self-employed individuals) is higher than normally, a flattening effect might take place, with significant effects on the development of pricing strategies for loans and credit more in general.

If, on the one hand, problems related to the score drop arise from temporary economic hardship (and, therefore, from quantitative information susceptible to recalibration), on the other hand additional concurring influencing factors pertain to the behavioural data that these algorithms exploit. Consider the effects of the Covid-19 in terms of stress and anxiety over the population: since behaviour scores are created utilising data through the credit cycle before the Covid-19 spread, abrupt variations in consumers' behavioural patterns (e.g. buying relevant amount of edibles and basic necessities in prevision of shortages in the supply chain) might be interpreted as symptomatic of irrational, non-strategic attitude and, therefore – along with the growth of the disbursement – lead to further drops of consumers' scores. In addition, stressed consumers might be willing to indulge in forms of delayed payment solutions or will seek for procrastination of their obligations (a strategy, which is further exacerbated by the "payment holiday approach" that many governments are promoting for mortgages and other expenses): this conduct will be interpreted as a lower propensity to-pay and therefore will affect payment projection scores. Since payments history accounts, for example, for 35% of the borrowers' *FICO* score, any sudden variation in the average expenditure will significantly impair the score for forthcoming months.

In the US, early investigations on the effects of the Covid-19 pandemic on credit applications conducted by the *Consumer Financial Protection Bureau* already showed significant drops (between 30% and 50%) in most categories, with relatively larger decreases among consumers with higher credit scores.[34]

In light of these events, the abovementioned predilection for payment holidays agreement, which currently represent the most viable solution promoted by government to face the economic effects of Covid-19, might as well reveal ultimately counterproductive for credit scores' functioning: even if payment holidays apparently offer short-term relief for temporary hardships, for those who will suffer severe long-lasting consequences (e.g. losing their job) the payment holiday is likely to cause an underestimation of clients probabil-

[33] Cfr. T. Maydon, *10 ways the COVID-19 crisis will affect your credit models (PART 1)*, 5 April 2020, www.insights.principa.co.za.

[34] See CFPB, *The Early Effects of the COVID-19 Pandemic on Credit Applications*, CFPB Office of Research Special Issue Brief, 1 May 2020, www.consumerfinance.gov.

ity-of-default rate for those months. This goes also for behavioral scores since, under a payment holiday agreement, expenditure perception is artificially adjusted downwards.
Lastly, indirect effects of individuals' consumeristic perspective arising from transitions in their professional activity should be taken into account: reduction in consumers' expenditure throughout the pandemic – in particular during the lockdown phase – has a direct effect in terms of sales contraction, and this is likely to affect counterparties' profit forecasting and budget models, conditioning their private activity as well. In such a situation, algorithmic models considering the expected income as a constituting factor for the score might fail to foresee how retailer will perform post-lockdown – especially for those operating in delicate sectors such as tourism[35] - and therefore underestimate its financial worthiness in case of application for credit. As another manifestation of the 'snowball effect' consumers' economic hardships determined by the lack of resources and credit will reverberate on the industry has a whole, undermining its ability to endure Covid-19 effects.

3. Strategies to reduce adverse impact of traditional scoring system during – and after – the pandemic outbreak

As we have observed, algorithmic credit scoring systems might heavily mis-perform in light of the Covid-19 effects, due to quantitative factors related to expenditure as well as to qualitative determinants, since consumption under crisis do not follow traditional psychological and behavioural patterns. This is susceptible to lead to several spillover harmful effect, both on consumers and on the market more in general.
Such contingent problem operates on top of the persisting uncertainty regarding the governance of credit scoring algorithm for creditworthiness assessment in the European Union: despite a broad request for indications by scholars and consumer interest groups, regulation in this field is still largely remitted to credit bureaus' discretion.[36] Risks arising from the delay in issuing rules for this technology are further exacerbated by the current crisis, considering that environmental and behavioural data can produce significant oscillations on credit scores.
Foreign countries that in the past promoted a stronger effort in the regulation of scoring algorithms are already recurring to centralized solutions in order to deal with the Covid-19 effects on credit scoring: the People's Republic of China, which has been investing for

[35] Cfr. N. Fernandes, *Economic Effects of Coronavirus Outbreak (COVID-19) on the World Economy*, 22 March 2020, www.ssrn.com.

[36] H. Aggarwal, *Machine Learning, Big Data and the Regulation of Consumer Credit Markets: The Case of Algorithmic Credit Scoring*, in H. Aggarwal, H. Eidenmüller, L. Enriques, J. Payne, K. van Zwieten (eds.) *Autonomous Systems and the Law*, Beck, 2019.

years into developing a Social Credit System (SCS) to represent the social and economic condition of citizens,[37] introduced a set of special provisions to amend the standards of the SCS. These accommodations mostly consist of exemptions on penalties that would otherwise be inflicted under the normal operativity of the system, presuming that such adverse behaviours are caused by the coronavirus outbreak (e.g. preventing any reduction of the social credit score for firms that fail to pay social insurance or taxes due to the coronavirus).[38]

The United States government promoted initiatives on a federal level within the framework of the Cares Act,[39] requiring lenders and creditors who agree to account forbearance or modified payments must treat those obligations as "current" if the consumer has trouble making a full payment during the Covid-19 crisis.[40] Yet, a major intervention specifically focused on credit scoring reporting obligations was expunged from the regulation, seemingly due to apparent pressure from the lending industry.[41]

In the European Union, in its recent statement[42] the European Banking Authority clarified that any acceptance of temporary measures for loan reclassification from a prudential perspective should not automatically lead to negative implications for the consumer's credit rating, but did not provide any further indication.

As for initiatives arising from private parties, score modelers and CRAs are implementing - besides the abovementioned payment freeze strategies – adjustments on their traditional models based on approaches applied on territories affected by natural catastrophes (hurricanes, floods, fires, tornadoes);[43] in addition, guidelines are issued for clients, suggesting responsible conducts to preserve their credit score (check credit regularly, promptly dis-

[37] See *ex multis* F. Liang, V. Das, N. Kostyuk, M.M. Hussain, *Constructing a Data-Driven Society: China's Social Credit System as a State Surveillance Infrastructure*, in *Policy & Internet*, 2018, vol. 10, iss. 4, 415.

[38] A. Chipman Koty, *China's Social Credit System: COVID-19 Triggers Some Exemptions, Obligations for Businesses*, 26 March 2020, www.china-briefing.com.

[39] Public Law No: 116-136, 27 March 2020, *Coronavirus Aid, Relief, and Economic Security Act or the CARES Act,* H.R.748 – 116th Congress.

[40] H.R. 748 § 4021, Coronavirus Aid, Relief, and Economic Security Act (CARES Act): "*Under this section, furnishers [of information] to credit reporting agencies who agree to account forbearance, or agree to modified payments with respect to an obligation or account of a consumer that has been impacted by COVID-19, report such obligation or account as "current" or as the status reported prior to the accommodation during the period of accommodation unless the consumer becomes current. This applies only to accounts for which the consumer has fulfilled requirements pursuant to the forbearance or modified payment agreement. Such credit protection is available beginning January 31, 2020 and ends at the later of 120 days after enactment or 120 days after the date the national emergency declaration related to the coronavirus is terminated*".

[41] J. Bykowicz, T. Mann, *No Coronavirus Break for Consumer Credit Scores*, 31 March 2020, The Wall Street Journal; B. Fredericks, *Lenders blocked plan to protect Americans' credit scores amid coronavirus*, 31 March 2020, The New York Post.

[42] See *footnote* 16.

[43] Consumer Data Industry Association, *Helping Consumers Avoid Credit Problems if They Have Been Impacted by Coronavirus (COVID-19),* 29 March 2020, www.cdiaonline.com.

pute any incorrect information; communicate any relevant event to service providers),[44] and customers are offered free weekly credit reports to help them protect and monitor their financial health.

Lastly, many private operators engaged into treating any Covid-19-related forbearance plan and deferred payment neutrally. However, without a mandatory prescription to act, these obligations are remitted to privates' autonomy and discretion. Furthermore, without any duty on clients to signal in advance any potential significant event related to credit to professional counterparties, the risk of a structural misalignment of scoring algorithms is still present.

Harmful effects of badly determined/distorted scores during the pandemic invest both consumers and credit operators: consumers are precluded from accessing credit in a moment of financial distress; banks and other institutions are not able to properly discriminate between the quality of potential borrowers, therefore facing risks of overexposure to losses and unprofitable operativity.

In order to prevent a further worsening of the (already distressed) global economic health, it is therefore pivotal to promptly introduce harmonized corrective measures to mitigate the risk of deviation in the credit scoring sector.

First, performance identification of essential rates for credit scoring as defined by the Basel Accords (probability of default, loans loss given default, exposure at loss, default timing, etc.) shall be redefined in accordance with variations determined by the pandemic. This can be achieved by means of gathering vintages and conducting a preliminary analysis on the score-to-odds relationship existing between pre-covid and post-covid credit default for traditionally "stable" customers.

Once new default rates are determined, models will then require a refresh of back-testing as long as data mature to validate their continued usage.

These activities should be conducted by means of a dynamic approach, with regular updates and adjustments on the basis of further data on credit emerging during and in the early aftermath of the pandemic, and subsequently might require alignment or rebuild in short term outcome windows. Constant monitoring and adjustment are essential to preserve scoring algorithms' stability, accuracy and predictive power over the pandemic, and to ensure early warning triggers when models move away average thresholds. At the same time, other measures meant at maintaining the quality of data (e.g. expunging 2020 data from future datasets as soon as the economy gets more stable) over and after the pandemic shall be subject to constant investigation, and implementation into normative prescriptions, in order to ensure a concerted response that will be essential to preserve access to credit as a fundamental tool for economic recovery in the forthcoming years.

[44] Fico, *Protecting Your Credit during Coronavirus Outbreak*, 13 March 2020, www.fico.com; Experian, *Protecting Your Credit During the COVID-19 (Coronavirus) Crisis*, 2020, www.experian.com.

Articles

The impact of Covid-19 crisis on the French Law of Contract

Olivier Deshayes*

The effect of the Covid-19 on contracts comes not as much from the virus itself than from the containment measures imposed by Governments which made it hard, if not impossible, for debtors to perform their obligations. This is why the crisis, as regards contracts, really started in France in the midst of March 2020 when President Macron and Prime Minister Edouard Philippe decided to shut down non-essential businesses, schools, restaurants, theatres, to forbid public gatherings and to impose containment measures on individuals. The consequences of this immediate and almost total shut down of activities could have been dealt with by the sole use of pre-existing general provisions, especially those recently enshrined in the Civil code by the 2016 reform of the law of Contract (force majeure, revision pour imprévision, délais de grâce, etc.). But it would have taken years before clear solutions would emerge. Individuals and businesses needed a faster response, they needed ready-to-use rules, exempted from judicial interpretation, telling them what would happen next

French Parliament responded quickly. It adopted within a couple a days, on March 23, a statute ("Loi")[1] authorizing the Government to take "ordonnances". 27 of them were adopted in almost no time on March 25. These "ordonnances" have been modified or completed several times since then. None of them is specifically dedicated to contracts but quite a few contain provisions interesting the law of contract.

* Professor of Private Law at Paris Nanterre University. olivier.deshayes@parisnanterre.fr.

[1] LOI n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19 (see http://www.legifrance.gouv.fr).

In this paper, we will give an overview of those new provisions (A), try to evaluate their impact on the general law of contract (B), and finally present the general provisions of the Civil code that will apply to fill in the blanks left by the new rules (C).

a) New provisions related to contracts

The containment measures adopted in France made it almost impossible to carry on simple activities or tasks such as delivering goods, posting a letter or filing an action. For this reason, it appeared justified to withhold the usual penalties or sanctions incurred in case of delay, and to do so regardless of whether the *force majeure* is or isn't characterized in each particular case. The main legislative response to the crisis hence consisted in postponing a vast number of time limits.

Precisely, amongst the many ordonnances adopted on March 25th, the one that has the broader scope – and could thus be described as containing the general provisions related to Covid-19 – is the ordonnance n. 2020-306 "on the extension of time limits during the period of public health emergency and the adaptation of procedures during the same period"[2].

In drafting this ordonnance, the French Government was helped by a precedent. Immediately after the May 1968 crisis, which resulted in a disorganization of the country, a "Loi n°68-696" was adopted on July 31 "on "foreclosures incurred as a result of the events of May and June 1968 and extending various time limits". The main provisions of this 1968 statute were copied, slightly modified and pasted in the 2020-306 "ordonnance". This is particularly true of the provisions interesting the law of contract. There are 3 of it. They will be reproduced hereafter before a short explanation is given.

Article 2 of the 2020-306 "ordonnance" holds that:

"Any act, appeal, legal action, formality, entry, declaration, notification or publication prescribed by law or regulation under penalty of nullity, sanction, lapse, foreclosure, prescription, unenforceability, inadmissibility, lapse, automatic withdrawal, application of a special regime, nullity or forfeiture of any right whatsoever and which should have been completed during the period mentioned in Article 1[3] shall be deemed to have been done in time if it has been done within a period which may not exceed, as from the end of the period mentioned in Article 1, the time legally prescribed for taking action, within a limit of two months.

The same shall apply to any payment prescribed by law or regulation for the acquisition or retention of a right.

[2] Ordonnance n° 2020-306 du 25 mars 2020 relative à la prorogation des délais échus pendant la période d'urgence sanitaire et à l'adaptation des procédures pendant cette même période (see http://www.legifrance.gouv.fr).

[3] This period starts on March 12th. It was to end one month after the end of the sanitary emergency period. But improvements regarding the spreading of the disease led the Government to transform this floating ending term into a fix term: June 23rd.

This Article shall not apply to cooling-off periods, withdrawal or renunciation time limits provided for by law or regulation, nor to the periods provided for the reimbursement of sums of money in the event of the exercise of such rights.
Where the provisions of this article apply to a time limit for opposition or contestation, they shall not have the effect of postponing the date before which the act subject to the expiry of that time limit cannot lawfully be performed or take effect or before which payment is not discharging".

Article 4 of the 2020-306 "ordonnance" holds that:
"Where periodic penalty payments ("astreintes"), liquidated damages clauses ("clauses pénales"), termination clauses ("clauses résolutoires") and clauses providing for forfeiture ("clauses de déchéance") are intended to penalise failure to fulfil an obligation within a specified period, they shall be deemed not to have commenced or to have taken effect if that period has expired during the period defined in Article 1(I).
If the debtor has not performed his obligation, the date on which those periodic penalty payments take effect and those clauses produce their effects shall be postponed for a period, calculated after the end of that period, equal to the time elapsed between 12 March 2020 or, if later, the date on which the obligation arose and the date on which it should have been performed.
The date on which such periodic penalty payments take effect, and such clauses take effect, when they are intended to penalise failure to perform an obligation, other than by way of payment of sums of money, within a specified period expiring after the period defined in Article 1(I), shall be postponed for a period equal to the time elapsed between 12 March 2020 or the date on which the obligation arose, whichever is the later, and the end of that period.
The course of periodic penalty payments and the application of liquidated damages clauses which took effect before 12 March 2020 shall be suspended during the period defined in Article 1 (I)".

Article 5 of the 2020-306 "ordonnance" holds that:
"Where an agreement may be terminated only during a specified period or is renewed if no denunciation is made within a specified time limit, that period or time limit shall be extended, if it expires during the period defined in Article 1 (I), by two months after the end of that period".

Short presentation. These texts refer to the period of time "defined in Article 1". This period is known as the "période juridiquement protégée" (legally protected period). It

starts on March 12 and ends on June 23. During the period a derogatory regime applies[4]. It consists in the following rules.

The person who was supposed, under the terms of the law or a regulation, to act before a certain time that falls into the "période juridiquement protégée" is granted an extra period of time after the end of that period (art. 2).

Regarding time limits imposed by contract, the situation is more complex. No general postponing is provided for by the new provisions (art. 2 *a contrario*). Hence, if a decision was to be taken or an act was to be accomplished before a certain time under the terms of a contract, no extra-time is given, as a general rule, by the 2020-306 "ordonnance". But a major exception exists. Some – but not all – of the remedies for non-performance of an obligation are temporarily frozen. If payment was due *during* the "période juridiquement protégée", periodic penalty payments, liquidated damages clauses, termination clauses and clauses providing for forfeiture only apply if the debtor does not fulfil his obligation before the end of an extra period of time starting at the end of the "période juridiquement protégée" (i.e. June 23). If payment is due *after* the end of the "période juridiquement protégée" and if the obligation is in kind, the above mentioned sanctions only apply if the debtor does not fulfil his obligation before the end of an extra period of time starting at the time payment is due under the terms of the contract. And if payment is due *before* the beginning of the "période juridiquement protégée" and if a periodic penalty payments or a liquidated damages clause has already come into effect, these sanctions are suspended during the "période juridiquement protégée".

Finally, the period within which a periodic contract may be terminated by notice or whose automatic renewal may be denunciated – whether this period is provided for the law, a regulation or a contract –, is extended (art. 5).

Alongside these important and broad provisions are a set of rules dealing with specific matters. The following can be mentioned: freezing of remedies for non performance in case of failure from the part of small enterprises to pay rents of commercial leases, electric, water or gas bills (under strict conditions)[5]; right for travel agencies, sports clubs or cultural events organizers not to reimburse immediately clients whose trip, practice or event has been cancelled or made impossible[6].

[4] On the impact of the 2020-306 « ordonnance » on contracts, see O. Deshayes, *«La prorogation des délais en période de Covid-19 : quels effets sur les contrats?»*, *D.* 2020, 831; On the 2020-306 « ordonnance » in general, see N. Cayrol, "Etat d'urgence sanitaire: dispositions générales relatives aux délais, A propos de l'ordonnance n°2020-306 du 25 mars 2020, titre I", *JCP G*, Apercus rapides, 481.

[5] Ordonnance n. 2020-316 du 25 mars 2020 relative au paiement des loyers, des factures d'eau, de gaz et d'électricité afférents aux locaux professionnels des entreprises dont l'activité est affectée par la propagation de l'épidémie de covid-19.

[6] Ordonnance n. 2020-315 du 25 mars 2020 relative aux conditions financières de résolution de certains contrats de voyages touristiques et de séjours en cas de circonstances exceptionnelles et inévitables ou de force majeure ; Ordonnance n. 2020-538 du 7 mai 2020 relatif aux conditions financières de résolution de certains contrats en cas de force majeure dans les secteurs de la culture et du sport.

b) Impact of new provisions on general contract law

As one can easily see, the new provisions afore mentioned are temporary ones. The imply no modification of the general provisions of the law of contract. In fact, they apply in addition to them to the extent they are compatible.

For instance, the fact that small enterprises benefit from a freezing of remedies in case of failure to pay rents of commercial leases (see above) does not mean that lessees outside the scope of that regime have to pay the rent. If the impossibility to welcome clients in a given shop under lease amounts to the non-performance – though an excusable one – on the part of the lessor of his contractual obligation to let access to a premise fit for the purpose of a commercial activity, then the lessee should have the right not to pay the rent under the provisions of Civil code on "force majeure" (C. civ., art. 1218)[7].

Another example is that the extra-time given to the debtor to fulfil his obligation after the end of the "période juridiquement protégée" – before the creditor can invoke a liquidated damages clause for instance – does not mean that the debtor is exposed to pay damages in any case. He can prove that the non-performance is excused by "force majeure" arising out of supervening events during this extra-time. In this case, no damages are due (C. civ., art. 1218).

On the contrary, if the new provisions are not compatible with the general ones, the former prevail on the latter (as always with special rules).

Whether the pre-existing general provisions apply in addition to the new ones or are set aside by the latter, they, in any case, need to be kept in mind and properly applied in the context of Covid-19.

c) General contract law provisions

We will focus on some of the most relevant provisions[8].

Impossibility of performance – Force majeure. If the Covid-19 disease or, more probably, the containment measures adopted by the French Government are seen as "force majeure" – which should be the case, at least for contracts concluded before mid-march 2020 – and if it makes it impossible for the debtor to perform his contractual obligations, then article 1218 of the Civil code applies[9]. This provision holds that (i) the contract is

[7] This is, to tell the truth, a highly debated question in France.

[8] See: M. Béhar-Touchais, *« L'impact d'une crise sanitaire sur les contrats en droit commercial, À l'occasion de la pandémie de Covid-19 »*, *La Semaine Juridique Entreprise et Affaires* n° 15-16, 9 Avril 2020, 1162 ; C-E. Bucher, « Contrats : la force majeure et l'imprévision remèdes à l'épidémie de covid-19 ? », *Contrats Concurrence Consommation* n° 4, Avril 2020, étude 5 ; J. Heinich, « L'incidence de l'épidémie de coronavirus sur les contrats d'affaires : de la force majeure à l'imprévision », *D.* 2020, 611 ; M. Mekki, *« De l'urgence à l'imprévu du Covid-19 : quelle boîte à outils contractuels ? »*, *AJ Contrat* 2020, 164.

[9] For a translation of this provision in English, made by J. Cartwright, B. Fauvarque-Cosson and S. Whittaker, see: http://www.textes.justice.gouv.fr/art_pix/Translationrevised2018final.pdf.

suspended if the "force majeure" only prevents temporarily the performance of his obligations by the debtor; (ii) the contract is terminated if the prevention is definitive or if the delay which would imply a suspension justifies such a termination. In both cases, no damages are due. No sanction is applicable. Unfortunately, the text does not consider the case where the prevention caused by "force majeure", though definitive, is only partial. Scholars agree that in this case of excused partial non-performance suspension or termination of contract are not appropriate remedies: a proportionate reduction of the counterpart should intervene[10].

Performance possible but excessively costly for the debtor – Révision pour imprévision. If Covid-19 arose or the containment measures were taken after the conclusion of the contract, were unpredictable at the time of that conclusion and make it excessively costly for the debtor to perform his obligation – though not impossible – then article 1195 of the Civil code applies[11]. This text allows one party to ask for re-negotiation of the contract. In the case where the re-negotiation is refused by the other party or fails, an action can be brought before the judge aiming at revising or terminating the contract. Adopted with reluctance in the 2016 reform, this new provision, was largely regarded as "supplétive" before the Covid-19 appeared: it was said that parties could wave the application of the text. Waiver clauses of this sort became indeed very frequent in contracts after 2016. There is no doubt that Courts will soon have to say if the prediction regarding the validity of such clauses was correct.

Specific performance of a disproportionate cost. French law of contract is legendarily favourable to specific performance. The 2016 reform introduced, though, a new brake: the creditor cannot be granted specific performance if the cost of this remedy for the debtor is disproportionate to its benefits for the creditor (C. Civ., art. 1221)[12]. One might think to invoke this provision when a debtor has committed a non-excusable breach of contract but still deserves some kind of compassion given the difficulties of the present time. It is doubtfull, though, that article 1221 would apply in Covid-19 cases. For this to happen, the cost of specific performance needs to be disproportionate to the benefits of the remedy for the creditor. It is thus insufficient that performance is costly or made costlier by the circumstances. What matters is that performance is of no – or little – interest to the creditor *compared to another remedy* (especially damages), while it exposes the debtor to much higher costs. Precisely, in Covid-19 cases, if the cost of specific performance is made higher by the circumstances, then it is probable that damages will also rise in the same

[10] See O. Deshayes, T. Genicon et Y.-M. Laithier, *Réforme du droit commun des contrats, du régime général et de la preuve des obligations*, 2nd ed., LexisNexis, 2018, under article 1218.

[11] For a translation of the provision in English, see ref. in *footnote* n° 9.

[12] For a translation of the provision in English, see ref. in *footnote* n° 9.

proportion, making the costs/benefits balance of specific performance more or less the same as the one of other remedies.

Bonne foi. Finally, if Covid-19 has made the contract unbalanced, one might think to invoke the duty to execute contracts in good faith ("bonne foi") in order to obtain from the creditor a renegotiation. This argumentation should not succeed. First, the French courts have been reluctant, in the past, to impose such an obligation of renegotiation on the ground of "bonne foi". It has merely been admitted in long-term relational contracts, with uncertain consequences. Second, the introduction of "révision pour imprévision" in article 1195 of the Civil code (see above) reform makes it even more unlikely for the Courts to use "bonne foi" in order to impose a duty to renegotiate because such a solution would amount to bypassing the new next.

Instant paper for Senegal

Komlanvi Agbam*

Table of contents

I. Overall Framework: New code of civil and commercial obligations

The provisions that apply to the contract in particular to force majeure and impracticability

Force majeure: Article 129 and 132 of the civil and commercial obligations' code

Article 129 of the Code des Obligations Civiles et Commerciales (COCC) stipulates that *«that there is no liability if the harmful event is the consequence of* force majeure *or a fortuitous event, i.e. an external, insurmountable event which could not be foreseen».*

Article 132 specifies that *«The debtor may by agreement take charge of fortuitous events or force majeure. Conversely, it may be agreed that the occurrence of a specific event shall be considered as creating the fortuitous event or force majeure».*

It can be inferred from this that in Senegalese law, there are three criteria in the definition of force majeure.

* Phd Candidate, Internationale Business Law. Teaching Assistant in private Law, Laval University of Canada.

I.1. The Externality

The event potentially constituting a force majeure shall first of all, under Senegalese law, be external to the will of the party invoking it. This means that the party invoking the force majeure shall not be the cause of the event or be involved in its occurrence. This requirement of externality was well illustrated in a decision of the Senegalese Court of Cassation, which held that: «the classification of a strike as force majeure cannot be recognized as such when it has erupted on within the company invoking it. The requirement of externality is not met and unpredictability appears likely»[1].

I.2. The unpredictability

In accordance with the Article 129 of the Senegalese's COCC, the event in question shall be unpredictable to the parties concerned on the day the contract is concluded. In other words, the contracting parties shall only be reasonably able to prevent the event potentially constituting a force majeure in order to anticipate and limit the damage. If the unpredictability is not established, or if it appears implausible, the force majeure will be ruled out. The rapid expansion of Covid-19 is likely to leave economic operators with an insufficient margin to protect themselves against it[2].

I.3. The insurmountability

In order to be able to invoke the insurmountably provided for in Article 129 of the COCC, the debtor of the obligation shall establish that the event occurring prevents the performance of such an obligation. For example, the measures taken by the Senegalese government on the occasion of Covid-19 (border closures, curfews at certain hours, etc.) may make the performance of certain contracts particularly delicate or even impossible.

The force majeure and the fate of conventions affected in Senegal

Once the force majeure is established, the contract is then suspended or terminated depending on the duration of the force majeure, the nature or the duration of the affected agreement. In the case of long-term contracts, a temporary force majeure event such as a pandemic may result in the suspension of the affected agreement until the pandemic ends. Such could be the case of the Covid-19 illness.

When the execution of the contract becomes impossible, in particular in the event of the disappearance of the contract's subject, the force majeure becomes a legal condition for termination of the contract. The force majeure constitutes a source of exemption from liability in Senegalese law. The contractual responsibility cannot therefore be engaged with

[1] *Senelec c/ Popec* [2000] Court of Cassation 142, [20 October 2004] <https://juricaf.org/arret/SENEGAL-COURDECASSATION-20041020-142> accessed 31 May 2020.

[2] For more forecasts, see Komlanvi Agbam, *Le COVID-19, la porte ouverte pour une entrée de l'imprévision dans les Etats d'Afrique Francophone à droit civil codifié?* (April 2020) n. 5 Recueil LGA <https://legiafrica.com/subscription/publication/36426-le-covid-19--la-porte-ouverte-pour-une-entree-de-l---imprevision-dans-les-etats-d---afrique-francophone---a-droit-civil-codifie> accessed 31 May 2020.

regard to the obligations affected by force majeure and the party concerned is therefore released from it. Also, it should be noted that the affected person shall not be related to any personal failure to perform the contract in question.
When the fault of the perpetrator of the damage is established, the force majeure's effect of exempting wears off.

A. The impracticability or unforeseeability (Imprévision, in french Law)
No provisions apply. The Senegalese law does not acknowledge the theory of unforeseeability, at least not expressly. The COCC drew heavily on the French Civil Code of 1804 (which did not acknowledge the theory of impraticabilit or hardship "Théorie de l'imprévision, in french law"). Thus, when the Covid-19 is not characterized as force majeure, but rather as unforeseeability, i.e. when it has made performance of the contract not impossible but difficult, the injured party will not be able to invoke the rules of force majeure.
It may propose to the other party the renegotiation of the contract. The latter may accept or refuse it, except in cases where the contract has provided for an obligation to renegotiate in the event of an unpredictable change of circumstance.
However, the party that is the victim may invoke the rules of good faith contained in Article 103 of the COCC of Senegal. It will be up to the Senegalese judge to assess the appropriateness of a revision or renegotiation for a change of circumstances based on good faith.

II. Specific framework

When it comes to special contracts, the Senegalese COCC does not generally apply. OHADA law (Organization for the Harmonization of Business Law in Africa), for example, will have to be used.
As a reminder, it should be noted that Senegal is a member of OHADA. OHADA enacts Uniform Acts which are directly applicable in all its Member States. The Uniform Act on General Commercial Law (AUDCG) applies to all contracts for the commercial sale of goods in the Member States and therefore in Senegal.

A. Rules applicable to contracts for the commercial sale of goods in Senegal: Change of Circumstances Rules Article 294 of the AUDCG
Article 294 of the AUDCG states that «*a party is not liable for non-performance of any of its obligations if it proves that such non-performance is due to an impediment beyond its control, such as the act of a third party or* an event of force majeure.
A case of force majeure is any impediment that is beyond the control of the company and which cannot reasonably be foreseen in its occurrence or its consequences».
There is a difference between the Senegalese legislator's definition of force majeure and the one enshrined in OHADA law. This difference is topical of a contrast relating to the

socio-economic elements that motivated their consecration. In Senegalese law, only **the event** is important, hence the need for the judge to check that it is an event that meets the characteristics mentioned in the provisions of article 129 of the COCC.
On the other hand, in OHADA law, the use of the noun «*impediment*» refers to a much broader concept not only in the nature of force majeure but also in its assessment.
In its nature, it is no longer a question of confining itself to material events such as natural disasters or other events. This approach leads to an analysis of the consequences of a given situation as constituting an **impediment**. The impediment refers to an event or any situation likely to disrupt the economy of the contract to some extent. Hence the assessment of a force majeure's case occurs at two levels in OHADA law: either in its occurrence or in its consequences.
Thus, when the COVID-19 retains the qualification of force majeure, the provisions of the aforementioned article 294 will apply and the party affected by the change in circumstances will be released from its contractual obligations.
A part of the doctrine considers that this text can also apply to unforeseen circumstances[3].
Other specific texts in Senegalese law.

– Order of 23 April 2020 on fiscal and business support measures in the context of the COVID-19 pandemic.
The text provides for:
1. The remission or suspension of the payment of tax contributions on the wages and salaries of employees.
2. The extension to 15 July 2020 of the obligations to declare and pay taxes due between March and May 2020 for:
a. Companies whose turnover does not exceed 100,000,000 CFA francs
b. As well as companies directly affected by the Covid-19 crisis and operating in the following sectors: tourism, catering, hotels, passenger transport, education, culture, agriculture, press.
3. The suspension of the collection of tax debts recorded for the companies mentioned in 2b.
In order to benefit from these measures, companies will have to commit themselves in writing to:
- Maintain their employees or
- Guarantee 70% of their salary to their employees who are laid off.

4. Taxpayers whose activities are directly affected by the covid-19 crisis will be able to request a partial remission of their tax debt as of December 31, 2019.

[3] Dorothé Cossi Sossa, 'L'adaptation dirigé du contrat du commerce international aux changements de circonstances'. D-10-49 OHADATA 16 <http://www.ohada.com/doctrine/ohadata/D-10-49.html> accessed 31 May 2020.

– **The act No. 15/2020 of 15 April 2020 on the extension of missed deadlines and the suspension of expulsion measures and procedures.**

The text provides for:

1. Suspension of extinctive prescription and civil, commercial, and tax customs forfeiture until the expiry of the state of emergency, with the exception of cases deemed urgent and by the courts and tribunals.
2. Suspension of expulsion measures ordered by judicial or administrative channel before the entry into force of the state of emergency.

III. Some cases that can be invoked in Senegalese Law

On the assessment of the unpredictable nature of the force majeure

Senelec c/ Popec [2000] Court of Cassation, 20 October 2004, Ruling Number 142, available at https://juricaf.org/arret/SENEGAL-COURDECASSATION-20041020-142, accessed 31 May 2020

Ministre de l'intérieurdirecteur général des électionsagent judiciaire de l'Etat c amadou mamadou thiam [2000] Supreme Court, Administrative Chamber, 24 June 2014, 38. Ruling number 38, available at : https://juricaf.org/arret/SENEGAL-COURSUPREME-20140624-38, accessed 31 May 2020

Corona and Dutch Contract Law

Harriet N. Schelhaas*

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1. Introduction

The Corona-virus caused a humanitarian and economic disaster that is unequalled, at least the last century or so. Unlike other economic crises the last decades, this crisis is rooted in public health and caused by a worldwide and fast spreading pandemic, that forced coun-

* Prof. dr. HN Schelhaas is professor in Private Law, Erasmus School of Law, Rotterdam, the Netherlands (schelhaas@law.eur.nl).

tries to lock down social life, thereby limiting the economy considerably. This may also have major influences on contracts. What happens, for instance, if a company just placed a big order for spare parts in China, which could not be delivered due to trade restrictions: is he still obliged to pay the purchase price or is it possible to terminate the contract? And the consumer, wishing to go on holidays, but discovers that his journey has been cancelled due to travel bans: is it possible to claim a refund, or is he obliged to accept a voucher for future travels?

These are just a few examples of contractual problems caused by government measures related to the Corona-virus. In this paper on the influence of Corona on Dutch contract law, I will first outline the measures Dutch government issued as a consequence of the Corona-virus and its possible consequences on contract law (Para 2). Subsequently, general Dutch contract law will more deeply be analysed (Para 3). It will be discussed whether it is possible to claim specific performance if the Corona-measures rendered performance impossible or difficult due to government restrictions (Para 3.1), after which it will be analysed whether the debtor, unable to perform due to the corona-measure, may invoke *force majeure* in order to escape from liability (Para 3.2). Furthermore, it will be discussed whether parties may terminate the contract for breach if the other party simply does not perform its obligations since corona-measures made it impossible to do so (Par 3.3), after which the doctrine of unforeseen circumstances or frustration in the context of the Corona-crisis will be analysed (Para 3.4). The last part of this paper will be devoted to contract clauses related to the Corona-pandemic (Para 4), followed by a conclusion (Para 5).

2. Government measures in response of the Corona-virus

2.1. Overview of regulations

Dutch government took a number of measures to restrict the spreading of the Corona-virus. On 12 March 2020 the government prohibited events having more than hundred visitor such as concerts and public sport events[1], three days later followed by an overall prohibition on the operation of hotels, restaurants and cafés, supplemented by the temporary closure of schools, childcare centers and sports clubs[2]. It was recommended to work from home and not to make use of public transport, unless strictly necessary and people should observe a 1,5 metre distance from each other. On the 23rd of March the government issued a prohibition of all public meetings. Moreover, contact professions such as hairdressers

[1] See https://www.rijksoverheid.nl/actueel/nieuws/2020/03/12/nieuwe-maatregelen-tegen-verspreiding-coronavirus-in-nederland.

[2] See https://www.rijksoverheid.nl/documenten/kamerstukken/2020/03/15/covid-19-nieuwe-aanvullende-maatregelen.

were not allowed until further notice[3]. Also, entry bans for foreign travelers into the Netherlands were issued. Though most shops and companies were allowed to stay open, it was in many cases decided to temporarily close the doors, since due to the Corona-restrictions there were no customers. From Mid-May onwards, government measures have been relaxed, resulting in the reopening of schools, restaurants, cafes and hotels, provided that a safe distance of at least 1,5 metres from one another was maintained[4]. In December 2020, measures were restricted again, schools, restaurants, cafes, hotels an non-necessary shops were closed and an evening clock starting at 9 PM until 4.30 was installed. These government restrictions, resulting in severe restrictions of social and economic activities, were combined with a substantial financial support package by the government for companies suffering from the Corona-measures[5]. Companies that suffered a loss in turnover due to the Corona-crisis of at least 20% were granted an allowance for labour costs to preserve employment[6] and for other structural costs. Vital companies for the Dutch economy, such as the Dutch airline KLM, were granted state aid.
Moreover, some emergency laws were issued, for instance to make it possible to have online court hearings, to enable online voting in company law, and also to make it possible to temporary extend the term of rental agreements during the corona crisis[7].

2.2. Consequences for Dutch contract law

The aforementioned Corona-measures issued by the Dutch government obviously influenced contracts that had been concluded prior to the Corona-crisis. For companies that had to close their businesses it meant that some contracts could not be concluded anymore. It was for instance not possible anymore to conclude or execute contracts for certain types of professions, for events in cafes and restaurants or for big events such as the Eurovision Song Festival in Rotterdam. In these cases performance of contractual duties were rendered permanently or temporarily impossible in fact or in law.
Moreover, the Corona-measures also indirectly influenced contract law. In many cases, performance or concluding of contracts was technically possible, but companies and con-

[3] Letter to the House of Representatives, dated 23 March 2020, <www.rijksoverheid.nl/onderwerpen/coronavirus-covid-19/nieuws/2020/03/23/aangescherpte-maatregelen-om-het-coronavirus-onder-controle-te-krijgen> accessed 1 December 2020.

[4] Rijksoverheid, *Corona-aanpak, de volgende stap* <www.rijksoverheid.nl/onderwerpen/coronavirus-covid-19/nieuws/2020/05/19/corona-aanpak-de-volgende-stap> accessed 1 December 2020. For an overview of the measures < www.rijksoverheid.nl/onderwerpen/coronavirus-covid-19> accessed 1 December 2020.

[5] <www.rijksoverheid.nl/onderwerpen/coronavirus-financiele-regelingen/overzicht-financiele-regelingen> accessed 1 December 2020.

[6] Tijdelijke Noodmaatregel Overbrugging Werkgelegenheid and Tijdelijke Ondersteuning Noodzakelijke Kosten (TONK) <www.rijksoverheid.nl/onderwerpen/coronavirus-financiele-regelingen/overzicht-financiele-regelingen/now> accessed 1 December 2020.

[7] Under regular tenancy law this is not possible and a renewal of temporary rental contracts would result in an open-ended contract: <www.rijksoverheid.nl/documenten/kamerstukken/2020/03/15/covid-19-nieuwe-aanvullende-maatregelen> accessed 1 December 2020.

sumers choose themselves not to execute or not to conclude them anymore for reasons of health or of a lack of consumers. Think of retail chains or service providers that voluntarily closed their shops and did not conclude any contracts any longer. This also caused pressure on contracts that already had been concluded, but were economically not viable anymore. Think of a restaurant chain which concluded a long-term contract for food supplies, but had to close his doors and did not need these supplies anymore. Another example is the company, whishing to do an investment in its own or other companies and concluded contracts prior to the Corona-crisis. The Corona-crisis caused a sharp decrease in turnover in its own company and in the economic value of the target companies. Will he be able to escape from its contractual duties?

From these examples it becomes apparent that the Dutch Corona-measures may have had a major influence on contracts. In the next paragraph I will discuss how Dutch contract law may respond to the Corona-measures and the (in)direct consequences thereof.

3. General Dutch contract law

3.1. Performance and impossibility

A first question that needs to be answered is whether someone can be compelled to perform its duties under a contract that was concluded before the Corona-crisis, but the Corona-measures made performance impossible or financially burdensome. As a matter of principle, Dutch contract law accepts a right to performance for any breach[8]. It is not necessary that the non-performance is attributable to the debtor nor that there is any form of *culpa*. However, some exceptions exist that may be helpful for a debtor not wanting or not being able to perform due to the Corona-measures. One exception is the situation that performance is absolutely impossible, legally or *de facto*, irrespective of whether the reason for this impossibility is imputable to the debtor[9]. So if the government prohibited certain activities or sectors, making it legally impossible to perform, the debtor cannot be compelled to perform. The same holds true if there is an import or export restriction due to the Corona-crisis, making it *de facto* impossible for a seller to deliver its products.

A second exception to the right to performance is the situation where performance is *relatively* impossible: performance is *de facto* possible but it has become excessively burden-

[8] In Dutch law the basis for this remedy is Art 3:296 Dutch Civil Code ('DCC') and Arts 7:21 and 7:22 DCC for the sale of goods. Unlike the remedy of claiming damages, it is not necessary to put the other party in default (Art 6:82 ff DCC).

[9] CH Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel II. De verbintenis in het algemeen, tweede gedeelte* (Wolters Kluwer 2017) no 344. See alos Dutch Supreme Court 27 June 1997, ECLI:NL:HR:1997:ZC2401, *Nederlandse Jurisprudentie* 1997/641 (*Budde v Tao Moa*) and Dutch Supreme Court 15 April 2016, ECLI:NL:HR:2016:667, *Nederlandse Jurisprudentie* 2017/122 (*Bouten v ABC*).

some for the debtor to perform[10]. If the legitimate interests of the debtor carry considerably more weight compared to the interests of the party claiming performance, this claim will be denied[11]. In the context of the Corona-crisis, one may think of the company that voluntarily closes its business for reasons (in)directly linked to the Corona-measures. Also, the situation that a company promised to resell for a certain fixed price a certain product such as a mouth mask that he normally imported from China may serve as an example. Import restrictions and an increased demand for this product caused the prices to increase considerably, thereby making the obligation to resell the product for the original price unreasonably burdensome.

3.2. Damages: force majeure

If the debtor is nevertheless obliged to perform and he refuses to do so, the question arises whether he is obliged to compensate the other person for the damages he suffered. Under Dutch law (Art 6:74 Dutch Civil Code, 'DCC') every failure in performance of an obligation shall require the debtor to repair the damage which the other party suffers therefrom, unless the failure is not attributable to the debtor[12]. Non-performance is attributable to the debtor if (Art 6:75 DCC, which in effect defines the concept of 'force majeure') it is due to his fault, or if it is for his account 'pursuant to the law, a legal act or generally accepted principles'. So in case of 'force majeure', no obligation to compensate for damages exists. Whether there is a situation of force majeure is dependent on the type of obligation that is not performed. If the debtor does not perform an obligation to pay the contract price, since the Corona-crisis put him in a financially vulnerable position, force majeure will generally not be accepted[13]. But if it is an obligation to deliver services that are not performed due to the corona-measures, this may be different. For instance, the hairdresser which was not allowed to operate his business and could not perform its services undertaken before the Corona-crisis can invoke the concept of *force majeure* and will not be liable for damages. But this may be different if, on the contrary, a company was not prohibited but voluntarily closed his doors for reasons of health risk for its personnel, or because there was a substantial decrease in its turnover due to the Corona-measures. In this case, it may be argued that this is according to common opinion at the risk of the debtor, since this is ultimately its own deliberate choice. This would result in a debtor fully liable for the damages of the other party. In the context of the Corona-crisis it is however argued in literature

[10] Zie D Haas, *De grenzen van het recht van nakoming* (Kluwer 2008), Para 6.1 and 6.2.

[11] See Haas (2008), Para. 6.2 and 6.3.4.3 and see Dutch Supreme Court 5 January 2001, ECLI:NL:HR:2001:AA931, *Nederlandse Jurisprudentie* 2001/79 (*Multi Vastgoed v Nebtou*).

[12] If performance is still possible, the non-performing party shall be put in default first (Art. 6:74 (2) DCC). This usually means that the creditor has to send a written notice of default, granting the other party an additional period of time to perform (see Art. 6:81 ff DCC).

[13] Harriët Schelhaas & Jan Spanjaard, *Contract & Coronacrisis*, 2020 Nederlands Juristenblad 14, p 959-960; Coen E Drion, Corona en het recht, (2020) Nederlands Juristenblad 12, p 761.

that a more proportionate solution should be considered, where the burden caused by the Corona-measures should be more proportionately shared by the debtor and creditor ('share the pain')[14]. The reason behind this proposition is the idea that the Corona-crisis is no-ones fault and hits the whole society and should therefore be borne by the whole society.

3.3. Termination of the contract

3.3.1. *Termination for breach*

The corona-crisis may also result in the possibility to terminate the contract. Under Dutch law (Art. 6:265 DCC) a contract may be terminated[15] for any breach of contract[16], unless the non-performance, given its special nature or minor significance, does not justify the setting aside of the contract and the consequences flowing therefrom[17]. The onus to proof that a contract may not be terminated since the non-performance is for instance insignificant, is on the non-performing party. If, for instance, the non-performing party proves that there was only a brief delay in the payment of the contract price that did not sufficiently harm the interests of the innocent party, he may usually avert termination of the contract[18]. *Culpa* is not required: a contract may be terminated for breach even if there was *force-majeure* on the side of the non-performing party. So, in the context of Corona, it is not relevant what the reason is for the non-performance, a strict government prohibition, the closure of borders by another country, or the choice to temporarily discontinue the operation of a business, as long as the Corona-crisis lasts. In all these cases the contract may be terminated, resulting in a claim to refund the payment of the contract price.

3.3.2. *Termination of continuing performance contracts*

In cases of continuing performance (or long term contracts), in which parties did not include a clause making it clear that this contract may be terminated early, an additional possibility to terminate the contract is possible. According to established case-law, such contract may in principle be terminated, but depending on the specific facts and circumstances of the case sometimes a serious reason for termination is required and/or a notice period should be observed. Sometimes, the party terminating the contract also has to

[14] Schelhaas & Spanjaard (2020), p. 967-968.

[15] A contract may be terminated in whole or in part. This may for instance result in a partial payment of the contract price if the other party only partially performs its duties to deliver goods.

[16] According to Art 6:265 (2) DCC the right to terminate the contract arises in cases where performance is not permanently or temporarily impossible only if the obligor is in default.

[17] Art 6:265(1) DCC.

[18] CH Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel III. Algemeen overeenkomstenrecht* (Wolters Kluwer 2018) no 684 ff.

compensate the other party for damages resulting from this termination[19]. In literature it is argued that the existence of the Corona-crisis[20] may be regarded as a sufficient ground for termination.

3.4. Unforeseen circumstances

The last question that needs to be answered is whether it will it be possible to invoke the doctrine of unforeseen circumstances or frustration, in order to adjust a contract. Dutch contract law provides the court with tools to amend the contract (i.e. modify the effects of a contract or set it aside in whole or in part) if there are unforeseen circumstances "(…) which are of such a nature that the other party, given those circumstances, cannot expect, in accordance with generally held standards of reasonableness and fairness, the unaltered contract to continue to be valid and enforceable" (Art 6:258 DCC). Three requirements must be met in order to successfully request the court to amend the contract: (i) the specific circumstances must be prospective at the time the contract was concluded (i.e. the contract was concluded before the Corona-outbreak), (ii) parties did not include a provision in their contract related to this pandemic (i.e. it is not decisive whether this pandemic was foreseeable), and (iii) unaltered maintenance of the contract is according to the standards of reasonableness and fairness unacceptable[21]. Assuming that the Corona-crisis was a future circumstance, the question arises whether parties took a pandemic as the Corona-crisis into account. This a matter of interpretation of the contract. If parties devoted a provision on the contractual consequences of a pandemic, it may generally be concluded that Art 6:258 DCC does not play a role here: the situation of a pandemic was included in the contract. But what if parties only agreed that no liability exists if an epidemic should occur, or in case of an economic crisis? Case-law indicates that the Dutch Supreme Court interprets these clauses quite extensive[22], which may result in the non-applicability of Art. 6:258 DCC[23]. The third requirement of the concept of unforeseen circumstances, the reasonableness and fairness, is applied strictly[24]. The severe 2007 economic crisis was therefore not considered to be a circumstance that should trigger the concept of unforeseen circumstances: it was considered to be part of the normal entrepreneurial risk[25]. In relation to the Corona-crisis it is, however, argued that Art. 6:258 DCC should be applied, since this

[19] Dutch Supreme Court 28 October 2011, Nederlandse Jurisprudentie 2012/685 (De Ronde Venen v Stedin).

[20] Coen E Drion, 'Corona en het recht', (2020) Nederlands Juristenblad 2020 12, p 781; Schelhaas & Spanjaard (2020), 960-961.

[21] In addition, Art. 6:258 DCC provides that the court shall not apply this provision if "the person invoking the circumstances is accountable for them pursuant to the very nature of the agreement or pursuant to generally accepted principles."

[22] Dutch Supreme Court 13 October 2017, ECLI:NL:HR:2017:2615 (Gemeente Bronckhorst).

[23] Schelhaas & Spanjaard (2020), p 965.

[24] Dutch Supreme Court 20 February 1998, Nederlandse Jurisprudentie 1998/493 (Briljant Schreuders v ABP).

[25] A.T.G.M. Venrooij & P.S. Bakker, *Contractuele gebondenheid in het licht van de krediet- en economische crisis*, (2013) Contracteren 4, p 122-125; Ton Hartlief, *Crisis? What crisis?*, (2013) Nederlands Juristenblad 27, p 1603.

crisis is very much different from a normal economic crisis and it cannot be said that this is a normal entrepreneurial risk. Solidarity between creditor and debtor should be relevant here too, it is submitted[26]. Also, it is argued that the unforeseen Corona-pandemic should give rise to an obligation to renegotiate the terms of the contract[27].

4. Dutch contract clauses and Corona

Several contract clauses that are quite common in use, may be used to amend or terminate contracts for reasons related to the Corona-crisis[28]. First, termination clauses often appear in contracts. Though they not often provide for a possibility to terminate a contract in case of a pandemic or other cases of force majeure, they sometimes do[29]. Second, commercial contracts may contain force majeure clauses, which provide for a solution (for instance amendment or termination of the contract) if *force majeure* causes difficulties in performing contractual duties. So, the General Terms and Conditions of the Rotterdam Terminal Operators' Association, applied to services provided in the Rotterdam harbor, entitles terminal operators to suspend their activities if there is a natural disaster or a government disaster[30]. Samsungs general conditions for services include a provision that Samsung is not liable and creates a right to suspend its obligations if an epidemic occurs[31]. In B2B contracts, these clauses are generally valid and enforceable, subject to the boundaries of reasonableness and fairness (Art 6:248 DCC) and the provision that general conditions may not be unreasonably onerous (Art 6:233 sub a DCC). Which, however, cannot be invoked by large commercial parties addition, force majeure clauses in B2C general conditions that effectively limit or exclude liability of a professional party, are considered to be unreasonably onerous and may be declared void (Art 6:237 sub f in conjunction with Art 6:233 sub a DCC).

[26] Schelhaas & Spanjaard (2020), p 965-966; Coen E Drion, 'Corona en onvoorziene omstandigheden', 2020 Nederlands Juristenblad 20, p 1251. In the first case where Corona was the cause of invoking the concept of unforeseen circumstances in a B2B-contract, this solidarity principle was underlined, but ultimately Art 6:258 DCC was not applied: Netherlands Commercial Court (Court of Amsterdam) 29 April 2020, ECLI:NL:RBAMS:2020:2406, NCC 20/014 (C/13/681900). In a second case, the application of Art. 6:258 in relation to the Corona-crisis was denied too: Court of Amsterdam 14 May 2020, ECLI:NL:RBAMS:2020:2644.

[27] Rieme-Jan Tjittes, 'Commerciële contracten en Corona: uitgangspunt 50/50 verdeling nadeel', <www.linkedin.com/pulse/commerciële-contracten-en-corona-uitgangspunt-5050-nadeel-tjittes> accessed 1 December 2020. Also Schelhaas & Spanjaard (2020), p. 964.

[28] Schelhaas & Spanjaard (2020), p. 960, 965, 967.

[29] Art 9.9 General Conditions ANVR Package Travel: a contract may be terminated if an exceptional circumstance at the place of destination occurs <www.anvr.nl/consumentenvoorwaarden.pdf> accessed 1 December 2020.

[30] Arts 7.1 and 7.2 <myservices.ect.nl/SiteCollectionDocuments/vrtoen.pdf> accessed 1 December 2020.

[31] Art 19.8 Samsung General Terms and Conditions <www.samsung.com/nl/info/legal/#verkoop> accessed 1 December 2020.

5. Conclusion

Dutch contract law provides for tools to mitigate the consequences of the Corona-crisis: (i) performance may not be enforced if the Corona-measures renders performance legally or practically impossible, (ii) force majeure may prevent liability if a person is not able or not willing to perform, (iii) contracts may be terminated if the other party does not perform its contractual duties for reasons related to the Corona-measures, and (iv) the court may when requested amend or terminate a contract in certain circumstances by applying the concept of unforeseen circumstances.

In addition, contract clauses making it possible to amend or terminate a contract, will generally be upheld. The magnitude of the Corona crisis both in humanitarian and economic terms is in both Dutch legal literature and case law regarded as so far-reaching and extraordinary that exceptions to the criterion of *pacta sunt servanda* is in many situations accepted.

Law of Contracts in Times of Covid-19 Pandemic: Polish Report

Radosław Strugała

As the world struggles with the Covid-19 pandemic, the debtors try to perform their contractual obligations despite the hardship it brings about. In the meantime contract lawyers are focused on trying and finding remedies that would help face the new circumstances. The remedies that enable the parties either to modify the contract or to bring it to an end seem the most apt solution in the context of current pandemic. Having said that, two provisions of the Polish Civil Code are to be considered, namely article 475 (read in conjunction with the article 495) and 3571.

The first one covers the issue of the so called impossibility of performance. According to the article 475, in the case of the subsequent (supervening) impossibility of performance – that is where the impossibility occurred after the contract was formed – the debtor is released from their duty to perform. Once the contract performance becomes impossible the contract is terminated automatically. This is true not only for contracts giving rise to unilateral obligations. Despite the fact that the article 475 confines the above-mentioned effect to such contracts (as due to systemic interpretation directives it is said to be applicable only to them), the article 495 of the Polish Civil Code leaves no doubts that the effect of automatic termination is also valid in the case of mutual contracts. This is clear in the light of § 1 of the article 495 as it provides that in the case of impossibility of performing the obligation by any of the parties to a contract, both parties are discharged and thus the contract is terminated in its entirety[1]. However, according to Article 495 §2 where the

[1] Krzysztof Zagrobelny in Edward Gniewek, Piotr Machnikowski (ed), 'Kodeks cywilny. Komentarz' (C.H. Beck 2019) 1119; Fryderyk Zoll, 'Wykonywanie i skutki niewykonania lub nienależytego wykonania zobowiązań' in Adam Olejniczak (ed), System prawa prywatnego. Prawo zobowiązań – część ogólna (C.H. Beck 2014) 1160.

obligation is mutual and one party's performance has become partly impossible, this party is no longer entitled to receive the other party's performance in the appropriate part. The other party may rescind the contract if the partial performance would inflict the nature of the obligation or the purpose of performance known by both parties.

The termination upon impossibility of performance analysed in this report comes into play where the impossibility cannot be attributed to either party to a contract (that is the impossibility is not caused by any fault, be it intentional or negligent actions or omissions of the parties). There is no doubt that in the context of Covid-19 pandemic debtors will have no problems with demonstrating that this condition is fulfilled. The same holds true for another prerequisite of application of the article 475 or 495, namely the requirement that the impossibility of performance be objective. In contrast to the so called subjective impossibility of performance – which occurs where a contract is not possible to be performed by a given debtor – the impossibility in the meaning of articles 475 and 495 must be objective, which entails that the impossibility goes to the essence of the contract (its very nature) and is not due to the circumstances concerning the debtor[2].

In the Polish Legal writing two types of objective impossibility are distinguished: factual (or physical) and legal. The former occurs, for example, when the object of performance ceased to exist (i.e. got destroyed) or actions constituting performance became factually impossible for any other reason. Whereas the latter is linked to the legal context and may be the case where in order to perform the contract (to avoid the breach) actions would have to be taken by the debtor that are not in line with the law, which is in place at the moment when the performance is due[3]. The nature of obstacles such as supply chain shortage, absence of employees (e.g. due to special parental leaves) or legal limits imposed by special legislation (e.g. restricting free movement, banning from rendering services or travelling abroad) make both legal and factual impossibility of performance likely to be invoked by debtors seeking effective defence. Whether they can succeed in raising it, is, however, conditioned on whether impossibility can be considered permanent.

In the case law it is unanimously held that impossibility of performance in the sense of articles 475 or 495 of the Polish Civil Code is to be ascertained only if it is permanent, as opposed to temporary impossibility which does not trigger remedies spelled out in the provisions under scrutiny[4]. At the first glance it may seem that the condition of impossibility of performance being permanent is not fulfilled in the majority of situations analysed in this paper, for obstacles linked to the Covid-19 pandemic will hopefully end within the time of a few months. However, one should bear in mind that whether impossibility of performance is permanent is to be decided in respect to given contract by taking into

[2] See Piotr Machnikowski, Justyna Balcarczyk, Monika Drela, *Contract law in Poland* (Wolters Kluwer 2011) 132.

[3] Bogusław Lackoroński in Konrad Osajda (ed.), *Kodeks cywilny. Komentarz* (C.H. Beck 2020); see also Piotr Machnikowski, Swoboda umów według art. 3531 KC. Konstrukcja prawna (C.H. Beck 2005) 194.

[4] See Supreme Court 5 December 2000, V CKN 150/00 and 15 November 2013, V CSK 500/12.

account its purpose and the type of performance due[5]. "Permanence" is a term with no fix, objective meaning and thus the requirement denoted by it may be met even where in a given case impossibility is of rather short duration.

Historically the provisions on impossibility of performance were given extensive interpretation. Some authors claimed that they are applicable not only in the case of actual impossibility and spoke in favour of broadening their scope of application to situations were performance, although possible, would be impractical because of excessive cost or excessive burden of performance[6]. This approach can be viewed as a substitute for traditional contract law figures similar to *frustration of purpose* in common law, *Wegfall der Geschaeftsgrundlage* (*§ 313 of BGB*) or *eccesiva onerositá* (article 1467 of the Italian Civil Code) which the Polish Law has not had in place for a long period of time. This changed in 1990 with the passing of the amendment of the Polish Civil Code which introduced the so called *rebus sic stantibus clausula* (article 3571 KC) into the Law of Contract. As a consequence, the above-mentioned lacuna seems filled in and extensive interpretation of the provisions of impossibility of performance is no longer legitimate[7].

The article 3571 provides the parties to a contract with special remedies. Namely, it enables them to claim the modification or termination of the contract where due to extraordinary change in circumstances, the performance of the contract becomes excessively onerous or would threaten one of the parties with substantial loss that the parties did not foresee when concluding the contract. Thus the article 3571 covers instances where the performance of contract would meet an essential hardship, but would still be possible (and consequently could not be terminated upon the articles 475 and 495).

The termination or modification of the contract on the basis of article 3571 does not operate *ex lege*. It is consequent upon an order which the court is empowered to issue after one party to a contract files a respective motion[8]. In contrast to some legal systems (see e.g. the article 1467 of the Italian Civil Code), article 3571 is not *expressly* confined to long-term contracts or contracts giving rise to continuous or periodic obligations. However, as a matter of fact it is applicable mostly to such contracts, for in the case of spot contracts

[5] Machnikowski (n. 3) 195.

[6] See Biruta Lewaszkiewicz – Petrykowska, *Niemożliwość świadczenia następcza* (1970) 4, Studia prawno ekonomiczne 80; Kazimierz Kruczalak, Skutki niemożliwości świadczenia według prawa cywilnego (Wydawnictwo Prawnicze 1983) 50.

[7] Zdzisław Gawlik in Andrzej Kidyba (ed.), *Kodeks Cywilny. Komentarz. Tom III. Zobowiązania. Część Ogólna* (Wolters Kluwer 2010) 628; Zagrobelny (n. 1) 1079; see also Piotr Machnikowski in Edward Gniewek, Piotr Machnikowski (ed), *Kodeks cywilny. Komentarz* (C.H. Beck 2019) 804.

[8] Under Article 3571 of the Polish Civil Code, if, following an extraordinary change of circumstances, the performance would be faced with excessive difficulties or threaten, which the parties did not foresee when concluding the contract, the court may, after considering the interests of the parties, define the mode of performing the obligations and the degree of the performance, and even decide upon termination of the contract, in accordance with the principles of community life. When terminating the contract the court may, as far as necessary, decide upon a settlement of accounts being guided by the principles specified in the preceding sentence.

there is very low probability for them to be affected by any change in circumstances[9]. Neither the provision at stake excludes its application to gratuitous contracts (contracts giving rise to unilateral obligation)[10].

The formulation of article 3571 leaves no doubt that it is only applied to contracts and no obligations arising under unilateral juridical acts are covered by this provision[11]. The court's power to modify or terminate the obligation under article 3571 cannot be extended to extra-contractual obligations, e.g. obligations which arise by operation of law (i.e. the obligation to reverse an unjustified enrichment or to pay damages for loss caused to another)[12]. Moreover, the court will have no power to vary or terminate the contractual obligation under article 3571 where the debtor assumed the risk of the change of circumstances either expressly (e.g. by inserting a hardship clause or similar terms into the contract) or impliedly (if the debtor is to be deemed to have assumed this risk because of the purpose or the nature of the contract, especially when it is of speculative character)[13].

For the remedies provided in the article in comment to arise, the performance of contract must be affected by a change of circumstances which can be considered exceptional (extraordinary). The risk of natural changes in circumstances that influence social and economic life (e.g. variation of market prices which are normal in market economy) is to be borne by parties to a contract and no remedy is available if such changes occur. Another requirement that needs to be met for the article 3571 to apply is the requirement of unforeseeability. In the Polish Law of contract it is referred rather to the way the change of circumstances affects the contract than to the change itself. In practical terms it means that the remedies spelled out in the article 3571 may be triggered only where the parties to a given contract did not foresee (and could not reasonably be expected to have foreseen[14]) that the change in circumstances which materialised would have made the performance of their contract excessively onerous or would put one of them under the risk of substantial loss. Approached in this manner, the requirement at hand may well be fulfilled even if the parties predicted (could have predicted) the change of circumstances itself[15]. As a consequence disputes that are going to be resolved by applying the article 3571 will be decided on the grounds on the actual impact that the pandemic had on the debtor's ability to perform or their monetary position. The burden of proof of the bearing that the pandemic

[9] Adam Brzozowski, Wpływ zmiany okoliczności na zobowiązania. Klauzula rebus sic stantibus (C.H. Beck 2014) 127; Machnikowski (n. 7) 710.

[10] Mirosław Bączyk, Leopold Stecki, *Darowizna*, in Jerzy Rajski (ed), System prawa prywatnego. Prawo zobowiązań – część szczegółowa (C.H. Beck 2018) 404; Brzozowski (n. 9) 126.

[11] Brzozowski (n. 9) 126.

[12] Brzozowski (n. 9) 141.

[13] Machnikowski (n. 7) 710; Brzozowski (n. 9) 128.

[14] See Supreme Court 21 November 2011 r., I CSK 727/10.

[15] Brzozowski (n. 9) 164; Machnikowski (n. 7) 714.

allegedly had on the debtor's ability to perform or on their monetary position lies on the debtor seeking the application of the remedies offered in the article 3571.

Despite the significant body of literature devoted to the subject of this report, there are still some doubts concerning the prerequisites of applicability of the article 3571. For instance, there are significant discrepancies between authors as to how the term "substantial loss" should be understood. It seems apt to assume that "substantial loss" is to be ascertained by comparing the position the party would have had, had the change in circumstances not materialised with the position they would have been in if the contract was performed after the change[16]. Thus the "substantial loss" may be reflected in the increased cost in performance of the party who demands termination or modification of the contract under article 3571 or the decreased value of counter-performance. As said above, excessive onerosity is an alternative trigger of *rebus sic stantibus clausula*. In contrast to "substantial loss", it is not linked to economic value of performance but to personal hardship, such as putting one's health at risk in order to perform the contract. It seems that in the context of Covid-19 situation the latter may constitute a valid argument for *rebus sic stantibus* defence more often than usually.

In the context of current applications of article 3571, its relation to special Covid-19 regulations becomes an important issue. As far as the Polish example is concerned, numerous provisions of these regulations (see articles 15k, 15ze, 15 zp, 31s, 31t, 31u, 31zu of the Act of 2 March 2020 on special solutions related to preventing, counteracting and combating Covid-19, other infectious diseases and emergencies caused by them[17]) directly affect the contracts concluded before the outbreak of the pandemic. As is the case of applying the article 3571, the application of above-mentioned provisions results in amending or terminating the contracts covered by them. For instance, the article 31t bans the landlord from increasing the rent and terminating the lease, thus allocating the risk of specific change in circumstances (the outbreak of the pandemic) solely on the landlord. Whereas the article 15ze provides the decrease of rent of commercial spaces in shopping malls, which entails that the burden is entirely on the landlord. To the extent that special provisions of this kind allocate the risk of Covid-19 pandemic they are said to exclude the applicability of remedies spelled out in the article 3571 of the Polish Civil Code[18].

[16] Radosław Strugała *Ingerencja sądu w stosunek zobowiązaniowy na podstawie art. 3571 KC* (2010) 8 Państwo i Prawo 51; Brzozowski (n. 9) 172.

[17] Journal of Laws, item 374, as amended.

[18] See more in details Radosław Strugała *Wpływ pandemii Covid-19 na wykonywanie umów w świetle art. 3571 KC* (2020) 11 Monitor Prawniczy.

Articles

Relevance of Contract Law Solutions Under a Pandemic

Reza Moradinejad*

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* Assistant professor, Faculty of Law, Laval University.

Who would have thought that a submicroscopic infectious agent would revive one of the most debated topics in contract law literature[1]? How to deal with a contract of which the obligations have become impossible or more difficult due to the occurrence of some unforeseeable contingencies?

Even if the main issue of Covid-19 remains public health and the protection of lives, there is now no doubt that the current crisis may have some serious consequences on other aspects of society. Among other sectors hit by the repercussions of the Covid-19 pandemic, the economy is the one that seems to be quite vulnerable. Massive layoffs, forced closures of nonessential businesses, and disruption of cross-border transport are the most visible consequences of this latest coronavirus outbreak; the one that makes headlines in the news outlets. There are, however, some less striking impacts which escape the attention of journalists. One may think of the indirect effects of economic difficulties on contractual relations.

The Quebec Government, like many other States, has decided[2] to put the economy "on pause"[3]. The extraordinary measures adopted by the Government to fight the Covid-19 pandemic, including the forced temporary closure of nonessential businesses, creates a very unprecedented uncertainty about the fate of the contracts already concluded by the concerned agents. These measures seriously undermine the ability of contracting parties to perform their contractual obligations. The prohibition of all indoor and outdoor assemblies simply makes the performance of some ongoing contracts impossible. Some other contracts may need small to substantial modifications to be adapted to the new socioeconomic realities. Last, but not least, some contracting parties may be in breach of contract because of financial difficulties.

Notwithstanding the specific cause of non-performance in each of the above-mentioned situations, we may agree on one point: several contracts can no longer be performed as expected. While a contract is the most effective tool to proceed to risk allocation[4], it is reasonable to ask whether or not this allocation depends on the stability of the surround-

[1] Several authors in academia or in legal practice have already published texts on the impact of the Covid-19 outbreak on ongoing contracts. In this regard, see, for example, J. Heinich, *L'incidence de l'épidémie de coronavirus sur les contrats d'affaires: de la force majeure à l'imprévision* [2020] Dalloz 611; C. Legendre, F. Plamondon and J. Hynes-Gagné, *COVID-19 pandemic: A force majeure under Québec civil law?* (*Osler*, 19 March 2020) <https://www.osler.com/en/resources/regulations/2020/covid-19-pandemic-a-force-majeure-under-quebec-civil-law> accessed 25 May 2020; H. Bundaru and V. Rochette,*Pandemic: Superior force ('force majeure') and its impact on business obligations in Quebec* (*Norton Rose Fulbright*, 20 March 2020) <https://www.nortonrosefulbright.com/en-ca/knowledge/publications/00261309/pandemic-superior-force-force-majeure-and-its-impact-on-business-obligations-in-quebec> accessed 25 May 2020.

[2] On March 13, the Government of Quebec adopted an Order in Council to declare a public health emergency according to article 118 of the Public Health Act (chapter S-2.2). (Décret no 177-2020, March 13, 2020 concernant une déclaration d'urgence sanitaire conformément à l'article 118 de la Loi sur la santé publique [2020] 12A G.O. 1101A.

[3] Government of Quebec, *Québec sur pause pour trois semaine* <https://www.quebec.ca/premier-ministre/actualites/detail/le-quebec-sur-pause-pour-trois-semaines/> accessed 26 May 2020.

[4] A. Schwartz, *The Law and Economics Approach to Contract Theory*, in D.A Wittman (ed), *Economic Analysis of the Law* (Blackwell Publishing Ltd 2004).

ing circumstances. This reminds us of the old opposition between two maxims: *pacta sunt servanda* and *rebus sic stantibus*. The question is whether or not the contracting parties should respect the initial risk allocation despite all challenges brought about by the drastic changes in the surrounding circumstances?

For Quebec contract law scholars, the most intuitive way to answer this question is to seek a solution from within contact law. Two traditional contractual doctrines exist which aim to put forward a solution to the risk allocation problem. The question may be analyzed as a case of force majeure[5] or within the doctrine of *imprévision*[6]. More recently, a solution based on the duty of good faith has been suggested by some scholars. Notwithstanding differences between these doctrines, they have one thing in common. They all follow the intrinsic logic of contract law by providing general rules applicable to address a problem encountered in one defined contract.

Different measures adopted by Federal and Provincial Governments to help contracting parties suggest that there should be another way to find a remedy for contracts affected by drastic changes in circumstances. *Ad hoc* solutions emerging from outside of contract law may be more efficient than contractual remedies in tempering the negative effects of the Covid-19 outbreak on contracts.

The objective of this paper is to shed light on some plausible responses to the crisis caused by the Covid-19 outbreak as it affects contractual relations. Even though our analysis is limited to Quebec contract law, we will discuss some measures adopted by the Canadian Federal Government which may nonetheless have some impacts.

In the first section of this paper, we will discuss the doctrine of force majeure, its conditions, its effects and its application in the current crisis. The second section will be dedicated to the theory of *imprévision*. After a historical overview, we will demonstrate the reasons this doctrine is not applicable under Quebec contract law. The first two sections will be dedicated to more traditional responses to this problem. In the third section, we will discuss the new role assigned to the duty of good faith by virtue of a new understanding of this concept which emphasizes cooperation in contractual relationships. It will be shown that even though this understanding seems to be promising, Quebec contract law is not yet ready to use it in order to judicially redistribute risks and benefits of a contract. Finally, the last section will study the out-of-the-box solutions brought by the public authorities to fight the effects of the current crisis. It will be shown that slight links may be made between public responses and cooperation in contractual relationships.

[5] The impossibility of performance is sometimes studied as the frustration doctrine. In this paper, we have decided to use only force majeure. This appellation is more faithful to Quebec contract law where this concept is largely known as force majeure.

[6] The doctrine of hardship represents some similarities with the theory of *imprévision*. In legal literature, these two concepts may be used indiscriminately. We use the expression "theory of *imprévision*" in order to remain faithful to the particularity of this concept in civil law.

1. Force Majeure: A Plausible Solution

In contract law in Quebec, force majeure is a doctrine that enables a contracting party to seek relief should the performance of an obligation become impossible due to an unforeseeable and irresistible event. Force majeure is an old concept in Quebec contract law[7], dating back to Quebec's first Civil Code, known as the Civil Code of Lower Canada (CCLC). The CCLC used to refer to two concepts for dealing with the impossibility of performance: "force majeure" and "fortuitous event"[8]. The Code did not give a formal definition of force majeure. Instead, the fortuitous event was defined by reference to the notion of force majeure. Article 17 (24) CCLC provided that "[a] 'fortuitous event' is one which is unforeseen, and caused by superior force which it was impossible to resist." Some authors suggest that there was a theoretical distinction between fortuitous event and force majeure. The former is an event caused by humans, while the latter is caused by nature[9].

In spite of this so-called theoretical distinction between "fortuitous event" and "force majeure," neither the case law[10] in Quebec nor the legal doctrine[11] have created a practical distinction between these terms and they are often used interchangeably. In accordance with this tendency, the term "fortuitous event" is no longer used in the current Civil Code of Quebec (CCQ). Article 1470 CCQ is the main provision dealing with force majeure. This article applies equally to the contractual and delictual responsibilities and remains the essential means by which debtors may excuse their non-performance. Note that the force majeure in Quebec contract law considers the performance of each obligation and not the contract[12].

The second paragraph of article 1470 CCQ provides a formal definition of force majeure[13]. While the new definition lists the characteristics of force majeure, the effects of force majeure are stated at article 1693 CCQ.

[7] The concept comes from Roman law. To read more on the subject, see R. Taschereau, *Théorie du cas fortuit et de la force majeure dans les obligations* (Thèse, Université Laval 1901).

[8] The English version of the Civil Code of Lower Canada used two terms to designate "force majeure": "irresistible force" or "superior force". The French version used "force majeure".

[9] L. Faribault, *Traité de Droit Civil Du Québec* (Wilson & Lafleur 1957) vol 7-*bis* 387.

[10] *Rivet v. La Corporation du Village de St-Joseph*, [1932] S.C.R. 1, 4.

[11] Faribault (n, 9) 387.

[12] M. Katsivela, *Canadian Contract and Tort Law: The Concept Of Force Majeure In Quebec And Its Common Law Equivalent* (2012) 90 The Canadian Bar Review <https://cbr.cba.org/index.php/cbr/article/view/4263> accessed 23 April 2020, "plainCitation": M. Katsivela, *Canadian Contract and Tort Law: The Concept Of Force Majeure In Quebec And Its Common Law Equivalent* (2012

[13] The English version of the Civil Code of Quebec uses the term "superior force". We prefer the term "force majeure" which corresponds to the term used in the French version. It corresponds better to the expression largely used in the doctrine of frustration in English literature.

1.1. Characteristics of Force Majeure

According to the second paragraph of article 1470 CCQ, force majeure is an unforeseeable and irresistible event. Two cumulative conditions must be satisfied in order to characterize an event as a case of force majeure. The case law indicates the manner in which these conditions may be interpreted.

The first condition concerns the ability of parties to foresee the probability of a contingency when contracting. The parties must absolutely not be able to foresee the contingency and, consequently, not be able to include a provision applicable in the event of its happening. In other words, the parties must not be able to bargain the risk and benefit allocation concerning that specific event. The simple fact that a contract does not contain a provision applicable to a specific event does not mean that this event was unforeseeable. In fact, the CCQ does not refer to an unforeseen event; the term used is unforeseeable. According to the case law, an analysis *in abstracto* is needed to state if an event is unforeseeable or not. The personal impossibility of the parties to estimate the probability of the contingency is not relevant. The focus should be on what a reasonable person – longtime known as *bon père de famille* in civil law – would have done when placed in the same situation. Was the reasonable person able to foresee the event? If so, a specific risk and benefit allocation would have been placed in the contract. The risk would have been shared by both parties or assumed by one of them. In this case, the event cannot be characterized as force majeure.

The case law gives some interesting examples of events that were or were not recognized as a case of force majeure[14]. It is not easy to draw a clear line between what is foreseeable and what is not. It depends largely on the facts of each case. The bottom line is that it seems to be rather hard to convince the Quebec Courts that a given event is an unforeseeable one. For instance, a court has refused to recognize a once-every-hundred-year rain as an unforeseeable event[15].

[14] In some cases, the unpredictability of the event is not admitted. In *Syndicat des travailleuses et travailleurs de Hilton Québec (CSN) v UMRCQ* [1992] CanLII 3067 (Court of Appeal of Quebec) the Court stated that the freezing of rain falling upon trees at certain seasons in Canada and consequent destruction of their branches by force of wind operating upon them when so laden was too frequent an occurrence to escape the attention of any intelligent person; In ibid, in the midst of collective bargaining, a hotel should have anticipated the risk of a legal strike by its employees. Therefore, the impossibility of the hotel to host a conference cannot be excused by invoking force majeure; In *Laidley v Kovalik* [1994] CanLII 5878 (Court of Appeal of Quebec), an economic crisis was not considered as a fortuitous event, because the investment professionals had to exercise caution and reserve and had to consider this probability; In *Banque Laurentienne Canada v Pinkerton du Québec ltée* [1994] JE 94-1360 (Superior Court of Quebec), a security firm could not plead the unpredictability of the theft committed by one of its employees.
On the other hand, in *Douville v 134188 Canada inc* [1995] JE 95-1769 (Superior Court of Quebec), the Superior Court of Quebec admitted the unpredictability of freezing rains; in *Factory Mutual insurance Company v Richelieu Métal Québec inc* [2011] QCCA 1690, the snow was considered as a case of force majeure; Finally in *Banque de Montréal v Krespine* [1999] 99BE-1164 (Superior Court of Quebec), theft is considered as force majeure.

[15] *Guardian du Canada (Nordique (La), compagnie d'assurances du Canada) v Rimouski (Ville de)* [2008] QCCS 2153 [408].

The second condition concerns the fact that the harmful event must be irresistible. This means that no matter how important the debtor's efforts, the contractual obligations can absolutely not be performed as expected. In other words, the performance of the obligation must become completely impossible. Some remarks must be made concerning the irresistible character of force majeure. First, the performance of the obligation should become impossible[16]. It is not just about the personal ability of the contracting party to perform. Again, the Court should proceed to an analysis *in abstracto*. The question is whether a reasonable person could have resisted the harmful event and been able to perform the obligation. It must be added that the performance must not become simply more onerous; in such a case, the problem must be analyzed as a case of *imprévision*[17]. Second, chronologically, the impossibility must occur after the conclusion of the contract and solely because of the harmful event. In other words, when signing the contract, contractual obligations must be possible. Should the performance of the obligation be impossible at the time of contract formation, the contract may be nullified by a court[18]. Third, the impossibility must be a direct consequence of the harmful event. It is not about the cash-flow problem caused indirectly by the harmful event. Finally, the irresistible character of force majeure implies that no reasonable person can avoid it happening. As some authors have said, "[the event] must, in fact, be irresistible as to its occurrence – inevitable – and regarding its effects – insurmountable"[19].

Some legal scholars persist that there is a third condition for an event to be qualified as force majeure. They believe that the event must be external to the debtor. Defined in the CCQ, the concept of force majeure is not necessarily an external event. This is a clear choice made by the legislature not to add this condition[20]. The case law also does not

[16] In *Deux-Montagnes (Ville) v St-Joseph-du-Lac (Municipalité)* [2015] QCCA 749 [24], the Court of Appeal of Quebec considers that "*(…) un événement, ou une série d'événements regroupés, peut être qualifié d'irrésistible s'il rend l'exécution de la prestation absolument impossible*".

[17] The Court of Appeal of Quebec reaffirms in *Transport Rosemont Inc v Ville de Montréal* [2008] QCCS 5507 that if an event makes the performance simply more difficult, more hazardous, or more onerous for the debtor, the event shall not be characterized as force majeure or fortuitous event. "*Quant à l'irrésistibilité, il suffit de mentionner que l'événement qui rend l'exécution simplement plus difficile ou plus périlleuse ou plus onéreuse pour le débiteur ne tombe pas dans cette catégorie des cas fortuits.*"

[18] Paragraph 2 of article 1373 CCQ provides that the debtor is bound to render a prestation that is possible. An impossible prestation makes obligation null.

[19] D. Lluelles and B. Moore, *Droit des obligations* (2nd ed, Éditions Thémis 2012) 2734.

[20] It should be noted that in some statutes, the legislature has implicitly included the external character as one of the constitutive elements of force majeure. In the context of responsibility for property damage caused by an automobile, article 108 of the Automobile Insurance Act (Ch. A-25) provides that damages resulting from the condition or the running order of the automobile, or from the fault or the state of health of the driver or a passenger were not caused by force majeure.

require such condition[21]. Some authors[22] propose to consider the external character as a part of a global analysis to verify if an event is unforeseeable and irresistible. This is only the case if the event is outside of the debtor's sphere of control. For example, an illegal strike by employees is not within the debtor's sphere of control – thus unforeseeable and irresistible – so that it may be considered as force majeure, while a legal strike is under the debtor's sphere of control, in which case a reasonable person may avoid the strike or at least anticipate its happening[23].

There is little doubt of the unforeseeable character of the Covid-19 outbreak for most contracting parties[24]. But is it really irresistible? To find the answer, a specific analysis needs to be done for each contract affected by the crisis. There is no universal answer to this question.

1.2. Effects of Force Majeure

To know the main consequence of characterizing an event as a case of force majeure, one should read article 1693 CCQ. According to this article:

Where an obligation can no longer be performed by the debtor, by reason of superior force and before he is in default, the debtor is released from the obligation; he is also released from it, even though he was in default, where the creditor could not, in any case, have benefited from the performance of the obligation by reason of that superior force, unless, in either case, the debtor has expressly assumed the risk of superior force.

The burden of proof of superior force is on the debtor.

Two remarks must be made in this regard. First, force majeure does not produce any consequences on the validity of the contract. The harmful event happens after the conclusion of the contract; the impossibility of performance does not then make the obligation invalid. It should be noted, secondly, that a contract may contain several obligations which are not equally affected by force majeure. In other words, not all obligations in a contract will become impossible by the happening of the harmful event. Therefore, the contracting parties remain bound by the contract unless the concerned obligation is an essential one and the harmful event is permanent[25].

[21] In *Guy St-Pierre Automobile Inc v Lavallée* [1964] CS 353 (Superior Court), the breaking of the axle of a car was considered as force majeure; In *Gougeon v Bousquet* [1994] RDI 523 (Courte of Quebec), the sickness of the debtor was recognized as force majeure.

[22] Lluelles and Moore (n. 19) 2736.

[23] *Syndicat des travailleuses et travailleurs de Hilton Québec (C.S.N.) v U.M.R.C.Q.* (n. 14).

[24] The 2009 swine flu pandemic was recognized as a case of force majeure in two decisions made by the Court of Quebec: *Lebrun v Voyages à rabais* [2010] QCCQ 1877 (Court of Quebec); *Béland v Voyage Charterama* [2010] QCCQ 2842 (Court of Quebec).

[25] Unlike the Civil Code of France in article 1351, which states the definitive character of impossibility, article 1693 CCQ does not include any specification regarding the definitive character of impossibility.

In a bilateral contract, the question arises about the correlative obligation of the creditor. May a debtor require the performance of the correlative obligation of the creditor, while being released from her own obligation? It should be recalled that the provisions concerning resolution or resiliation of contracts may not be applied. Articles 1604 to 1606 CCQ apply only where there is faulty non-performance; that is clearly not the case where non-performance is caused by force majeure. The answer may be found within the risk theory. According to article 1694 CCQ, "[a] debtor released by impossibility of performance may not exact performance of the correlative obligation of the creditor; if the performance has already been rendered, restitution is owed." This solution fits well non-translative contracts in which each party assumes only obligations that consist of doing or not doing something[26].

Unlike article 1351 of the French Civil Code[27], article 1693 CCQ does not specify if the extinction of an obligation applies only when the impossibility is permanent, or if it applies even when the harmful event is temporary. To find the answer, the focus should be on the importance of performance at a certain time. Should the performance be done at a fixed time, the obligation will be extinguished, and the debtor will be discharged. On the other hand, if the moment of performance is not of capital importance, a temporary impossibility of performance will only suspend the obligation, and the debtor is not relieved. In this case, should the harmful event be lifted, the creditor may exact the performance. Therefore, depending on the obligation, the sanction may be extinction or suspension of the obligation. This conclusion is not provided by CCQ. There is also little precision in the case law. The solution seems to be a doctrinal one[28] inspired by the French law. It fits well with the philosophy of Quebec contract law which promotes the specific performance of obligations[29].

As a conclusion to this section, we may summarize the solutions proposed by Quebec contract law. In the case of force majeure, if the harmful event is temporary and the moment

[26] When the contract implies a transfer of real rights, according to article 1456 CCQ, "[t]he debtor of the obligation to deliver the property continues, however, to bear the risks attached to the property until it is delivered," although the debtor is no longer the owner of the good. Article 1456 CCQ creates an exception to the general rule which makes the owner the bearer of risk.

[27] "L'impossibilité d'exécuter la prestation libère le débiteur à due concurrence lorsqu'elle procède d'un cas de force majeure et qu'elle est définitive, à moins qu'il n'ait convenu de s'en charger ou qu'il ait été préalablement mis en demeure."

[28] Lluelles and Moore (n. 19) 2747; J.-L. Baudouin, P.-G. Jobin and N. Vézina, *Les obligations* (7th ed, Ed Yvon Blais 2013) para 846; V. Karim, *Les Obligations*, (4th ed, Wilson & Lafleur 2015) vol. II, para. 3454.

[29] "*Le mouvement constaté durant la dernière partie du 20e siècle en faveur d'une plus grande ouverture à l'exécution en nature était donc très opportun et se traduit d'ailleurs dans la lettre du Code civil du Québec. Ainsi, il est intéressant de noter que le législateur, à l'article 1590 C.c.Q., place l'exécution forcée en nature en tête de la liste des recours du créancier, de façon bien distincte, immédiatement après la mention de la sanction universelle que constitue l'exécution par équivalent. De plus, il lui consacre maintenant une disposition propre qui en énonce le principe (art. 1601 C.c.Q.), tout en y ajoutant deux dispositions consacrées à des applications particulières (art. 1602 et 1603 C.c.Q.). Ce sont là autant d'indices que le législateur la considère véritablement sur le même pied que les autres sanctions, et non plus comme un recours exceptionnel*" (Baudouin, Jobin and Vézina, n. 28, para. 731).

of performance of the obligation affected by the event may be variable, the performance is simply suspended until the end of the event. Otherwise, the debtor may seek relief and the obligation will be extinguished. The court may not rewrite the contract or reduce the obligation of the debtor except where the impossibility is partial.
But an unforeseeable event may not always lead to the impossibility of the performance. Sometimes, the performance becomes extremely onerous but still feasible. The theory of *imprévision* addresses this issue.

2. Revision of Contract for *Imprévision*: An Impossible Solution

The theory of *imprévision* is one of the most controversial theories in civil law. Under what conditions may a court intervene to balance a contract whose equilibrium is upset due to an unforeseeable contingency? The basic idea behind the theory of *imprévision* is to permit courts to rewrite or to terminate the contract despite the initial arrangement made by the contracting parties. This *ex-post* rearrangement aims to make the debtor's obligation less onerous so that it may be performed.
There is no homogenous approach to this theory among any of the civil law legal systems. Some tend to admit revision or termination of the contract when the surrounding circumstances have substantially altered[30]. Others, including Quebec, take a different approach by sticking to an orthodox reading of contract law based on the autonomy of the will[31] which precludes any judicial intervention regarding a validly concluded contract. Even though the general tendency is to recognize the theory of *imprévision*, Quebec maintains its opposition. A brief historical review of *imprévision* may help us better understand Quebec's choice to deal with this issue.

2.1. *Imprévision* under the Civil Code of Lower Canada

An author rightfully states that the CCLC was "impregnated in liberalism"[32]. Consequently, the principle of the binding force of contracts had the utmost importance under that Code.

[30] By proceeding to a thorough reform of contract law (Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, ratified by the Loi n. 2018-287 du 20 avril 2018), France becomes the latest legal system which admits the revision of contracts in case of *imprévision*.

[31] To know more about the doctrine of the autonomy of the will, see Véronique Ranouil, *L'autonomie de la volonté : naissance et évolution d'un concept* (Presses universitaires de France 1980).

[32] S. Normand, *Le Code et la protection du consommateur* (1988) 29 Les Cahiers de droit 1063. The Civil Code – virtually by itself – governed questions relating to private contractual relationships. Yet it happened that where the legal framework instituted in the mid-19th century satisfied the needs of that liberal society, it could no longer suit the requisites of a consumers' society without leading to serious injustices. The arrival of the consumers' society had a significant effect on private law. On the one hand, the liberal ideology which had been the keystone underlying the Code, was shaken and, on the other, the technique of codification which had often been presented as a culmination, was discredited. This

But surprisingly, the 1866 legislature omitted[33] to explicitly affirm this principle. The CCLC contained no provision equivalent to former article 1134 of the French Civil Code[34]. The only article dealing with the binding force of a contract was article 1022 CCLC that simply described the effects of contracts. The third paragraph of this article provided that "[contracts] can be set aside only by the mutual consent of the parties, or for causes established by law." This provision made any judicial revision of contracts subject to prior legal permission. By omitting to refer explicitly to the theory of *imprévision*, the judicial revision of contracts was neither permitted nor prohibited.

Despite the absence of a clear rule, authors were mostly opposed to any judicial intervention after the conclusion of the contract[35]. Courts unhesitatingly followed the mainstream doctrine. In 1975, the Superior Court of Quebec, in *Grant Mills Ltd. v Universal Pipeline Welding Ltd*[36] concluded that the theory of *imprévision* had not yet managed to overturn traditional principles of civil law[37]. This conclusion was confirmed by two other subsequent decisions of the Court of Appeal of Quebec made under the CCLC[38]. There was, therefore, no doubt that under the CCLC, Quebec Contract Law did not recognize the theory of *imprévision*.

2.2. Evolution of Quebec Contract Law: More Place for Equity

During the 20th century, the evolution of contract law was remarkable to the point that we may call it a slow metamorphosis. The weakening of the "autonomy of the will" was at the heart of this evolution which may be demonstrated by pointing out three significant episodes: the legislative response to the great crash, the introduction of a new section to the CCLC, and the adoption of the consumer protection Act.

study investigates in turn these two unsettling factors. Consumer law serves to illustrate problems that are all too often neglected, especially the relationship between private law and the Code, the Code's capacity to be adapted to socio-economic changes and the phenomenon of hybridization which private law cannot escape.",“container-title": “Les Cahiers de droit”, “DOI”:“https://doi.org/10.7202/042925ar”, “ISSN”: “0007-974X, 1918-8218”, “issue”:“4”, “journalAbbreviation”:“cd1”,“language”:“fr”,“note”:”publisher: Faculté de droit de l’Université Laval”, “page”: “1063-1082”,“source”: “www.erudit.org”, “title”: “Le Code et la protection du consommateur”, “volume”: “29”, “author”: [{“family”:“Normand”,“given”:“Sylvio”}],“issued”:{“date-parts”:[[“1988”]]}}],”schema”:“https://github.com/citation-style-language/schema/raw/master/csl-citation.json”}

[33] According to Pierre-Basile Mignault, a prominent legal scholar and former Justice of the Supreme Court of Canada, there was no need to repeat a well-known maxim (Pierre-Basile Mignault, *Droit Civil Canadien* (Théoret 1901) vol 5, 260).

[34] "*Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi.*"

[35] Gérard Trudel, *Traité de Droit Civil Du Québec* (Wilson & Lafleur 1946), vol 7, first part, 323.

[36] *Grant Mills Ltd v Universal Pipeline Welding Ltd* [1975] CS 1203 (Superior Court).

[37] ibid 41.

[38] *H Cardinal construction Inc v Dollard-des-Ormeaux (Ville de)* [1987] JE 87-970 (Court of Appeal); *Montréal (Communauté urbaine de) v Ciment indépendant Inc* [1988] JE 88-1127 (Court of Appeal).

As reported by an author[39], the great crash of 1929 was one of the pivotal moments in the history of Quebec contract law. The financial disaster created by the great crash had a significant effect on the hypothecary debtors. Several debtors were facing proceedings brought by hypothecary creditors in the exercise of their rights. That would have resulted in several homeowners being dispossessed of their properties. In order to help homeowners who could no longer pay their debts, the National Assembly of Quebec adopted an Act[40] (*Loi suspendant l'exigibilité des créances hypothécaires et autres*) aiming to impose a moratorium on the mortgages. Article 1 of this Act provided a thirty-day moratorium on any action for debt recovery relating to the capital of a mortgage. According to article 2 of the Act, during this period, the hypothecary debtor could present a motion to a court in order to obtain a delay for payment. Finally, article 8 of the Act provided that any judgment granting a delay could be rescinded if it could be established that the circumstances justifying the delay had changed.

Three remarks are pertinent concerning this legislative intervention. First, this act recognized, for the first time, the judicial revision of a contract. Although the courts were not allowed to reduce the debtor's obligation, they did find the power to change the date on which the debt was due. Second, this measure was a temporary response. The period granted to debtors could not extend beyond May 1, 1934. Finally, the legislature didn't have the intention to modify contact law; not a single modification was made to CCLC.

The introduction of a new section "Of equity in some contracts"[41] constituted the second significant episode in the evolution of Quebec contract law. Among the five articles contained in this section, article 1040c is the one which is the basis for the grounds for further judicial interventions in contracts. The first paragraph of the then-new article 1040c CCLC provided that:

[39] Normand (n. 32).the Civil Code – virtually by itself – governed questions relating to private contractual relationships. Yet it happened that where the legal framework instituted in the mid-19th century satisfied the needs of that liberal society, it could no longer suit the requisites of a consumers' society without leading to serious injustices. The arrival of the consumers' society had a significant effect on private law. On the one hand, the liberal ideology which had been the keystone underlying the Code, was shaken and, on the other, the technique of codification which had often been presented as a culmination, was discredited. This study investigates in turn these two unsettling factors. Consumer law serves to illustrate problems that are all too often neglected, especially the relationship between private law and the Code, the Code's capacity to be adapted to socio-economic changes and the phenomenon of hybridization which private law cannot escape.","container-title":"Les Cahiers de droit","DOI":"https://doi.org/10.7202/042925ar","ISSN":"0007-974X, 1918-8218","issue":"4","journalAbbreviation":"cd1","language":"fr","note":"publisher: Faculté de droit de l'Université Laval","page":"1063-1082","source":"www.erudit.org","title":"Le Code et la protection du consommateur","volume":"29","author":[{"family":"Normand","given":"Sylvio"}],"issued":{"date-parts":[["1988"]]}}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}

[40] Loi suspendant l'exigibilité des créances hypothécaires et autres SQ 1933, c. 99.

[41] This modification of CCLC is made by the adoption of an *Act to protect borrowers against certain abuses and lenders against certain privileges* SQ 1964 (12-13 ElizII), c. 67.

"**1040a.** The monetary obligations under a loan of money may be reduced or annulled by a court so far as it finds that, having regard to the risk and to all the circumstances, they make the cost of the loan excessive and the operation harsh and unconscionable".
It was clearly not a case of *imprévision*. The excessive character of the loan had to exist at the time of contracting. In fact, this provision created a new exception to the preclusion of a lesionary remedy for persons of full age. The importance of this provision may be summarized in four points. First, the legislature admitted for the first time that a contract made between two persons of full age may be harsh and unconscionable. This led to the first ever recognition of a lesionary remedy in Quebec for a contract concluded between two persons of full age. This provision went far beyond the mindset of the CCLC editors, which could be represented by the following maxim, "*qui dit contractuel, dit juste*"[42]. This provision is an implicit admission of the fact that a contract between two persons of full age might be unjust. Second, the mere insertion of a new section to the CCLC was highly symbolic; the choice of its title made it even more significant. It revealed the intention of the legislature to introduce a dose of equity in some contracts. In the third place, this modification of the CCLC did not affect the general theory of contracts. The mainstream reading of contracts remained based on a rigid conception of contract. Finally, courts did obtain the power to rewrite contracts by reducing the obligations of the debtor.
The adoption of the first consumer protection act constituted the third episode of the evolution of contract law in Quebec. For the purpose of this paper, we only mention provisions dealing with lesion. The first *Consumer Protection Act*, adopted in 1971[43], granted to a consumer whose inexperience had been exploited by a merchant the possibility of demanding the nullity of the contract or a reduction in obligations if they were greatly disproportionate to those of the merchant[44]. The second Act, which is the current *Consumer Protection Act*[45], adopted in 1978, slightly modified this provision. Article 8 states that "[t]he consumer may demand the nullity of a contract or a reduction in his obligations thereunder where the disproportion between the respective obligations of the parties is so great as to amount to exploitation of the consumer or where the obligation of the consumer is excessive, harsh or unconscionable". Albeit this provision applies only to the consumer contracts as defined in the Act, it affects a great number of persons of full age who may be qualified as a consumer. This fact makes this provision more than a simple exception of the preclusion of a lesionary remedy for persons of full age.
The above-mentioned examples were part of a wider movement aiming to enhance fairness in Quebec contract law. Other manifestations of this movement could be found in the

[42] A. Fouillet, *La Science Sociale Contemporaine* (2nd ed, Hachette 1885) 410.
[43] Consumer Protection Act SQ 1971, c. 74.
[44] ibid., s. 118.
[45] Consumer Protection Act 1978 c. P-40.1.

decisions of the Supreme Court of Canada. In three major decisions, the Supreme Court recognized the existence of the duty of good faith by stating that all "agreements [had to] be performed in good faith"[46]. According to one of the most prominent authors in Quebec, these steps contributed to what we may call "the new contractual morality"[47]. This new era is fundamentally based on the duty of good faith and equity.

2.3. Civil Law Reform Project

In 1955, in the midst of the renewal of legal doctrine in Quebec, the legislature initiated a wide reflection on a global reform of civil law. The idea was to proceed to a systematic revision of the Code in order to make it more compatible with the social, political, and economic realities of modern Quebec. In 1955, the task was entrusted to a "jurist"[48] and subsequently, in 1960, to four other "codifiers to study the reports, observations and recommendations"[49] of the said jurist. The "Civil Code Revision Office" was then created to accomplish the task. In 1977, the office published its final report containing the Draft Civil Code[50] and the accompanying commentaries.

The Office was quite sensitive to issues relating to fairness in contracts. Several provisions were proposed to grant a contracting party the possibility to seek judicial intervention when contractual equilibrium was upset. These provisions were mostly based on the concepts of good faith and equity[51]. Most importantly for the purpose of this article, the Office proposed the revision of contracts in case of *imprévision*:

"**75.** If unforeseeable circumstances render execution of the contract more onerous, the debtor is not freed from his obligation.

In exceptional circumstances, and notwithstanding any agreement to the contrary, the court may resolve, resiliate or revise a contract the execution of which would entail excessive damage to one of the parties as a result of unforeseeable circumstances not imputable to him[52]".

This proposition broke with the longtime position based on the maxim *pacta sunt servanda*. The Office explained this turnaround in the commentaries of the Draft. We find it useful to reproduce integrally the commentaries on article 75:

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[46] *National Bank v Soucisse et al* (1981) 2 SCR 339 (Supreme Court of Canada) 356. See also *Bank of Montreal v Kuet Leong Ng* (n. 46) 442; *Houle v. Canadian National Bank* (n. 46) 146; *Bank of Montreal v Bail Ltée* (1992) 2 SCR 554 (Supreme Court of Canada).

[47] J.-L. Baudouin, *Justice et équilibre : la nouvelle moralité contractuelle du droit civil québécois*, in *Etudes offertes à Jacques Ghestin: le contrat au début du XXIe siècle* (LGDJ 2001).

[48] An Act respecting the revision of the Civil Code SQ 1954-55 (3-4 ElizII), c. 47.

[49] An Act to amend the Act respecting the revision of the Civil Code SQ 1959-60 (8-9 ElizII), c. 97.

[50] Québec (Province) – Civil Code Revision Office, *Report on the Quebec Civil Code*, vol. I (Éditeur officiel du Québec 1977).

[51] For instance, we may cite the admission of lesionary remedy for all contracting parties (art. 37 of the Book five on obligations, ibid 337) or the nullity of an abusive clause in any contract (art. 76 of the Book five on obligations, ibid 343).

[52] Ibid., 343.

"The first paragraph of this article reaffirms the principle of the binding effect of contracts and maintains the present rule of Quebec law *[reference omitted]*, according to which the debtor is not freed merely because execution of the contract has been rendered more difficult or more onerous; if the debtor is to be freed because execution is impossible, such impossibility must truly be the result of a fortuitous event.
The second paragraph is new law. It consecrates in the Draft the possibility of judicial review where there has been imprevision, namely, in circumstances which do not constitute a truly fortuitous event because they do not make it absolutely impossible but merely more difficult to execute the commitment. A few comments must be made on this subject. In the first place, the words "exceptional circumstances" are at the beginning of the text to stress that the rule must only be used in truly extraordinary situations. The use of the expressions "excessive prejudice" and "unforeseeable circumstances" reinforce this idea and limit judicial discretion.
In the second place, this rule is seen as representing, in effect, the complement of a general legislative policy, which is intended to establish better justice and equity in contractual relations. The provisions relating to lesion protect at the time the contract is formed; those of imprevision protect at the time the obligation is executed.
Finally, as a result of legislative evolution in recent years, for example in consumer protection and in the lease of things *[reference omitted]*, where the courts may review an agreement because of lesion, adoption of such a rule of principle seems more acceptable to Quebec law[53]".
This ambitious proposal did not convince the legislature. In 1987, the Quebec Government presented the "*Avant-projet de loi : Loi portant réforme au Code civil du Québec du droit des obligations*"[54]. The text of *Avant-projet* did not contain any provision similar to the one proposed by the Office in its final report. It was clear that the legislature did not intend to follow the Office on this issue. Finally, in 1990, the Bill 125 on Civil Code was presented to the National assembly of Quebec. The final draft did not contain any provision regarding the case of *imprévision*.

2.4. *Imprévision* Under the Civil Code of Quebec

In 1991, the CCQ entered into force. The principle of the binding force of contracts is stated in two articles. According to article 1434 CCQ, "[a] contract validly formed binds the parties who have entered into it not only as to what they have expressed in it but also as to what is incident to it according to its nature and in conformity with usage, equity or law." This provision differs slightly from its equivalent in CCLC. Unlike article 1024 CCLC,

[53] Québec (Province) – Civil Code Revision Office, *Report on the Quebec Civil Code*, vol III (Éditeur officiel du Québec 1977) 614.

[54] Québec (Province) – Bibliothèque de l'Assemblée nationale, *Avant-projet de loi: Loi portant réforme au Code civil du Québec du droit des obligations* (Éditeur officiel, 1987).

the new provision does explicitly mention the binding effect of a validly formed contract for the parties.

The sanctity of contracts is stated in article 1439 CCQ. "A contract may not be resolved, resiliated, modified or revoked except on grounds recognized by law or by agreement of the parties". Other than some slight semantic differences between article 1439 CCQ and article 1022 CCLC, the two provisions do not meaningfully differ. Both of them unequivocally state the sanctity of contracts. But unlike the former Code, the new one multiplies the cases where courts may intervene to adjust the contract. These cases mostly concern contracts[55] or obligations[56] whose validity might be contested, but the fact that courts may reduce the obligation of the debtor is an important achievement in comparison to the former Civil Code. These new powers entrusted to courts do not, however, help us to decide between two contradictory maxims: *pacta sunt servanda* and *rebus sic stantibus*.

No explicit provision of the CCQ states a rule to admit or to refuse judicial review of a contract whose equilibrium is disrupted by an unforeseeable event. What is the best interpretation of this mutism? Before focusing on the case law, we examine some indirect arguments brought by two authors[57].

The first and most important argument is the fact that this provision was effectively proposed by the Office in the Draft Civil Code but never included in the *Avant-projet* or in the Bill 125. This was obviously not an oversight nor an omission. The choice was deliberately made not to go in that direction. Second, some other provisions of the CCQ suggest that the theory of *imprévision* should be rejected. According to two authors[58], the expansion of monetary nominalism to all contracts, on the one hand, and the authorization of judicial revision of contract in some specific cases[59], on the other hand, reveal the hidden intention of the legislature not to allow the judicial revision of contracts in general.

[55] For instance, article 1407 CCQ provides that, in the case of error occasioned by fraud, of fear, or of lesion, a person whose consent is vitiated may apply for a reduction of his obligation.

[56] For instance, according to article 1437 CCQ, the obligation arising from an abusive clause in a consumer contract or contract of adhesion it may be reduced.

[57] Lluelles and Moore (n. 19) para 2233.

[58] Ibid.

[59] According to article 1834 CCQ, in a donation "[a] charge which, owing to circumstances unforeseeable at the time of the acceptance of the gift, becomes impossible or too burdensome for the donee may be varied or revoked by the court, taking account of the value of the gift, the intention of the donor and the circumstances." In another context – the lease of a dwelling in low-rental housing lower – article 1994 CCQ provides that "The lessor, at the request of a lessee who has suffered a reduction of income or a change in the composition of his household, is bound to reduce his rent during the term of the lease in accordance with the by-laws of the Société d'habitation du Québec; if he refuses or neglects to do so, the lessee may apply to the court for the reduction." According to the second paragraph of the article, "If the income of the lessee returns to or becomes greater than what it was, the former rent is re-established; the lessee may contest the re-establishment of the rent within one month after it is re-established". These two provisions make it clear that in some extremely exceptional cases, the legislature may allow courts to rewrite a valid contract.

The case law confirms this interpretation. In several judgments rendered after the adoption of the CCQ, different Quebec courts refused to apply the theory of *imprévision*[60]. Recently, in a major judgment[61], the Supreme Court of Canada forcefully rejected the application of this theory in Quebec contract law. In *Churchill Falls (Labrador) Corp. v Hydro-Quebec*, the Supreme Court found the opportunity to state clearly the rejection of *imprévision* in Quebec contract law. A brief summary of the facts contributes to a better understanding of the judgment. It is all about a contract (Power contract) signed in 1969 between two electric power companies: Hydro-Quebec and Churchill Falls (Labrador) Crop. (hereinafter, CFLCo). The contract drew the legal and financial framework for the construction and operation of a hydroelectric plant for a long period of time (65 years). According to the contract, Hydro-Quebec had to purchase nearly all of the electricity produced by the plant at a fixed price for the entire term of the contract. A few years after the conclusion of the contract, some substantial changes occurred in the energy market so that the price of electricity increased significantly. As a result, the contract price became derisory. The contract then became more profitable for the buyer, Hydro-Quebec, than for the seller because the former could resell the electricity at a much higher price in the market. CFLCo asked the court to order the renegotiation of the contract in order to replace the fixed price by a new one reflecting the new realities of the energy market. The application was ruled out before the Superior Court and the Court of Appeal of Quebec.

Even though the plaintiff claimed that she was not relying on the theory of *imprévision*, Justice Gascon, who wrote the majority judgment of the Supreme Court, dedicated a whole section to this doctrine to assess whether there is a legal basis for CFLCo's arguments regarding the renegotiation of the Power contract. The appeal was dismissed on this ground for two reasons: "First, and fundamentally, the doctrine of unforeseeability [*imprévision*] is not recognized in Quebec civil law at this time. Second, even in jurisdictions where the

[60] In *Coderre v Coderre* [2008] QCCA 888 (Court of Appeal), an arbitration agreement contained no provision expressly allowing the arbitrator-amiable compositeur to depart from the contractual stipulations. The Court reminded that Quebec law does not recognize the theory of *imprévision* or the right to the unilateral revision of the terms of a contract; in *Construction DJL inc v Montréal (Ville de)* [2013] QCCS 2681 (Superior Court), the applicant requested the court to declare that the tariff for the elimination of waste for certain years must be higher than the rate appearing in the contract concluded following a call for tenders. Rejecting the demand, the Court stated that it did not believe that it must rewrite a condition of contract binding the parties; in *Transport Rosemont Inc. v Ville de Montréal* (n. 17), the applicants requested an adjustment to the price of their snow removal contract arguing that the substantial increase in fuel was entirely unpredictable. The Court considered that the parties were bound by the contract they had freely formed. The Court added also that it had no power when the alteration of contract equilibrium was due to economic factors; in *GPL Excavation Inc v Trois-Rivières (Ville de)* [2010] QCCS 1839 (Superior Court), the applicant asked for an upward adjustment of its snow removal contract on the grounds that at the concerned season, much more snow had fallen than the average for the past 36 years. According to the court, a fixed price contract meets the needs of the client who wants to be certain about the costs of the work and those of the contractor who wishes, with a certain risk, to increase his profit margin. The applicant could have benefited from this contract had it not been for the random and extrinsic event that happened. The contract is therefore not abusive in itself, nor has it become so in the process of execution.

[61] *Churchill Falls (Labrador) Corp v Hydro-Québec* [2018] SCC 46 (Supreme Court of Canada).

doctrine is recognized, it applies only in narrow circumstances that quite simply do not correspond to those of CFLCo"[62].

Regarding the first argument, Justice Gascon referred to Quebec legal doctrine that almost unanimously rejects the admission of *imprévision* in Quebec law[63]. Furthermore, he noted that the Civil Code revision Office's suggestion was not retained because it was "no doubt incompatible with the concern to preserve contractual stability"[64]. It must be noted that contractual stability as well as promoting greater fairness constitute two cardinal objectives underpinning the Book Five of the CCQ[65].

As for the second argument, given the absence of a formal definition of *imprévision* in Quebec law, the Supreme Court as well as the Court of Appeal[66] retained the common acceptance of *imprevision*. Referring to the new French provision[67] and the Unidroit Principles of International Commercial Contracts (2016)[68], Justice Gascon identified the two main constitutive elements of *imprévision* as follows:

"[T] his rule is subject to two core conditions in particular. First, unforeseeability cannot be relied on where it is clear that the party who was disadvantaged by the change in circumstances had accepted the risk that such changes would occur. Second, it applies only where the new situation makes the contract less beneficial for one of the parties, and not simply more beneficial for the other. It does not apply where the parties receive the prestations and benefits that are provided for or are allocated to them in the contract"[69].

Applied to the case, the relief could not be granted simply because the Power contract became more profitable for Hydro-Quebec. CFLCo had no problem performing its obliga-

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[62] Ibid. [92].

[63] Ibid. [93] (Justice Gascon).

[64] Ibid. [95] (Justice Gascon).

[65] Québec (Province) – Assemblée nationale, *La réforme du Code civil: Quelques éléments du projet de loi 125 présenté à l'Assemblée nationale le 18 décembre 1990* (Québec 1991) 16.

[66] *Churchill Falls (Labrador) Corporation Ltd.v. Hydro-Québec* [2016] QCCA 1229.

[67] French Civil Code:
"**1195.** *Si un changement de circonstances imprévisible lors de la conclusion du contrat rend l'exécution excessivement onéreuse pour une partie qui n'avait pas accepté d'en assumer le risque, celle-ci peut demander une renégociation du contrat à son cocontractant. Elle continue à exécuter ses obligations durant la renégociation.*
En cas de refus ou d'échec de la renégociation, les parties peuvent convenir de la résolution du contrat, à la date et aux conditions qu'elles déterminent, ou demander d'un commun accord au juge de procéder à son adaptation. A défaut d'accord dans un délai raisonnable, le juge peut, à la demande d'une partie, réviser le contrat ou y mettre fin, à la date et aux conditions qu'il fixe".

[68] "**6.2.2.** There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and
(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
(c) the events are beyond the control of the disadvantaged party; and
(d) the risk of the events was not assumed by the disadvantaged party".

[69] *Churchill Falls (Labrador) Corp v Hydro-Québec* (n. 61) [89] (Justice Gascon).

tions under the contract. The performance became neither more onerous nor more difficult. Additionally, according to the trial judge, CFLCo had fully accepted the risk of not including an escalator clause in the Power contract[70].
But the fact is that in its application, CFLCo did not seek relief on the ground of *imprévision*. Basing its argument on the duty of good faith, it pretended that Hydro-Quebec had failed to respect the obligation of cooperation. This constitutes an unorthodox way to seek relief in a case of changing circumstances.

3. Duty of Good Faith: A Marginal Solution

Absent under CCLC[71], the duty of good faith was recognized in civil law by the Supreme Court of Canada[72]. Four major judgments that were rendered in the last two decades of the 20th century made it clear that the parties to a contract should act in accordance with the requirements of good faith[73]. Unlike the CCLC, the CCQ provides an explicit provision on good faith in contracts. According to article 1375 CCQ, "[t] he parties shall conduct themselves in good faith both at the time the obligation arises and at the time it is performed or extinguished." Even though it is difficult, if not impossible, to precisely define the contours of this concept[74], two authors[75] undertook an important case-law analysis to identify the content of this obligation. They believe that good faith in Quebec law is divided into two duties[76]: the duty of loyalty and the duty of cooperation. The duty of loyalty is the nega-

[70] *Churchill Falls (Labrador) Corporation Ltd v Hydro-Québec* [2014] QCCS 3590 (Superior Court) [498]–[501].

[71] Even though the CCLC did not contain any provision on the duty of good faith, some scholars like Mignault considered it as evident (*vérité de La Palice*). Mignault (n. 33) 261.

[72] For a historical summary of the introduction of this concept in Quebec contract law, see B. Lefebvre, *La justice contractuelle : mythe ou réalité?* [1996] 37 Les Cahiers de droit 17.

[73] In *National Bank v Soucisse et al.* (n. 46) 356–357, citing Domat, the Supreme Court states that "There is no species of agreement in which it is not implied that one party owed good faith to the other party, with all the consequences which equity may demand, in the manner of stating the agreement as well as in the performance of what is agreed upon and all that follows therefrom." This is in keeping with art. 1024 of the Civil Code; In *Bank of Montreal v Kuet Leong Ng* (n 46) 442, the Court states that "[t]he fact that there is no express provision in the Civil Code to the effect that an employee who profits from the breach of his obligation of good faith to his employer must turn over those profits to the employer does not necessarily indicate that such a rule is no part of the law of Quebec"; in *Houle v. Canadian National Bank* (n 46) 146, the Court states that "[t]o summarize, then, it appears indisputable that the doctrine of abuse of contractual rights is now part of Quebec law. The standard with which to measure such abuse has expanded from the stringent test of malice or bad faith, and now includes reasonableness, as expressed by reference to the conduct of a prudent and diligent individual"; Finally, in *Bank of Montreal v. Bail Ltée* (n. 46) 582, the Court stated that "[i]n a contractual context, the general duty imposed by art. 1053 C.C.L.C. is expressed as a duty to act reasonably toward third parties. A general duty of good faith in contractual relationships, which derives from art. 1024 C.C.L.C., has been recognized by the courts [references omitted] and by legal authors".

[74] E.M Charpentier, *Le Role de La Bonne Foi Dans l'elaboration de La Theorie Du Contrat* (1996) 26 Revue de Droit Universite de Sherbrooke 299.

[75] Lluelles and Moore (n. 19) para 1120 ff.

[76] This classification is soon adopted by other authors (Baudouin, Jobin and Vézina (n. 28) para. 160).

tive side of the duty of good faith[77], while the duty of cooperation is the positive side. The one which may eventually be the basis of the grounds for an obligation to renegotiate a validly formed contract is the duty of cooperation. This idea is already defended by some Quebec legal scholars who base the judicial revision of contact on the ground of the duty of good faith[78].

In *Churchill Falls (Labrador) Corp. v. Hydro-Québec,* the plaintiff took a similar position. It argued that, given the relational nature of the Power contract, the duty of good faith imposed on the parties was more intense. This argument is essentially justified by the relational contract theory[79]. According to this theory, in a relational contract, parties are bound to the highest duty of good faith. This duty gives rise to an implied obligation of cooperation which may, in some cases, impose an obligation to renegotiate the contact.

Before assessing this argument, we proceed to a brief survey of the relational theory of contracts as understood by the Supreme Court.

3.1. The relational Contract Theory in Quebec Law

There is no formal definition of relational contract in CCQ. Originally conceptualized by Ian R. Macneil, the relational contract theory was soon adopted as part of the Quebec legal doctrine[80]. In relational contract theory, a fundamental distinction is often made between relational contracts and discrete or transactional contracts. In his works, Macneil insists, however, that the opposition between these two types of contract is fictitious[81]. Nevertheless, the image of opposition between these two types of contract has already forged the mindset of some authors who consider this opposition a new classification of contracts82. Before *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, the case law was rather mute on this theory. Some implied references to relational theory may be found in two decisions

[77] According to professors Lluelles and Moore, the duty of loyalty implies three prohibitions. The contracting party must not make the obligation of the other party more difficult. She should not compromise the relationship. Finally, she must not adopt an excessive or unreasonable behavior. (Lluelles and Moore (n. 19) para 1979).

[78] P.-G. Jobin, *L'imprévision Dans La Réforme Du Code Civil et Aujourd'hui*, in B. Moore (ed), *Mélanges Jean-Louis Baudouin* (Yvon Blais 2012); Baudouin, Jobin and Vézina (n. 28) para 446; S. Martin, *Pour une réception de la théorie de l'imprévision en droit positif québécois*, [1993] 34 Les Cahiers de droit 599.

[79] To know more about this theory, see: I.R Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (Yale University Press 1980).

[80] J.G Belley, *Le contrat entre droit, économie et société : étude sociojuridique des achats d'Alcan au Saguenay-Lac-Saint-Jean* (Éditions Yvon Blais 1998); J.-G. Belley, *Théories et Pratiques Du Contrat Relationnel : Les Obligations de Collaboration et d'harmonisation Normative*, in *Conférence Meredith Lectures 1998-1999, La pertinence renouvelée du droit des obligations : Back to Basics/The Continued Relevance of the Law of Obligations: retour aux sources* (Yvon Blais 2000).; V. Gautrais, *Une approche théorique des contrats: application à l'échange de documents informatisé* (1996) 37 Les Cahiers de Droit 121.

[81] I.R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law* (1977) 72 Northwestern University Law Review 854, 857.

[82] Baudouin, Jobin and Vézina (n. 28) para. 78.

made by the Court of Appeal of Quebec[83]. In these decisions, the Court of Appeal relied on the relational nature of a contract (*Franchise agreement*) to impose an obligation of cooperation on the parties. The Court of Appeal did not, however, define the relational contract.

The first approximative definition of this concept was given by Justice Gascon in *Churchill Falls (Labrador) Corp. v. Hydro-Québec*. According to this definition, suggested originally by a prominent legal scholar[84], "a relational contract can roughly be defined as a contract that sets out the rules for a close cooperation that the parties wish to maintain over the long term"[85]. A relational contract is therefore seen as a vehicle to make economic coordination possible. The contract does not necessarily contain precise obligations of the parties. In contrast, there is a discrete contract which sets out a series of predefined obligations. Justice Rowe, who wrote the dissenting opinion, suggested another way to characterize relational contracts. Without putting forward a formal definition, Justice Rowe considered that the relational contract is a contract which "establishes a long-term cooperative relationship whereby both parties expected to gain. This relationship assumes a high degree of trust and collaboration between the parties"[86].

Notwithstanding the differences between the two understandings of relational contract, it should be noted that in both cases, the Supreme Court Justices believe that the relational contract may be characterized as a new type of contract. The main objective of characterizing a contract is sometimes "to define the specific legal scheme of the contract"[87]. Regarding relational contracts, the most important consequence is to impose a higher degree of good faith.

3.2. Scope of Obligation of Cooperation in Relational Contracts

According to article 1375 CCQ, the duty of good faith exists in all types of contracts, but its intensity may vary depending on the nature of the contract. It is often argued that this duty is highly intensified in relational contracts. The Supreme Court in *Churchill Falls (Labrador) Corp. v Hydro-Quebec* was not unanimous on the scope of this duty.

Even though Justice Gascon, writing on behalf of the majority, did not characterize the Power contract as a relational contract, he admitted that the behavioral standard required for the duty of good faith under article 1375 CCQ depends on the clauses and the nature

[83] *Provigo Distribution inc v Supermarché ARG inc* [1998] RJQ 47 (Court of Appeal); *Dunkin' Brands Canada Ltd v Bertico inc* [2015] QCCA 624 (Court of Appeal).

[84] Belley, *Théories et Pratiques Du Contrat Relationnel: Les Obligations de Collaboration et d'harmonisation Normative* (n. 78) 139.

[85] *Churchill Falls (Labrador) Corp. v. Hydro-Québec* (n. 61) [67] (Justice Gascon).

[86] Ibid. [154] (Justice Rowe).

[87] *Uniprix inc v Gestion Gosselin et Bérubé inc* [2017] SCC 43 (Supereme Court of Canada) [43]. On the characterization exercise, see also P. Fréchette, *La qualification des contrats : aspects théoriques* (2010) 51 Les Cahiers de droit 117.

of the contract at issue[88]. He added that "because good faith is a standard associated with the parties' conduct, it cannot be used to impose obligations that are completely unrelated to their conduct"[89]. In other words, the cause of the alteration of contractual equilibrium must be determined. Should it be caused by an unforeseeable contingency, the mere fact that a contracting party refuses to renegotiate does not mean that it fails to respect the obligation of cooperation. Putting it differently, to assess whether a party has failed to fulfill the obligation of cooperation, the court must proceed to an analysis *in concreto* in order to identify an unreasonable conduct. Moreover, even if a failure is noted, Courts may not be able to force "a party to renegotiate the prestations on which the commutative nature of the contract was based"[90].

The dissenting Justice held a diametrically opposed position. He stated that "[t] he practical requirements of good faith vary in intensity according to the nature of the contractual relationship at issue. In circumstances where the parties must work together to achieve the object of their agreement over a long period of time, the relational nature of the contract imposes a heightened duty of good faith on the parties"[91]. He reminded that the positive duty of good faith "entails a heightened duty of loyalty and cooperation to fulfill the obligations of the contract, whether they be explicit or implied"[92]. Applying this rule to the case, Justice Rowe concluded that:

The binding force of contracts and the considerations of good faith and equity that inform the application of the Power Contract by virtue of its relational nature confirm that the respondent must be held to this obligation. Good faith and equity in these circumstances require that the parties cooperate in reaffirming the intended balance of their relationship. The recognition of this obligation does not amount to a revision, a modification, the imposition of an unintended equilibrium on the parties, or a forced renegotiation of the Power Contract. It simply recognizes the existence of an implied obligation to cooperate that arises from the relational nature of the Power Contract itself[93].

These two antagonist understandings of relational contracts lead to two different approaches regarding the scope and the application of good faith. The first understanding, which is shared by the majority of the Supreme Court, is more compatible with the general reading of good faith in Quebec contract law. The function of good faith under this interpretation is to control the behavior of a contracting party[94]. According to Justice Gascon, this is the reason "the concepts – good faith and equity – favoured by the Quebec

[88] *Churchill Falls (Labrador) Corp. v. Hydro-Québec* (n. 61) [112] (Justice Gascon).

[89] Ibid. [113] (Justice Gascon).

[90] Ibid. [121] (Justice Gascon).

[91] Ibid. [176] (Justice Rowe).

[92] Ibid. [177] (Justice Rowe).

[93] Ibid. [183] (Justice Rowe).

[94] Ibid. [75].

legislature to ensure contractual fairness are incompatible with a rule that would depend on external circumstances rather than on the conduct and the situation of the parties." Applied to a case of *imprévision*, this interpretation leads to two conclusions. First, in a case of *imprévision*, the difficulty of performance does not result from any misbehavior of the creditor. The creditor cannot be forced to renegotiate the contract if the debtor's cost of performance is increased for an external reason. Second, in the latter case, the mere refusal of creditors to renegotiate the contract must not be considered as an unreasonable behavior. A reasonable party is not expected to share the windfall profits with her contracting partner.

The second understanding of the duty of good faith goes beyond what is commonly accepted as the scope of this duty in Quebec contract law. This reading views the obligation of cooperation as an implied obligation (article 1434 CCQ) which exists in all relational contracts. "The duty to cooperate […] imposes a positive obligation that requires proactive steps to accommodate the interests and fair expectations of the other contracting party"[95]. This obligation goes way too far. Contracting parties should cooperate in order to establish a mechanism for the allocation of extraordinary profits under the contract. According to Justice Rowe, "[t] his obligation flows not from the fact that any profit imbalance between the parties was unforeseen. Rather, it is premised on the fact that an imbalance of this nature and magnitude is beyond what the parties intended when they concluded their agreement"[96]. This conclusion depends strictly on the characterization of the contract as a relational contract. Interestingly, Justice Rowe goes beyond the requirements of the theory of *imprévision*. He states that in such cases, the imbalance between the parties does not need to be "unforeseen"[97]. This understanding of good faith emphasizes an existing but implied obligation which requires the parties to cooperate in order to reestablish the balance of profits. That's why it must not be considered as a derogation to the principle of binding force of the contracts. On the contrary, it insists on the respect of all contractual obligations no matter if the obligation is an explicit obligation or an implicit one. Even though the latter interpretation of good faith is attractive, the first understanding of the good faith theory seems to prevail in Quebec contract law. It is, therefore, unlikely for a contracting party to obtain relief based on this ground in a case of *imprévision*.

[95] Ibid. [177] (Justice Rowe).

[96] Ibid. [180] (Justice Rowe).

[97] Ibid.

4. Extraordinary Governmental Programs: An Out-of-the-Box Solution

Since the moment that the World Health Organization characterized Covid-19 as a pandemic[98], many States declared a public health emergency in their jurisdictions. The Quebec Government, alongside other Canadian provincial Governments, did the same[99]. This decision seems to have all the characteristics of an unforeseeable contingency; no one could have anticipated such a drastic public response to a pandemic.

So many sectors of the economy had to suspend or reorganize their activities as a result of the authorities' decision to impose confinement. The reorganization or suspension of the activities had a tangible impact on the contracts and the obligations that had been undertaken by concerned economic agents. If the objective is to find a solution within contract law, the contract or obligation must be subject to an individual contextual analysis in order to define the applicable rule. There is no universal remedy which its application is independent of the concrete state of each contract. Moreover, the closure of Courts does not make it easy to seek a solution based on contract law. This partially explains why almost all of the public responses have come from outside contract law.

As a matter of fact, the interruption of the economic activities did do harm to the agents' capacity to pay their debts. The immediate problem was cash-flow. It affected particularly agents' recurring payments: rent and mortgage payments. This is the reason that we may note that among the first measures adopted by federal and provincial authorities were ones aimed at helping lessees.

The CCQ recognizes two types of lease. The first type, defined at article 1851 CCQ, is commonly known as a commercial lease. According to article 1851 CCQ, a "[l] ease is a contract by which a person, the lessor, undertakes to provide another person, the lessee, in return for a rent, with the enjoyment of movable or immovable property for a certain time." This general definition applies also to the second type of lease which is known as the lease of a dwelling. Special rules are provided at the Division IV of the Chapter IV of the Title two of the Book five of the CCQ. Notwithstanding the differences between the rules applicable to all leases and the ones applicable to the lease of a dwelling, it is clear that the most affected obligation by the current situation is the obligation of the lessee to pay the rent. The current crisis reduces or cuts the revenue of several individuals and businesses. Needless to say, the contract law mechanisms described above may not help a lessee to seek relief. However, the Covid-19 outbreak does not make impossible neither more on-

[98] World Health Organization, *WHO Announces COVID-19 Outbreak a Pandemic* (12 March 2020) <http://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/news/news/2020/3/who-announces-covid-19-outbreak-a-pandemic> accessed 26 May 2020.

[99] Government of Quebec, Order in Council 177-2020 concernant une déclaration d'urgence sanitaire conformément à l'article 118 de la Loi sur la santé publique.

erous the obligation of the lessee to pay the rent. This obligation may still be performed by different means. Should it become more difficult for debtors to perform, the difficulty does not even arise from any alteration in contractual equilibrium. The contract remains a balanced one, but the lessee can no longer pay the rent because of the deterioration of his/her own financial situation. Neither force majeure nor the theory of *imprévision* may be a valid ground for the debtor to seek relief. The solution must then be sought outside of law. Two different responses have come from the two levels of government in Canada. The provincial Government has taken a measure in regard to leases of dwellings, while the Federal Government has suggested a solution for commercial leases.

The Government of Quebec's response was to suspend any judgments authorizing the eviction of lessees. Actually, the Government chose not to intervene directly in leases of dwellings. Instead of modifying or suspending some obligations in these contracts, the Government of Quebec preferred to address indirectly the lessees' difficulty to pay the rent under a lease of a dwelling. By a Ministerial Order[100] adopted on March 17, 2020, any judgment authorizing the repossession of a dwelling or the eviction of the lessee of a dwelling was suspended. Being a rather shy measure, this response aims only to delay the eviction of lessees. Lessees are not discharged; their obligations are not reduced; and those who fail to pay rent will be evicted once the crisis is over.

The Federal Government's response was completely different. The program announced by the Prime Minister of Canada aims at encouraging lessors to reduce the obligations of lessees. The program, known as the Canada Emergency Commercial Rent Assistance (CECRA) for small businesses, is financed by the Federal Government and administered by the Canada Mortgage and Housing Corporation (CMHC). The program offers a forgivable loan to lessors who agree to reduce the rent by at least 75% for the months of April, May, and June 2020. To be eligible for this program, lessor and lessee must meet certain conditions. The property owned by the lessor should be a real commercial property located in Canada that generates rental revenue for the owner. Moreover, the lessor should have a mortgage secured by the commercial real property leased by at least one small business eligible for this program. Regarding the lessees, only small businesses, including non-profit and charitable organizations, may be concerned. According to CMHC, three cumulative conditions define a small business. The amount of monthly rent paid under the contract should not exceed $50,000 per location; the gross annual revenue of the entity should be less than

[100] "The effects of any judgment by a tribunal or any decision by the Régie du logement authorizing the repossession of a dwelling or the eviction of the lessee of a dwelling are suspended, as are the effects of any judgment or any decision ordering the eviction of the lessee or occupant of a dwelling, unless the lessor rented the dwelling again before the coming into effect of this Ministerial Order and the suspension would prevent the new lessee from taking possession of the premises. Despite the foregoing, the tribunal or the Régie du logement may, when exceptional circumstances justify doing so, order the enforcement of one of its judgments or one of its decisions, as the case may be" (Quebec - Minister of Health and Social Services, *Ministerial Order* 2020-005 concerning the ordering of measures to protect the health of the population during the COVID-19 pandemic situation).

$20 million per year; and last but not least, the business should have temporarily ceased operations and experienced at least a 70% decline in pre-Covid-19 revenues[101]. To be eligible for the program, the parties should modify their contract and agree to a rent reduction for the period of April, May, and June 2020. The agreement has to include a moratorium on eviction for the same period. By this agreement, the lessee has to pay 25% of the initial rent, the lessor has to assume 25% of it, and CMHC pays, through the forgivable loan, the remaining 50%.

Some remarks should be made in regard to this measure. First, the federal program respects the principle of binding force of contracts because it does not include any legal or judicial intervention[102]. Second, this program promotes cooperation in contractual relationships by persuading the parties to redistribute risks and benefits. By offering a forgivable loan in return for rent reduction, the Federal Government creates a win-win option in a situation that resembles the most the "prisoner dilemma game"[103]. For the lessor, who has nothing to do with the inability of the lessee to pay rent, accepting the program means the assumption of 25% of the loss. But on the other hand, not entering into the program will lead to the collapse of the relationship. It would be fatal for both parties because the lessee will lose its location and the lessor will have to find another lessee at a time when the demand for such contracts has fallen because of the crisis. Consequently, the best option for each party is to enter into the program even if it implies that the lessor should assume some part of the losses. This solution is in sync with the relational contract theory which implies that cooperation constitutes the essence of relationships. By providing some financial incentives, the Government facilitates the cooperation between the parties so that they can reach an agreement to temporarily deviate from the initial contract. This deviation seems to be essential to the preservation of the relationship which is a contractual norm that strongly characterizes relational contracts[104].

In the same way, but without a clear financial incentive offered by the public authorities, some major Canadian banks[105] have proposed mortgage deferral to their clients. Eligible homeowners may be allowed to suspend their mortgage payments up to 6 months. This is again a private agreement between the concerned parties[106]. There is no direct public

[101] Canada Mortgage and Housing Corporation, *CECRA | Coronavirus Funding | CMHC* <https://www.cmhc-schl.gc.ca/en/finance-and-investing/covid19-cecra-small-business> accessed 26 May 2020.

[102] It should be noted that according to article 92 (13) of the Constitution Act of 1867 (30 & 31 Victoria, c 3 (U.K.)), the Legislature in each Province may exclusively make Laws in relation to Property and Civil Rights in the Province. Consequently, the Federal Government did not have the power to intervene directly in contractual relations.

[103] AW Tucker, *The Mathematics of Tucker: A Sampler* (1983) 14 The Two-Year College Mathematics Journal 228.

[104] "[T]he ongoing character of relations is such that preservation of the relation becomes a norm." (Macneil (n 77) 66).

[105] E. Alini, *Coronavirus: Canada's Big Banks to Allow Mortgage Payment Deferrals* (*Global News*) <https://globalnews.ca/news/6694459/coronavirus-canada-big-banks-mortgage-payment-deferrals/> accessed 26 May 2020.

[106] Canada Mortgage and Housing Corporation, *Are You Financially Impacted by the #COVID19 Crisis?* <https://www.cmhc-schl.gc.ca/en/finance-and-investing/mortgage-loan-insurance/the-resource/covid19-understanding-mortgage-payment-deferral> accessed 26 May 2020.

intervention in the contract. This is yet another measure adopted in accordance with the relationship preservation norm. This solution implies some losses for the creditor but ultimately permits the relationship to undergo the crisis. The two described initiatives highlight the importance of cooperation in ongoing and often long-term contractual relationships. We note that the cooperation in question does not necessarily arise from a well-established and explicit contractual obligation. It emerges from the internal dynamic of the contract and notably from the shared desire to have the relationship continue.

5. Conclusion

Contract law reaches its limits when it comes to proposing a solution applicable to a crisis which undermines simultaneously the performance of several hundred thousand, if not millions, of contracts. The efficiency of contact law is uncertain because all the remedies within contract law require an analysis *in concreto*. Without reviewing the facts of each contract and its obligations, it is impossible to determine the rule applicable to a contract for which the performance is somehow compromised. It is only after knowing the facts and the contextual reality of a defined contract that a court may decide to discharge the debtor, suspend the obligation, reduce it, or simply enforce the contract. This requires that the dispute be brought before a Court, which is quite difficult in a situation where the activities of judicial Courts are limited. Even after the reopening of Courts, the judicial option is far from being the most optimal one. The judicial proceeding is costly and time consuming. Moreover, there is no guarantee that the Court will order the relief. Traditional remedies, especially force majeure, require the meeting of several strict conditions. Finally, traditional solutions almost never lead to the revision of a contract. The final result is binary: either the debtor will succeed – and the obligation will be suspended or extinguished – or the debtor will fail and the contract will be enforced. In both cases, the relationship will no longer be a win-win situation for the parties.

The solution suggested by the Federal Government to save commercial leases seems to be a more suitable solution in this context. By providing a financial incentive, the Government encourages contracting parties to proceed to a temporary modification of their contract. This out-of-the-box solution best serves the preservation of relationships and does not harm the freedom of contracting.

Impact of Covid-19 Pandemic on Contractual Relationships: the Case of Estonia*

Karin Sein-Kai Härmand

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1. General contract law rules: restrictions due to the Covid-19 pandemic as force majeure

Estonian contract law contains a general force majeure clause in § 103 LOA (Estonian Law of Obligations Act[1]) modelled after art 79 CISG and comparable provisions of PICC and PECL[2]. In order to qualify as force majeure, an impediment has to be 1) beyond the control of the debtor; 2) unforeseeable at the time of conclusion of the contract and 3) not reasonably possible for the debtor to avoid or overcome. Under such definition, restrictions due to Corona-19 pandemic can in principle be qualified as force majeure[3] but it surely depends on the circumstances of each case. For example, in construction contracts where foreign workforce cannot enter the state or already ordered materials are stuck abroad, it is important to ask whether the debtor can overcome these obstacles eg by hiring local workforce or buying building materials from local stores. As for the unforeseeability requirement, one can argue that if a contract was concluded after COVID-19 was called pandemic by WHO on 11 March 2020 such impediments would most probably not constitute force majeure any more.

One must bear in mind, however, that force majeure under Estonian law only relieves the debtor from damages claims and penalty payments and the creditor retains the right to terminate the contract, reduce the price or withhold performance (§ 105 of LOA)[4]. Moreover, under the principle of party autonomy parties may agree upon different risk allocation[5]. The force majeure provision applies to all contracts, including consumer contracts. However, solvency problems due to loss of job etc fall within the risk sphere of a person and do not qualify as force majeure[6].

2. Adaptation or termination of contracts due to Covid-19 pandemic under the doctrine of change of circumstances

Estonian law also contains a change in circumstances clause in § 97 LOA, very much comparable to § 313 BGB and the respective provision in PICC allowing for adaptation of the contract if there is a change in circumstances underlying the contract, the change was

1 RT I 2001, 81, 487; RT I, 08.01.2020, 10.

2 Paul Varul and others, *Võlaõigusseadus. Kommenteeritud väljaanne*, (1st vol, Juura 2016) 481.

3 In depth on the meaning of force majeure in Estonian contract law see K. Sein, *Mis on vääramatu jõud?* (2004) 8 Juridica 511-519.

4 Varul and others (n. 2) 485, 496.

5 Varul and others (n. 2) 487; Sein,'*Mis on vääramatu jõud?* (n. 3) 519.

6 Decision of the Supreme Court n. 3-2-1-50-06.

unforeseeable at the time of conclusion of the contract and if it is not reasonable for the debtor to bear the risk[7]. If adaptation is not possible or reasonable, the contract may be terminated under § 97 (5) LOA. Until now courts have been very reluctant to adapt contracts under the change in circumstances doctrine, especially in case of one-off contracts. By 2015 there were virtually no cases where courts would have adapted contracts under that provision although especially after the 2008 financial crisis debtors often tried to invoke it in court proceedings[8].

In 2015 the Supreme Court for the first time admitted that the economic crisis of 2008 can be considered a case of change in circumstances in case of a rental contract of a store as the rental prices had dropped by 50%.[9] In other contexts resorting to § 97 LOA would be problematic, especially in case of one-off contracts as it was twice rejected for sale of land after the 2008 crisis.[10] Similarly, loss of job or not getting credit to finance a project has not been considered reason enough for adaptation or eventual termination of a contract.[11] The doctrine of change in circumstances applies also to consumer contracts but in practice this has not been applied even once.

3. Regulatory allocation of risks for specific contract types

In case of rental contracts, the tenant bears the risk for the profitability of the rented premises and is thus obliged to pay full amount of rent even if he is not able to use the premises due to the pandemic-induced restrictions. It has been argued, though, that such restrictions constitute restrictions of use under § 296 of LOA, entitling the tenant to rent reduction or even to termination of the rental contract.[12] This argument should not be followed as these restrictions have nothing to do with the quality of the rented premises and thus there is no breach of contract on behalf of the landlord. Therefore restrictions due to

[7] See more on this: I. Kull, *About Grounds for Exemption from Performance under the Draft Estonian Law of Obligations Act (Pacta Sunt Servanda versus Clausula rebus sic Stantibus)* (2001) 6 Juridica International 44-52; Sein, *Mis on vääramatu jõud?* (n. 3) 518-519; M.A. Simovart, *Lepingu muutmise nõue riigihankelepingu kohustuste vahekorra muutumisel* (2008) 4 Juridica 219-224; Karl-Erich Trisberg, 'Majandussituatsiooni muutus: kas piisav põhjus kestvuslepingu muutmiseks või ülesütlemiseks?' (2010) 6 Juridica 427–437; K. Sein, *The Principle of Change in Circumstances in Estonian Contract Law – "Much Ado About Nothing?"*, in K. Torgāns and Jānis Pleps (eds), *Jurisprudence and Culture: Past Lessons and Future Challenges* (University of Latvia Press 2014).

[8] Sein, *The Principle of Change in Circumstances in Estonian Contract Law* (n. 7).

[9] Decision of the Supreme Court no 3-2-1-179-15, paras 34-35.

[10] Decisions of the Supreme Court 3-2-1-76-10; 3-2-1-136-11.

[11] Decision of the Supreme Court 3-2-1-76-10, para 13.

[12] P. Jesse, *Advokaat selgitab: viibimiskeelud ja liikumispiirangud võivad anda aluse üüri alandamiseks*, *Delfi Ärileht* (Tallinn, 19 March 2020) <https://arileht.delfi.ee/news/uudised/advokaat-selgitab-viibimiskeelud-ja-liikumispiirangud-voivad-anda-aluse-uuri-alandamiseks?id=89273377> accessed 5 May 2020; T. Tark, *COVID-19: mis saab üürilepingutest?* (Tark Legal, 19 March 2020) <https://tark.legal/covid-19-mis-saab-uurilepingutest/> accessed 7 April 2020.

the pandemic typically lie within the sphere of risk of the tenant who is therefore obliged to continue rental payments despite the reduced possibility to use the premises. Under § 296 (3) LOA tenants are only entitled to deduct gains of the landlord, eg diminished costs for electricity or heating[13]. The same applies to businesses whose activities do not directly fall under the statutory restrictions but who have nevertheless closed their doors due to the lack of clients or health reasons[14]. It should be possible, however, to achieve reduction of rental payments under the change in circumstances doctrine as the Supreme Court allowed for it in the 2008 financial crisis[15] and the current situation should be treated as being at least equally unforeseeable.

The situation is, however, different for stores or other businesses who have rented their premises in big shopping centres: in these cases landlords were forced to restrict the access of tenants to their rented premises with the consequence that the tenants are entitled to reduce the rent to a considerable extent under § 296 (2) LOA[16].

It is currently also under discussion how to allocate the risks arising from the pandemic in case of construction contracts. As the rentability risk is usually upon the construction company[17] it should not be possible to claim a higher fee or additional expenses just because the works have become more expensive due to unforeseeable events. However, it can be argued that it should be possible to prolongate the initially agreed deadline under the change in circumstances doctrine, if the work has to be temporarily stopped or postponed due to the pandemic restrictions.

There are no specific consumer protection rules for situations like the current one, meaning that the regular mandatory rules eg for consumer credit contracts or housing rental contracts apply. For example, it is forbidden to terminate consumer credit contracts unless the consumer is in default with 3 months' payments (§ 416 LOA) or housing rental contracts unless the tenant has been in delay with substantial amounts of rental payments for 3 months (§ 316 of LOA).

4. New regulatory provisions due to the pandemic crisis?

Until now there have been no pandemic-induced changes to contract law in Estonia. Estonian Chamber of Commerce and Estonian Food Industry Association with the support

[13] P. Kalamees and others, *Lepinguõigus* (Juura 2017) 176.

[14] K. Sein, *Eriolukorra mõju üürilepingutele Eesti ja Saksa õiguse kohaselt* (2020) 3 Juridica 180, 183.

[15] Decision of the Supreme Court no 3-2-1-179-15, paras 34–35.

[16] Sein, 'Eriolukorra mõju üürilepingutele Eesti ja Saksa õiguse kohaselt' (n 14) 183–184.

[17] See § 639 LOA; P. Varul and others, *Võlaõigusseadus. Kommenteeritud väljaanne*, (3rd vol, Juura 2006) 56; Decision of the Supreme Court no 3-2-1-102-14, para 22.

of the Ministry of Finance made a proposition to modify the force majeure clause in LOA. The draft was proposed by the organisations to the Legal Affair Committee of the Estonian Parliament (Riigikogu) to add a new § 1031 LOA, a provision stating that every non-performance of the obligation during the emergency situation is presumed to be excusable. It meant to reverse the burden of proof so that the creditor must prove the non-performance of the debtor was not due to the pandemic crises. This would have led to inacceptable consequences as it would have applied also to monetary obligations. Moreover, the draft raised questions about the purpose of the amendment and what protection it seeks to provide to the debtor. For example, that amendment would not have affected the creditor's right to require additional securities or to terminate the contract due to debtor's late payment. It was also discussed whether one should follow the example of Germany, where the legal amendments provided for statutory moratoria for credit agreements for a limited period under certain conditions. As clarity and explanations were needed in society, legal experts and the Ministry of Justice have produced guidelines with simple explanations[18].
Another draft foreseeing a 3-month moratorium on credit contracts concluded with SMEs and consumers has been prepared but not brought to the final parliamentary discussions. Both proposals were discussed in the Legal Affairs Committee of the Parliament in 24.03.2020[19]. The Ministry of Justice stated at the meeting and later in its answers to the stakeholders[20] that amendments to contract law are not necessary. It was argued in the meeting that it is not unreasonably difficult to prove the circumstances of force majeure and existing legal provisions already protect debtor's rights where it is necessary. A debtor is in the best position to prove that the obligation is obstructed by the specific event due to the unforeseeable facts. For the other party, proving such a negative fact would be significantly more complex and could lead to an unreasonable burden on the other party and his ability to defend its rights.
Moreover, the Estonian Banking Association has voluntarily agreed to offer postponement of credit payments under common principles[21]. This, in turn was surely influenced by the decision of the Estonian Financial Supervisory Authority to adopt the guidelines of the European Banking Authority on legislative and non-legislative moratoria on loan repayments applied in the light of the COVID-19 crisis[22]. The current lack of interest of credit

[18] Practical guidance by the Ministry of Justice <https://www.just.ee/et/eesmargid-tegevused/praktilisi-nouandeid/lepinguoiguslikud-reeglid-javaaramatu-joud> accessed 5 May 2020.

[19] *Protocol of the meeting* <https://www.riigikogu.ee/tegevus/dokumendiregister/dokument/300ada23-c746-4643-9b19-7c9f1c7ae688> accessed 5 May 2020.

[20] Letter of the Ministry of Justice to Finance Estonia (07 April 2020) <https://adr.rik.ee/jm/dokument/7150688> accessed 5 May 2020.

[21] Estonian Banking Association, *Common Guidelines on Moratoria on Loan Repayments due to the Emergency Situation* (24 April 2020) <http://pangaliit.ee/files/Eriolukorrast%20tingitud%20maksepuhkuse%20andmise%20%C3%BChtne%20kord.pdf> accessed 5 May 2020.

[22] Decision of the Estonian Financial Supervisory Authority of 20 April 2020 no 1.1-7/53.

institutions in terminating credit contracts and starting mortgage foreclosures is surely an economic one as the real estate prices are in decline. Possibly it is even further reduced due to the position held by the Supreme Court that if the creditor has breached the obligation of responsible lending then his repayment claim is restricted to the amount obtained from the forced sale of the property[23]. The current voluntary postponement offer of the banks is often not the most consumer-friendly one as consumers still have to pay interests and some banks have reserved the right to raise the interest rate or are demanding additional postponement fees[24].

As in other European countries, a package for various subsidies has been adopted, which is mostly sector-specific. However, the government has also promised specific targeted subsidies for rent payments: these are foreseen for these shops located in shopping centres that were forced to close down by government decree due to the pandemic.

5. Contractual clauses used in practice and their impact on contractual allocation of risks

There are several typical standard contract clauses used in practice which foresee a specific allocation of contractual risks. In construction industry, for example, contracts are often concluded under FIDIC rules, which foresee specific force majeure clauses as well as certain possibilities for contract adaptation. Under FIDIC Yellow Book 2017 the constructor is entitled to extension of time if the completion of the work is delayed by unforeseeable shortages in the availability of personnel or goods (or employer-supplied materials, if any) caused by epidemic or governmental actions[25]. Moreover, insurance contracts often list pandemic or public travel restrictions as risks that are not covered by the contract.

[23] Decision of the Supreme Court n. 2-14-21710, paras. 44-45.

[24] Estonian Financial Supervisory Authority, *Laenu- ja liisinguandjad on pakkunud klientidele erinevaid tingimusi maksepuhkuste andmisel* (23 April 2020) <https://www.fi.ee/et/uudised/laenu-ja-liisinguandjad-pakkunud-klientidele-erinevaid-tingimusi-maksepuhkuste-andmisel> accessed 5 May 2020.

[25] FIDIC Yellow Book, *Conditions of Contract for Plant and Desing-Build*, (2017) art 8.5(d).

Articles

The Impact of Covid-19 in Chilean Contract Law

Rodrigo Momberg Uribe*, Alberto Pino Emhart**

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* Pontificia Universidad Católica de Valparaíso, Chile.
** Universidad Adolfo Ibáñez, Chile.

I. Introduction

This report will briefly examine the impact that the epidemic of Covid-19 is having on Chilean contract law, both in commercial (B2B) and consumer contracts (B2C). Section II of the report will focus on new regulations enacted to deal with the crisis, particularly from some administrative agencies, and its possible impact on general contract law.[1] Section III will analyze whether the general provisions of Chilean contract law could be applied to deal with the problems arising from the crisis.

As a general remark, it is possible to claim that this health crisis is putting pressure on the general rules regarding contract law. For instance, given the absence of a general provision regarding the change of circumstances (*teoría de la imprevisión*) in the Chilean Civil Code of 1855, many Chilean jurists are currently debating whether a new provision should be added[2]. Meanwhile, some bills of legislation have been proposed, such as a general provision on change of circumstances[3] and a provisional rule regarding tenant agreements[4], but none of these have yet seen the light. However, some regulatory agencies have enacted some interesting directives and guidelines that are worth examining.

II. Administrative regulations enacted to deal with the crisis

As explained above, with regard to contract law, at the moment there is no special legislation enacted in Chile to deal with the crisis, regardless of some proposals that may or may not be finally approved[5]. This lack of legislation has been contrasted with other legal systems such as Spain, Germany or Portugal[6]. However, some regulatory agencies have enacted special directives that will be examined here. Particularly, we will analyze some directives of the National Consumer Agency (Servicio Nacional del Consumidor [SERNAC]), two directives of the Financial Market Commission (Comisión para el Mercado Financiero

[1] The report is updated until May 31, 2020.

[2] For example, J. Alcalde Silva, *A vueltas con los riesgos del contrato: el Covid-19 y la teoría de la imprevisión*, *Estado Diario*, May 22, 2020 <https://estadodiario.com/columnas/a-vueltas-con-los-riesgos-del-contrato-el-covid-19-y-la-teoria-de-la-imprevision/> accessed 28 May 2020, and Enrique Barros Bourie, "Cambios imprevisibles que afectan la economía del contrato", *El Mercurio*, May 12, 2020 <http://www.derecho.uchile.cl/comunicaciones/columnas-de-opinion/cambios-imprevisibles-que-afectan-la-economia-de-un-contrato.html> accessed 28 May 2020.

[3] Boletín n. 13474-07.

[4] Boletín n. 13373.

[5] The legislative activity has been concerned mainly with labour law (e.g. Ley 21.227), procedural law (e.g. Ley 21.226) and specific economic measures for SME's and the more vulnerable groups of the population.

[6] I. de la Maza & A. Vidal, *El impacto del Covid 19 en los contratos. El caso chileno: Medidas excepcionales y derecho común*, *Revista de Derecho Civil*, Vol. VII, No. 2 (2020), 137.

[CMF]), a directive of the Ministry of Public Works (Ministerio de Obras Públicas [MOP]), a resolution of the General Accounting Office (Contraloría General de la República [CGR]), and a directive of the Public Contracts Agency (Dirección de Compras y Contratación Pública [Chile Compra]). Of these, only SERNAC's and CMF's directives can be applied generally to consumer contracts, whereas the other agencies have regulated some aspects of contracts between private individuals and the State.

II.1. Consumer contracts and SERNAC's directives

SERNAC is a specialized agency in charge of the enforcement of consumer law in Chile. Its main functions are to supervise compliance with the Consumer Protection Act (Ley 19.496 of 1997), the promotion of consumer rights and the development of actions for the information and education of the consumer[7].

The agency is legally empowered to issue interpretative directives of legal rules regarding consumer protection. Even when these directives are no legally binding but for SERNAC itself, they can be considered has relevant orientations for legal operators and courts in future disputes[8].

SERNAC has issued four directives up to this date:

a. Resolución Exenta No. 0326, of April 6, 2020[9]*. Interpretative Directive regarding Contracting on Distance during the Pandemic caused by Covid-19.*

This Directive stresses the importance of the information that the seller has to provide the consumer, taking into account that most of the commercial transactions are currently being made electronically. The Directive does not introduce new regulations. It only summarizes the sellers' duties established in the legislation, mainly the Consumer Protection Act (Ley 19.496).

b. Resolución Exenta No. 0340, of April 9, 2020[10]*. Interpretative Directive regarding the Suspension of the Statute of Limitations During the Health Crisis.*

This is by far the most interesting directive enacted by SERNAC. The Directive interprets that the statute of limitations established in the Consumer Protection Act (articles 19, 20, 21, 40 and 41) are suspended as long as the constitutional state of catastrophe is in place for consumers[11]. The suspension of the statute of limitations includes the consumers' rights established by the law, known as *garantía legal*[12], and also rights contractually agreed.

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[7] See generally R. Momberg, M.E. Morales and A.P.-Emhart, *Enforcement and Effectiveness of Consumer Law in Chile: A General Overview*, in H.-W. Micklitz and G. Saumier (eds.), *Enforcement and Effectiveness of Consumer Law* (Springer, 2018), 154-7.

[8] See article 58 b) of Ley 19.496, 1997.

[9] Available at <https://www.sernac.cl/portal/604/w3-article-58438.html> accessed 28 May 2020.

[10] Available at <https://www.sernac.cl/portal/604/w3-article-58446.html> accessed 28 May 2020.

[11] The constitutional state of catastrophe was declared in Chile on March 18, 2020. Decreto n. 104, Ministry of Internal Affairs and Public Order.

[12] See generally F. Barrientos, *La garantía legal* (Legal Publishing, 2016).

The Directive argues that under the present circumstances, it is not possible for consumers to enforce their rights, since consumers do not have access to the sellers' physical facilities, such as shopping centers and stores. Therefore, it is stated that the statute of limitations should be suspended because consumers are currently unable to enforce their rights. Accordingly, the suspension should be in place as long as the constitutional state of catastrophe is maintained. The interpretation seems to be good news for consumers. However, two points must be made. First, SERNAC does not have powers to modify through interpretation the statute of limitations established by the legislation. In this sense, some sellers might argue that SERNAC here is legislating and not just interpreting the Consumer Protection Act, because the law does not establish these exceptions. And secondly, it is not obvious to claim that consumers are currently unable to enforce their rights during the health crisis. SERNAC reports that consumers are currently filing complaints against sellers[13], and these complaints seem to be increasing with the use of ecommerce[14]. Moreover, some sellers could eventually argue that they have provided suitable procedures and mechanisms for consumers to enforce their rights. And finally, it could be argued that the constitutional state of catastrophe does not necessarily involve the closure of the commerce, especially if some regions of the country are affected by the crisis at a different level.

c. Resolución Exenta No. 0360, of April 20, 2020[15]*. Interpretative Directive regarding Good Practices During the Health Crisis.*

The Directive establishes general recommendations to all sellers, suggesting the use and encouragement of digital platforms, the establishment of flexible hours of attention for consumers, and the adoption of hygiene measures in open spaces and in the physical contact with consumers.

d. Resolución Exenta No. 0371, of April 20, 2020[16]*. Interpretative Directive regarding the Protection of Consumers' Health and Alternative Measures for Performance of Consumer Contracts during the Health Crisis.*

This Directive stresses that the consumers' safety and health must be especially protected. Accordingly, despite the fact that consumer contracts should be in principle performed within the same terms that they were agreed upon, during the crisis some goods or services exceptionally might be supplied after the date that was agreed, or even might be cancelled reimbursing the consumers. The Directive is interesting because it allows sellers to excuse from performing some contracts based on impossibility or *force majeure* caused by the health crisis.

[13] See for example <https://www.sernac.cl/portal/604/w3-article-58536.html> accessed 28 May 2020.

[14] See <https://www.t13.cl/noticia/negocios/ola-reclamos-tardanza-despachos-domicilio-pone-al-retail-mira-del-sernac> accessed 01 June 2020.

[15] Available at <https://www.sernac.cl/portal/604/w3-article-58521.html> accessed 28 May 2020.

[16] Available at <https://www.sernac.cl/portal/604/w3-article-58529.html> accessed 28 May 2020.

II.2. Consumer credits and CMF's directives

The CMF is a decentralized public service. Its main objectives are to safeguard the proper functioning, development and stability of the financial market, facilitating the participation of market agents and promoting the care of public faith.
CMF has issued two directives about consumer credits up to this date:

a. Directive of April 2, 2020[17].
This Directive eases the treatment of provisions required from banks when rescheduling loan installments in the commercial, consumer and mortgage portfolios. These transitional measures seek to mitigate the impact of the shock on the economy due to the spread of Covid-19. The Directive establishes a maximum grace or installment deferment period of six months in the case of mortgage loans, a period four months in the case of commercial loans, and a period of three months for consumer loans.
The Directive allows banks and financial institutions to grant periods of grace or deferment periods with consumers. However, they are not mandated to do so, and the terms of the new conditions must be negotiated individually with each debtor. Interestingly, CMF reports that 18% of mortgage credits have been renegotiated, and 261,386 customers have renegotiated their consumer credits[18].

b. Directive of April 27, 2020[19].
This Directive extends the period for financial institutions to reschedule loans to six months for commercial loans.

II.3. Construction contracts with the State

The Ministry of Public Works (MOP) is the cabinet-level administrative office in charge of planning, studying, designing and constructing as well as repairing, maintaining and operating public infrastructure in Chile[20]. The Ministry has issued a Directive regarding construction contracts with the State, Oficio Ordinario n. 239, of March 27, 2020.
This regulation distinguishes between contracts that are currently in progress and contracts that have not yet been performed. Regarding the latter type of contracts, MOP establishes that these contracts might be suspended, and the works rescheduled. It is established that these suspensions will not allow the builders to claim compensatory damages.
Whereas in the case of contracts that are currently in progress, MOP states that the works should not be suspended or paralyzed. If it is necessary to suspend the works, the builder

[17] Available at <http://www.cmfchile.cl/portal/principal/605/w3-article-28582.html> accessed 28 May 2020.
[18] Report available at <http://www.cmfchile.cl/portal/principal/605/w3-article-28643.html> accessed 28 May 2020.
[19] Available at <http://www.cmfchile.cl/portal/principal/605/w3-article-28682.html> accessed 28 May 2020.
[20] <https://www.mop.cl/Paginas/ingles.aspx> accessed 01 june 2020.

will have to provide evidence that the suspension was necessary, and will not be entitled to get compensation based on the rescheduling of the works.

II.4. CGR and contracts with the State. Dictamen No. 6854-20

The Office of the Comptroller General of the Republic (CGR) is a supreme audit institution of the State Administration and autonomous with respect to the Executive Branch and other public bodies. It controls the legality of administrative acts and safeguards the correct use of public funds[21].

CGR has issued the Resolution n. 6854-20, of March 25, 2020, regarding contracts between private individuals and the State, especially contracts of personal services that are not being performed, since most of the public offices have been closed[22]. The Directive establishes that these services must be paid by the State, despite the fact that most of these services are not currently being performed. However, the CGR establishes that these payments will proceed only if the providers keep their workers employed, and pay them all their salaries and social security debts. According to the CGR, this condition is necessary because otherwise the contractors would be unjustly enriched.

II.5. Chile Compra and contracts with the State

The Public Contracts Agency (Chile Compra) is a decentralized public service. Its main objective is to administer the transactional platform Mercado Publico, a platform that allows public offices to purchase products and services from private suppliers. The agency has issued a directive with recommendations to public offices regarding public contracts and biddings, Resolución Exenta n. 237 B, of April 13, 2020.

The Directive establishes various suggestions regarding the bidding procedures, prioritizing communications through digital channels. It also suggests that biddings should have more flexible dates and deadlines. More importantly, the Directive states that warranties should only be demanded to providers and suppliers in very few exceptional cases, when it is strictly necessary. It also suggests that public offices should pay for the goods and services provided as soon as possible.

Finally, the Directive suggests public offices to be more flexible regarding the dates of performance. Moreover, the Directive holds that contractors should be allowed to justify their breaches, and public offices could eventually excuse these breaches given the current difficult circumstances.

[21] <https://www.contraloria.cl/portalweb/web/cgr-ingles> accessed 28 May 2020.

[22] Available at <https://www.contraloria.cl/pdfbuscador/dictamenes/006854N20/html> accessed 28 May 2020.

III. General contract law

III.1. The Chilean Civil Code. A strong recognition of *pacta sunt servanda*

The Chilean Civil Code was adopted in 1855 and entered into force on January 1, 1857. Regardless of the enactment of an important amount of special legislation, e.g. consumer law, labour law, loans, leases, etc., the Code still contains the main core of Chilean private law. Besides, although relevant reforms to the law of persons, family law and inheritance law were introduced in the second half of the twentieth century, the books on property law and obligations have remained without significant modifications.

The Code was inspired and reflects the nineteenth century's prevailing liberal doctrine and individualism. Consequently, of the principles of freedom and sanctity of contract (*pacta sunt servanda*) are strongly recognized and protected. Article 1545 of the Code, which is based on the old article 1134 of the *Code Civil* states that '*Contracts lawfully entered into are a law for the contracting parties and cannot be invalidated except by mutual consent or for causes authorized by law*'[23].

Accordingly, in the Code's system, the parties are free to enter into a contract and to pursue their own interests. Profits derived from a contract are neither restricted nor limited, with the exception of *lesión* in the sale of immovable goods and some restrictions on the amount of interest on loans.

III.2. Force majeure

Force majeure is defined in article 45 of the Civil Code as the unforeseen event which is not possible to avoid[24]. Based on this definition, Chilean doctrine and case law has traditionally required for an event to be considered as force majeure to be unforeseeable, external to the affected party and unavoidable. This last condition has been interpreted in the sense that the event must render the performance of the obligation impossible[25].

Under this interpretation, a party only is allowed to claim force majeure if the performance of its obligation has become absolutely and definitively impossible. Therefore, the effect of force majeure is the extinction of that obligation.

However, modern contract law doctrine has contended that the main effect of force majeure is the extinction of the affected party's obligation. It is claimed that the main effect of force majeure is to release the debtor of its liability to pay damages for non-performance,

[23] 'Todo contrato legalmente celebrado es una ley para los contratantes, y no puede ser invalidado sino por su consentimiento mutuo o por causas legales'. Author's own translation.

[24] "Se llama fuerza mayor o caso fortuito el imprevisto a que no es posible resistir, como un naufragio, un terremoto, el apresamiento de enemigos, los actos de autoridad ejercidos por un funcionario público, etc." Author's own translation.

[25] For a comprehensive study of force majeure in Chilean private law see M.G. Brantt, *El caso fortuito y su incidencia en el derecho de la responsabilidad civil contractual* (Abeledo Perrot 2010).

but still the creditor may exercise any other remedy, if available. More importantly, since the debtor is not released from its obligation, she still has to apply her best efforts in order to overcome the force majeure event, and even may be compelled to perform if the impediment is only temporal[26].

The strict measures imposed in order to control the spread of the disease can be easily considered as unforeseeable and external circumstances. More problematic can be to determine whether it is unavoidable, because not all contracts and not all obligations have been affected to the same extent.

If the performance of the contract by the affected party has become impossible or the purpose of the contract has been totally frustrated, that party is definitively released from her obligations. However, considering the temporal nature of the emergency measures, suspension of performance is a more plausible outcome, with no liability for the affected party. Finally, if performance is still possible, that party should take the necessary actions in order to overcome the impediment and perform her obligations, even when the costs of performance were higher than those anticipated at the time of conclusion of the contract. This situation leads to the analysis of the doctrine of a change of circumstances or *teoría de la imprevisión*.

III.3. Change of circumstances (*teoría de la imprevisión*)

III.3.1. *Legal doctrine*

Based on the already cited article 1545, traditional Chilean legal doctrine rejects the possibility of a revision of contracts in cases of change of circumstances and in any other case that is not expressly regulated. The principle of sanctity of contracts is arguably absolute, and therefore any attempt to find other underlying principles may be regarded as artificial. In sum, the provisions of the Civil Code leave no room for the general application of *imprevisión* in Chilean private law, and therefore the introduction of an express legal provision is required for its recognition by the courts[27].

On the contrary, most of the contemporary Chilean legal doctrine argues for the application of *imprevisión* in Chilean private law, based on article 1546 of the Civil Code, which provides the principle of good faith in the performance of contracts.: '*Contracts must be performed in good faith and are consequently binding not only as to what is expressed therein, but also with regard to all consequences which are derived from the nature of the obligation, or belong to it by statute or usage*'[28].

[26] See Brantt (2010).

[27] L. de la Maza, *La teoría de la imprevisión. (En relación con el Derecho Civil Chileno)* (Universidad de Chile 1933) and R. Abeliuk, *Las obligaciones* (Editorial Jurídica de Chile 2001).

[28] 'Los contratos deben ejecutarse de buena fe, y por consiguiente obligan no sólo a lo que en ellos se expresa, sino a todas las cosas que emanan precisamente de la naturaleza de la obligación, o que por la ley o la costumbre pertenecen a ella' Author's own translation.

Good faith in performance is considered to be a limit on the power to claim the execution of the contract by the creditor, when the performance of the contract as agreed implies an unjustified and serious detriment to the debtor derived from external events, which is unforeseen by both parties at the time of the conclusion of the contract[29]. Some additional arguments are usually added: a serious alteration in the performance of the obligation by supervening events will lead to the disappearance of its *causa*, leading to the nullity of the contract; and in the case of commutative contracts (*contratos conmutativos)*; i.e. those with reciprocal obligations which are considered to be equivalent by the parties (article 1441), the equivalence between the counter-performances would be an inherent element of the agreement[30]. If after the conclusion of the contract, such equivalence is severely disturbed by unforeseen and extraordinary circumstances, the purposes of the parties may be deemed to have been frustrated and the contract (with regard to its original nature) has been transformed into another completely different.

Finally, it has to be noted that some particular rules of the Civil Code do allow the modification of specific contracts in cases of change of circumstances: articles 2003 rule 2 (construction contracts – *contrato de construcción*), 2180 (loan for use – *comodato*) and 2227 (bailment – *depósito*). On the contrary, articles 1983 (lease of rural property – *arrendamiento de predios rústicos*) and 2003 rule 1 (construction contracts – *contrato de construcción*) expressly reject the modification of such contracts on that basis.

III.3.2. *Case law*

To this date, the Supreme Court has not applied *imprevisión* to terminate or revise a valid contract. Thus, in the landmark case of *Galtier v. Fisco*[31], the Supreme Court held that the courts had no power to ignore or revise the terms of the contract, either by reasons of equity, custom or administrative rules.

More recently, in *South Andes Capital S.A. c/ Empresa Portuaria Valparaíso*[32] the Supreme Court expressly declared that article 1545 of the Civil Code excludes the possibility of accepting the *imprevisión* theory in Chilean private law because under that provision the contract cannot be terminated or adjusted by the courts, but only by the mutual consent

[29] J.C. Dörr, *Notas acerca de la teoría de la imprevisión* (1985) Revista Chilena de Derecho 12, 253-270; and D. Peñailillo, *La revisión judicial de obligaciones y contratos en la reforma del Código Civil: la lesión y la imprevisión* (2000) Revista de derecho (Concepción) N°208 año LXVIII, 209-237.

[30] Dörr (1985).

[31] *Gaceta de los Tribunales* of 1925, l.er Sem., p. 23. *RDJ*, T. 23, sec. 1, p. 423 (10 January 1925) *Los tribunales carecen de facultad para derogar o dejar sin cumplimiento la ley del contrato, ya sea por razón de equidad, o bien de costumbre o reglamentos administrativos*. In the same sense, the Supreme Court stated that article 1545 gives the force of law to the terms of a contract, and therefore such terms should be observed by the contractual parties and the courts (*RDJ*, T. 37, sec 1, p. 520, 1940). The *Repertorio de Legislación y Jurisprudencia Chilenas* reports eight decisions on *Casación* by the Supreme Court, which state that the decision of a lower court is null and void if such a decision ignores the binding force of a contract through the omission or alteration of the terms agreed by the parties.

[32] Corte Suprema, 09.09.2009, Rol 2651-08.

of the parties. The Court added that neither article 1546 nor article 1560 (interpretation of the contract on the basis of the parties' intention) are legal grounds to invoke *imprevisión*, because neither the duty of good faith nor the intention of the parties are contravened if the creditor claims the performance of the contract as agreed. In a later decision, the Court also disregarded the claim for additional costs due to unexpected circumstances, incurred by a contractor on a lump sum contract[33].

However, there are a small number of decisions at the level of Court of Appeals that have accepted, to a different extent, the application of *imprevisión*. Most of these cases are concerned with construction contracts, in order to compensate the constructor the higher costs incurred due to the occurrence of unexpected circumstances during the performance of the contract[34]. Other decisions of Court of Appeals, recognizing the possibility to apply the doctrine of *imprevisión* in Chilean contract law, have rejected the claim because the strict conditions for its application were not met to the case in dispute[35].

On the other hand, arbitral courts have accepted the application of *imprevisión* in some cases[36]. Most of these cases are again related to construction contracts concerning additional costs borne by the building contractor deriving from unexpected difficulties in the construction process, which were unknown at the time of contracting, e.g., relating to the soil composition or an increase in the price of materials or labour. However, the limited number of cases makes it difficult to come to any general conclusions as to the willingness of arbitral judges to broadly apply the *imprevisión* theory. On the contrary, some authors have argued that the cited cases are extraordinary and the general rule still is that the Chilean courts refuse to revise contracts based on these grounds[37]. In this sense, a close

[33] Corte Suprema, 03.07.2012, Rol 9110-2009. More recently, the Supreme Court rejected again the application of *imprevisión*, not on the grounds of its lack of recognition in the Civil Code, but because on the merits of the case, it was clear that the affected party had assumed the risks of the change of circumstances. See Corte Suprema, 20.03.2020, Rol 28.122-2018.

[34] The most well known and reported is *Guillermo Larraín Vial con Servicio de Vivienda y Urbanización de la Región Metropolitana*, Corte de Apelaciones de Santiago, 14.11.2006, Rol 6812-2001. For comments on the case, see E. Alcalde, *Corte de Apelaciones de Santiago y teoría de la imprevisión. Un hito fundamental en la evolución de nuestra justicia ordinaria* (2007) Revista Chilena de Derecho 34, 361-372; and R. Momberg, *Análisis crítico desde el derecho alemán y nacional de la sentencia de la Corte de Apelaciones de Santiago que acoge la teoría de la imprevisión*, in A. Guzmán (ed), *Estudios De Derecho Civil III* (Legal Publishing 2008). See also Corte de Apelaciones de Santiago, Rol 2187-2010; and Corte de Apelaciones de San Miguel, 17.01.2011, reported in A. Aguad and C. Pizarro, '*Comentarios de Jurisprudencia. Responsabilidad Civil* (2011) Revista Chilena de Derecho Privado n. 16, 338-344.

[35] Corte de Apelaciones de Concepción, Rol 2060-2008; Corte de Apelaciones de Valparaíso, Rol 2141-2008; Corte de Apelaciones de Santiago Rol 5442-2011.

[36] The decisions reported are *Pavez y Cia. Ltda. c/ Alemparte* (1983), *Sociedad de Inversiones Mónaco Ltda. c/ ENAP* (1986), *Sociedad Constructora La Aguada c/ Emos S.A.* (1994), *Chilesat S.A. c/ Smartcom PCS S.A.* (2005). See C. Illanes (2000) *Teoría de la Imprevisión*, in Fundación Fernando Fueyo (ed), *Estudios Sobre Reformas al Código Civil y al Código de Comercio* (Editorial Jurídica de Chile 2000); and R. Domínguez *et al.*, *La révision du contrat. Rapport Chilien*, in Société de Législation comparée (ed), *Le Contrat: Juornées Brésiliennes* (Société de Législation comparée 2008).

[37] Domínguez *et al.*, (2008).

examination of the cases shows that even arbitral courts apply *imprevisión* only in very exceptional situations and after a strict assessment of its requisites.

III.3.3. *Perspectives*

It seems that even in the context of the emergency measures adopted in the context of epidemic of Covid-19, the judicial scenario for the application of the doctrine of a change of circumstances is uncertain. As stated above, the approach to *imprevisión* by Chilean Courts has been very restrictive, and there is no reported case on a Court allowing the adaptation of a contract because of unexpected circumstances. On the other hand, even when arbitral courts have accepted its application to long-term contracts affected by a change of circumstances, they have done that only in exceptional cases following a rigorous examination of its requisites.

The Impact of the Health Emergency on Contract Law: National Report Perù

Daniel Ugarte Mostajo*, Raúl F. Zúñiga**

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The global pandemic caused by Covid-19 has affected many areas of social life. One of these is undoubtedly civil, commercial and consumer contracts (B2B and B2C). The Peruvian Government declared a nationwide lockdown under art 137.1 of the Peruvian Consti-

* Professor of Civil Law at the Department of Law and Political Science, Universidad Católica San Pablo, Arequipa, Perú.
** Assistant Professor of Contract Law at the Department of Law and Political Science, Universidad Católica San Pablo, Arequipa, Perú.

tution (PC),[1] which authorises the restriction or suspension of the exercise of certain fundamental rights. Such restrictions were, as far as this work is concerned, the compulsory immobilisation during time slots and the prohibition of any economic activity that did not consist of, or was not linked to, the provision of essential goods and services[2].
The severity of the restrictions has been reduced as the lockdown has been extended. Some economic activities were later partially released, subject to constraints designed to ensure the health of the citizens. As of the writing of this report, the lockdown has been extended until 30 June 2020, and the number of economic activities allowed under e-commerce and delivery has also been expanded[3].

I. Peruvian contract law provisions on circumstances interfering with contractual performance

I.1. General framework

Art 1361 of the Peruvian Civil Code (CC)[4] prescribes that 'contracts are obligatory in so far as it has been expressed in them'; likewise, art 1354 provides that 'the parties can freely determine the content of the contract, as long as it is not contrary to a legal rule of a mandatory nature'. Read together, these rules provide that what the parties freely agreed upon is enforceable.
Both provisions derive from the principle of *private autonomy*, recognised in art 2.14[5] and the first sentence of art 62[6] of the PC. In turn, from these provisions derive the fundamental rights to decide whether or not to conclude a contract, to choose with whom to contract

[1] 1993 Political Constitution of Peru; for brevity, we are not quoting some provisions mentioned in the text, which could be consulted in <https://spijweb.minjus.gob.pe/>, including an official English translation of the PC.

[2] The national lockdown was declared by Supreme Decree n. 044-2020-PCM (published 15 March 2020, entered into force 16 March 2020), this norm was extended by Supreme Decree n. 046-2020-PCM (published 18 March 2020, entered into force 19 March 2020), determining the essential activities which could continue operating.

[3] A first set of activities which could restart operations was declared by Supreme Decree No 080-2020-PCM (published 3 May 2020, entered into force 4 May 2020), Supreme Decree No 094-2020-PCM (published 23 May 2020, entered into force 25 May 2020) annex; a second set of activities was approved by the Ministerial Resolution No 142-2020-PRODUCE (published 8 May 2020, entered into force 09 May 2020) and Supreme Decree n. 110-2020-PCM (published 18 June 2020, entered into force 22 June 2020); each economic activity must follow the requirements of Ministerial Resolution n. 239-2020-MINSA (published 28 April 2020).

[4] Civil Code, Legislative Decree n. 295.

[5] 'Every person has the right to: … contract for lawful purposes, provided that there is no violation of public policy norms'.

[6] 'The freedom to contract guarantees that parties can validly agree according to the rules in force at the time of the contract'.

and to design the content of contracts[7]. Thus, in Peru, contracts are mandatory and must be performed exactly because they are an exercise of the fundamental rights of contracting parties[8].

It should be noted that this understanding of the binding nature of a contract harmonises the notion of respect for the parties fundamental rights with their search for economic efficiency through the free determination of the content of the contract.

Nonetheless, it is generally held that the second sentence of art 62 of the PC, by providing that 'contract terms may not be modified by law or other provisions of any kind', would have taken up the doctrine of the *sanctity of contracts* in an absolute scheme[9]. Thus, one could claim that contract terms are immutable and that they cannot be revised under any circumstances, like a pandemic.

Yet, this statement does not correspond to the reality of Peruvian law. A harmonious reading of arts 2.14 and 62 of the PC allows us to conclude that private autonomy in contracting is subject to explicit and implicit limits so that the prohibition to modify contractual terms in art 62 is not absolute[10]. In this sense, the principle of the bindingness of the contract is not absolute, contemplating a constitutional basis for an exceptional revision of contracts. This constitutional basis has been materialised through the different provisions of the CC, which we develop below.

I.2. Impossibility of performance due to unforeseen circumstances or force majeure

Art 1315 of the CC defines the force majeure as 'the non-attributable cause, consisting of an extraordinary, unforeseeable and irresistible event, which prevents performance of the obligation or determines its partial, late or defective performance'. The foundation of the rule is common sense – by requiring non-attributable, extraordinary, unforeseeable and irresistible events, it is understood that the debtor cannot perform any conduct to comply with the contract.

In this sense, given their restrictive nature, the measures adopted by the Government can be qualified, in principle, as cases of force majeure in those contracts linked to non–essential – and therefore not allowed – economic activities. Yet, the impossibility to perform the contract should not be understood in general terms. On the contrary, the impossibility is *objective* – it falls on the obligation – but *relative* since distinct contracts may require variable cooperative efforts to determine the irresistibility of the event.[11] In this sense,

[7] *Instituto Superior Pedagógico Belaúnde v Ministerio de Educación* [2004] 02158-2002-AA/TC [2]; Baldo Kresalja and Cesar Ochoa, *Derecho Constitucional Económico* (Fondo Editorial PUCP 2009) 280.

[8] M. de la Puente y Lavalle, *La libertad de contratar* (1996) 33 *THĒMIS-Revista de Derecho* 7, 8.

[9] Ibid., 10.

[10] *Cooperativas de trabajo v Congreso de la República y Ministerio the Trabajo* [2004] 02670-2002-AA [3(d)]; the *social market economy* model adopted in art 58 of the PC reinforces this affirmation, B Kresalja and C Ochoa (n 7) 286.

[11] G. Fernández Cruz, *El deber accesorio de diligencia en las relaciones obligatorias* (2005) 13 *Advocatus* 143, 155.

impossibility must be conceived and interpreted with a criterion of reasonableness and evaluating the interests of the parties protected by the contract. This is also true because the impossibility has different legal consequences in Peruvian law, depending of the scope of the impossibility itself.

If the impossibility is definitive or, even without being definitive, it results in the loss of utility of performance for the creditor, the consequence is that the debtor is relieved of his obligation to compensate for the breach. The same consequence applies if the impossibility – definitive or temporary – was only partial, but incomplete performance would be useless to satisfy the creditor's interest.

If, on the other hand, the temporary impossibility does not cause the creditor's loss of interest in delayed performance, the consequence is that the debtor will be exonerated from liability for breach during the impossibility and must resume performance once it disappears. Conversely, if the impossibility of performance is partial, but the creditor retains an interest in incomplete performance, the debtor shall perform the contract on those terms, yet its initial payment will be reduced proportionally, or the reduced amount must be returned if it has already been paid.

These consequences of impossibility due to unforeseen circumstances or force majeure are set out in art 1316 of the CC, and are reiterated in the treatment of the *theory of risk* in the obligations to give a certain good – art 1138 CC –, in the obligations to do – art 1156 CC – and the obligations to abstain – art 1160 CC –, as well as in the regulation of contracts with reciprocal benefits – arts 1431 to 1433 CC –.

Finally, in the case of impossibility to perform in plurilateral contracts (with more than two parties), where obligations are autonomous – not reciprocal –, the impossibility of one obligation has consequences only concerning the injured party unless that service is essential to the transaction as a whole, where total cancellation is appropriate – art 1434 CC –.

I.3. Excessive onerousness of performance or hardship

The CC also contemplates the *excessive onerousness of performance* (hardship), where the unforeseeable event, even if it does not make performance impossible in the agreed terms, determines that such performance entails excessive costs or sacrifices for one or both parties, which were not contemplated or assumed by them when they decided to enter into the contract. The scope and application of this figure are regulated, fundamentally, in arts 1440, 1441, and 1442 of the CC.

In Peru, the first remedy for hardship situations is the adaptation of the contract by the court or arbitral tribunal through the reduction of performance whose execution has been increased or the increase of the counter-performance. Exceptionally, if adaptation is not possible due to the nature of the obligation or the circumstances of the case, termination of the contract may be demanded. The defendant of an adaptation claim may also request termination, in which case the court should first determine that it is impossible to adapt the contract. In any event, the effects of termination do not extend to performance already rendered.

On the other hand, note that – unlike uniform contract law instruments – the CC does not expressly provide for renegotiations between the parties before requesting adaptation or termination at the court, yet this does not impede the renegotiation. The parties should reach an agreement to overcome the imbalance of the contract according to their interests, without the intervention of a third party. Yet, despite being the most reasonable alternative, there will not be consequences if the parties directly request adaptation or termination to the court.

Hardship and its remedies apply to commutative contracts of continuous, periodic or deferred, performance; that is, those in which the sacrifices and benefits of the parties are agreed from the beginning and there is a lapse of time between the conclusion of the contract and its execution, or between the performance of each obligation of the parties. However, the CC contemplates some exceptions to this rule, specifying that the figure and its remedies may also be applied to (i) commutative contracts of immediate execution when the obligation of one party has been deferred for a cause not attributable to him; (ii) to aleatory contracts, when the hardship is produced by causes alien to the risk of the contract; and, (iii) to contracts with unilateral performance, in which case the adaptation may only be achieved with the reduction of performance, without affecting the subsidiary remedy of termination.

Finally, the waiver of remedies for hardship is void – art 1444 CC –. Such remedies may be requested within three months after the definitive cessation of the unforeseeable events, the expiration of the period entails the loss of the rights to request the adaptation and termination of the contract – arts 1445 and 1446 –.

I.4. The disputed application of the *frustration of purpose*

The CC does not regulate the frustration of purpose of the contract, which is why there is no unanimity in scholarship regarding its application in Peru[12].

In this figure, expected performance – although possible and therefore enforceable – has lost its utility considering the practical purpose pursued by the creditor through the contract, due to an unforeseeable event which supervenes after its conclusion. In these cases, the other party acknowledges and assumes the pursuit of such practical purpose. Mere individual motives have no place.

The application of the frustration of purpose would be possible based on a broad interpretation of the hardship provision – art 1440 CC –, specifically from the language which provides that the injured party may request the court to 'increase the counter-performance' to cease the imbalance, and if this is not possible due to the nature of the obligation or

[12] In favour of the application, see E. Benavides Torres, *Hacia una revalorización de la finalidad contractual*, in A. Bullard and G. Fernández (eds), *Derecho Civil Patrimonial* (Fondo Editorial PUCP 1997) 169-83; against the application, mainly because there is no express rule providing it, see . Espinoza Espinoza, *La doctrine of frustration: ¿es factible su aplicación en el ordenamiento jurídico peruano?* (2018) 49 *Actualidad Civil* 130.

the circumstances, 'the contract may be terminated'. This reasoning assumes that the obligation of the aggrieved party is excessively onerous because it must be performed in exchange for something that will not provide the expected utility. It is precisely because it is impossible to achieve the expected benefit that termination of the contract would be the appropriate remedy.

This questionable interpretation seems to have been rejected by the recent *Draft Proposal for the Improvement of the Peruvian Civil Code*[13], since it proposed the independent regulation of the *frustration of the cause*, establishing different consequences according to whether the frustration is definitive or temporary. In the latter situation, the affected party may terminate the contract if the exact performance of an essential obligation is prevented[14].

II. Application of the provisions to certain contracts

II.1. Construction contracts[15]

It is clear that Government's measures have made it impossible for the contractor – either under a B2B and B2C schemes – to perform, thus creating a clear case of force majeure, the effects of which will depend on the scope of the impossibility, the nature of the obligation and the creditor's interest and practical purpose, as noted above.

The contractual remedies available to the principal are limited. He may not, during the impossibility, require the contractor to carry out the work or claim compensation for any damage caused by such impossibility. Yet, the principal is not obliged to pay the contractor any compensation during the impossibility[16]. If the contractor demands payment, the principal may invoke the *exception of non-performed contract* – art 1426 CC –, or the exception of limitation period – art 1427 CC –.

[13] The draft and its explanatory statement are available in <https://www.gob.pe/institucion/minjus/informes-publicaciones/429560-anteproyecto-de-modificaciones-del-decreto-legislativo-n-295-codigo-civil>.

[14] The proposal provides 'Article 1372-A. – Frustration of purpose of the contract: 1. If the common purpose pursued by the contracting parties is permanently frustrated due to a cause not attributable to them, the contract is terminated by right, unless otherwise agreed. 2. If the frustration is temporary, the contract will be terminated as a matter of law, only if said temporality prevents the timely performance of an essential obligation'.

[15] We recall that our analysis addresses contracts between private parties, excluding the regulation of Public Procurement Law. Yet, one must note that according to the First Final and Complementary Provision of the Public Procurement Bylaw (Supreme Decree n. 344-2018-EF) the Civil Code supplements Public Procurement Law, a view also adopted by the Supervisory Body for the Procurement with the State (OSCE for its abbreviation in Spanish) in *Legal Consultation No 17-2018-JUS/DGDNCR* [2018] para 56; moreover, practitioners expressed the view that the distancing of Public Procurement Law from the principles of private contracting leads to unfair solutions in particular cases, see G. Vera Vásquez and C. Aguilar Enríquez, *Entre la teoría contractual y las normas de contratación pública: Una necesaria mirada a raíz del Covid-19* (2020) 71 *Actualidad Civil* 155.

[16] This rule is different from that provided in the Public Procurement Bylaw, in which, according to art 142.7, the principal must reimburse the expenses necessary to suspend the performance to the contractor.

On the other hand, if the contractor has partially performed his obligation and this is useful for the principal, the agreed price may be reduced – art 1316 CC –. Moreover, it is unlikely – although not impossible – that the principal will be able to terminate the contract, since this remedy requires the breach to be fundamental[17], and in the cases of construction, it does not seem that delayed performance will make it useless to resume it once the impossibility has ceased, unless exceptional cases.

Finally, the limitation of liability in these cases will remain until the contractor obtains the administrative authorisation to restart activities, which obviously must be requested as soon as possible. The rationale of this interpretation is that the force majeure provision requires that the impossibility of performance must be irresistible – art 1315 CC –, and from the moment that the administrative permit is obtained, the impossibility ceases to be so. Note that the time during which the administrative authority evaluates the request is still governed by the force majeure provisions, and any delay in this period is non-attributable to the contractor.

II.2. Contracts for the provision of educational services

The pandemic has also given rise to a discussion about the possible effects on the performance of contracts for the provision of educational services by private institutions, at school and university levels. Once the lockdown was declared, private institutions – schools and universities – decided to resume educational work under a virtual scheme. This measure led to different positions on the enforceability of the service and the applicable figures to this case.

A first position argues that, with the virtual scheme, consumers would be receiving an inaccurate (partial or defective) performance regarding what was initially agreed in the contract, and would, therefore, be entitled to a reduction in the price – art 1316 CC –. Besides, it could be argued that there is a fundamental breach, and consumers could terminate the contract – art 1428 CC –, obviously without compensation because the breach is not attributable. Another position supports the application of the hardship provisions, assuming that the virtual scheme has much lower economic value than the contracted face-to-face service, which would enable to request the court for the reduction of the payment, without denying the possibility of renegotiating with the educational institution.

We believe that none of these positions is correct. We do not share the idea that the virtual educational service has a lower economic value than the one agreed in the contract, justifying a reduction of payment under the hardship provisions. In most cases, universities incur in unpredictable expenses to adapt their service, which are not necessarily minor

[17] We believe that under Peruvian law, the attribution of the breach is not a requirement for the termination, see M. de la Puente y Lavalle, *El contrato en general* (vol 2, 2nd edn, Palestra 2011) 388-89; yet, we recognise that this is a disputed matter within national scholarship, see A. Torres Vásquez, *Teoría General de las Obligaciones* (vol 1, Instituto Pacífico 2014) 152, who argues that the breach must be attributable to the debtor in order to allow termination.

than planned expenses. Likewise, although the virtual scheme is partially different from the face–to–face education, we believe that it is not a defective performance of the contract. Indeed, the practical purpose of the education contract, which is the transmission of knowledge to students and the achievement of learning objectives, is still accomplished, at least in the majority of cases. On the other hand, the possibility – exceptional – of executing a through different means service derives from the fact that the educational service is an *essential public service* under Peruvian law. Such a qualification remains even if a private institution provides the service, and obliges the institutions to guarantee its accessibility, continuity and adaptability. Thus, according to the circumstances, performance under the virtual scheme is a legitimate adaptation of the institution's obligation.

The adaptation is not only based on the public and essential nature of the educational service, but also on the fact that the impossibility for force majeure, by requiring that the impediment to perform must be irresistible, obliges the debtor to make every effort to overcome it, and therefore it is reasonable to affirm that the implementation of the virtual scheme prevented the pandemic as an event which precludes supplying educational services[18].

The Ministry of Education seems to adopt this position[19]. After qualifying the educational contract as a B2C contract, the Ministry addressed the issue not as a force majeure event, but from the obligation of institutions to report on the costs of supplying educational services in the face-to-face and virtual schemes, and on proposals to amend the contract. With this information, users can select between continuing to receive the service, or making use of a *right to unilateral termination*[20], demanding restitution of the registration fee, admission fees and other advanced payments, proportionally to the time the student has been at the institution, discounting any outstanding debts.

The decision of the Ministry of Education to consider the virtual scheme as a case that enables unilateral withdrawal, which is not a remedy for breach of contract – attributable or not –, indicates that the obligation to supply educational services is not being breached. If it were considered as such, consumers would have at their disposal remedies such as the proportional reduction of the payment or the termination of the contract.

[18] It is possible to conclude differently regarding elementary school, in which the circumstances and nature of the obligation – contents and objectives of the education at this level, features of the age of the students –, would not be able to supply the service under the virtual scheme. This, of course, means that institutions are not able to resist the consequences of the force majeure event, in which case there is a non-attributable breach of the contract.

[19] Legislative Decree n. 1476 (published 5 May 2020, entered into force 6 May 2020).

[20] The Legislative Decree uses the term '*resolución*', being its literal translation the term 'termination', yet the meaning of this provision is an unilateral right of withdrawal, known in other jurisdictions as *résiliation* (French law), *Kündigung* (German law) and *recceso* (Italian law).

II.3. Lease contracts

The problem with lease contracts is that some lessees, due to the lockdown, may experience financial difficulties in paying the rent.

Since it is a monetary obligation, it is not appropriate to affirm the existence of a force majeure impediment since money will never disappear. However, it could be argued that in such cases there is an *economic impossibility* for the lessee to pay, yet it is doubtful whether this figure is similar to the impossibility in the strict sense since the latter must necessarily be objective – over the obligation – and not on the subject. Thus, if the lessee does not pay the rent, the lessor may exercise the contractual remedies for breach, including specific performance and compensation for damages, since performance is not only possible, but the breach would be attributable to the debtor.

Regarding this issue, Congress is currently debating two bills referred to the economic impossibility of the lessee to pay the rent. The first one aims to suspend the payment of the rent, interests and penalties for the entire duration of the lockdown and two months after if the lessee demonstrates that he is unemployed, his remuneration was reduced, provoking the reduction of his income, and if the income for the use of the property has decreased by more than 40 per cent[21]. The second attempts to suspend evictions during the lockdown and 45 days after for housing leases[22]. Regarding the first bill, we consider that a distinction between housing and commercial leases is necessary because, as argued before, a modification of the terms of the contract through legal regulations must be justified on public interest consideration – arts 14.2 and 62 of the PC –, and arguably, protecting housing of unemployed lessees and its family is included in such goal, yet, it does not seem the case for commercial leases. Regarding the second bill, its reduced scope on housing leases makes this attempt constitutionally legitimate, yet non-payment is not the only reason for which lessors can evict lessees – art 1697 of the CC –. Thus, to suspend the eviction for other breaches different than non-payment still seems problematic.

In the case of a lease for commercial purpose, if the possession is not useful, at least temporarily, to achieve the practical purpose for which the contract was concluded, the only applicable figure ends up being the frustration of the contract through the disputed broad interpretation of the hardship provision. Yet, it must be verified whether the practical purpose was shared and whether it was frustrated[23]- Alternatively, it would be possible to argue that there is a non-attributable breach by the lessor of his obligation to maintain the lessee in the use of the property during the term of the contract – art 1680.1 CC – and consequently, he could raise the exception of non-performed contract to oppose the lessor's

[21] Bill n. 5004/2020-CR.

[22] Bill n. 5238/2020-CR; note, however, that in Peru, the eviction is a right for the protection of property rights, rather a remedy for breach of contract.

[23] The good could still be useful for a purpose (eg storage), in which case there is not frustration of the contract. In this case it is also possible to argue hardship because what is being obtained is only a part of what motivated the contract.

payment request. However, this interpretation does not seem to correspond to the design of the CC, which regulates the liability for latent defects of the goods in a different regime applicable to all contracts consisting in the transmission of property or possession[24].

[24] National scholarship argues, for instance, that the lessor's obligation is not permanent during the lease contract, and that when he hands over the possession, he is entitled to conditional restitution upon the termination of the lease, see J. Bigio Chrem, *El Contrato de Arrendamiento* (1994) 30 *THĒMIS-Revista de Derech*o 197, 205; yet, we are working in a paper which argues for a unitary concept of breach of contract within Peruvian Contract Law. From this standpoint, current solutions for problems in lease contracts provided in Property Law can also be solved by the general regime of breach of contract.

Articles

An overview of the colombian contract law, in times of the Covid-19 pandemic

Isué Natalia Vargas Brand*

Abstract

This paper notes the potential contract law rules applicable in the Colombian legal system to contracts affected by the economic crisis caused by the Covid-19 pandemic. Also, it points out the different temporary Decrees enacted by the Colombian government to mitigate the effects of the pandemic in Contract Law.

Keywords

Covid-19 – contracts – nonperformance – Impossibility – Imprevision – Hardship – Force majeure – Unforeseeable circumstances – Frustration – Breach of contract – Lease contracts – Home loans – Tourist contracts

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* Lecturer of Private Law at Sergio Arboleda University (Bogotá-Colombia). Doctor of Law Autonomous University of Madrid (Spain). Email: isue.vargas@usa.edu.co.

I. Introduction

The governmental measures on social distancing and the cessation or limitation of economic activities to avoid the spread of covid-19 have led to a deep economic crisis where a lot of questions around compliance with contracts are raised. The problem of legal uncertainty is significant in such an unprecedented situation that has affected all types of contracts (including, B2B and B2C contracts).

Because of this situation, there is a need to analyze the different legal rules applicable under the general Colombian contract law to address the breach of contracts due to the covid-19 pandemic. Nevertheless, because of this great crisis the Colombian government has taken exceptional, urgent, general and temporary measures to mitigate the consequences of the Covid-19 pandemic (an exceptional contract law).

In this paper, I will refer *first*, to the general Colombian contract law rules, that can be applicable in times of a pandemic. *Secondly,* I will address the exceptional and temporary measures in the field of civil law that the Colombian government has taken to mitigate the impact of the Covid-19.

II. General contract law rules applicable in times of pandemic

General Colombian contract law rules that would be applicable in case of a nonperformance of a contract due to the pandemic are related to the concepts of *force majeure* and unforeseeable circumstances (articles 64 and 1504 of the Colombian Civil Code), the imprevision theory (supervening event) (traditionally known as the *rebus sic stantibus*), the frustration doctrine and the subjective causa (well expressed by the Latin term *causa obligationis*). I will refer briefly to each of these rules and theories.

2.1. *Force majeure* and fortuitous events (unforeseeable circumstances)

These legal concepts are defined and regulated under articles 63 and 1604 of the Colombian Civil Code. The Colombian author, Jorge Oviedo Albán, notes that the current situation caused by the Covid-19 would be considered as a fortuitous event (*unforeseeable circumstances*). According to the Civil Code and decisions of the Colombian Supreme Court, in order to establish fortuitous events, it must be established that: 1) The circumstance is not attributable to the debtor; 2) the situation is irresistible; and 3) the situation is unpredictable[1].

Under the concept of *fortuitous events* the debtor must be in a situation of absolute impossibility of performance. First, the consequences of the application of this concept are a contractual liability release, in other words, the party in breach shall not be accountable for any damages and losses. Second, under this concept the enforceability of performance in case of non-generic (specific) goods or services, could be affected as well[2].

2.2. Imprevision, hardship or *rebus sic stantibus*

The Colombian Commercial Code enacted in 1971 included article 868 which provided for the judicial modification of contractual terms because of *unpredictable* change in the economic circumstances of the contract, after the parties entered into the contract (*imprevision*, hardship or *rebus sic stantibus*) (despite the principle that contracts are binding enshrined in art. 1602 of the Civil Code).

In part, the doctrine in Colombia supports this interpretation of a change in the economic basis of the contract where contracts have been affected by the pandemic[3]. Nevertheless, this option does not seem to be a solution for the generalized and systemic problem caused by the pandemic, because, although it is established in the Colombian legal system, Colombian judges have been reticent to apply it[4]. In addition, this approach is not ef-

[1] J. Oviedo Albán, *El caso fortuito y el incumplimiento de los contratos. A propósito del Covid-19*, (2020) (4) Boletín Estudios de Derecho Comparado, VLEX, 2.

[2] *Ibid*., 3-4.
Also, See M. Aramburo Calle, *Pandemia y fuerza mayor* (Ámbito jurídico, 27 Mar 2020) <https://www.ambitojuridico.com/noticias/columnista-impreso/administrativo-y-contratacion/pandemia-y-fuerza-mayor> accessed 2 June 2020.

[3] M. Aramburo Calle, *Pandemia y fuerza mayor*, cit.; D. Vázquez Vega, *Oportunidad de oro para reconsiderar la teoría de la imprevisión* (Ámbito Jurídico, 8 Apr. 2020) https://www.ambitojuridico.com/noticias/ambito-del-lector/civil-y-familia/oportunidad-de-oro-para-reconsiderar-la-teoria-de-la accessed 2 June 2020.

[4] So far, there are not Colombian Supreme Court decisions in which it would have readjusted the contract based on this rule. Though, for example, there is an excellent decision which, in it's *obiter dictum*, extensively explains and analyzes, with comparative law references, the imprevision theory established in article 868 of the commecial code, because the plaintiff asks the Court to readjust the contract loan agreement, due to the financial crisis of 1998 in Colombia. Nevertheless, the plaintiff doesn't succeed with it's claim because she had already complied with it's obligation. So, this discarded the application of the imprevision theory, which requires the mandatory impossibility to comply because the excessive cost of a party's performance. Supreme Court of Justice (Civil Chamber), February 21, 2012, Opinion of the Court delivered by: William Namén Vargas; ref. 0537.

fective in times of crisis because of delays in civil proceedings, and the additional burden that applications for judicial modification of contracts would impose on judges[5]. Indeed, in Germany, where there are significant decisions about the *Rebus*, there is a lack of trust in the application of this concept to deal with the current situation[6].

2.3. Frustration of purpose and the subjective causa

The Colombian author, Felisa Baena Aramburo, has analyzed the application of the frustration doctrine, inspired by English and U.S Contractual Law by examining the coronation English cases[7]. Under the frustration doctrine the contractual purpose is frustrated due to unpredictable circumstances that go beyond the scope of control of the parties. This doctrine is not about circumstances that make it an impossibility for parties to comply such as the unforeseeable circumstances concept. But rather, even though it is still possible to comply and even if it is not more onerous (like under the *rebus sic stantibus* term), the purpose of the contract that the parties intended disappears or loses its meaning. As a consequence, there would not be a breach of contract, but rather, the reciprocal obligations are discharged[8].

Felisa Baena states that the frustration doctrine would be applicable to some contracts affected by the pandemic. However, due to the fact that in Colombia, as in the other civil law countries in general, there is no rule that establishes this doctrine or case law that adopts it, the author tries to support its application under the nullity of the contract for lack of "*causa*". In civil law systems, "the function of causa is now mostly taken over the requirement of the intention to be legally bound"; that usually can be defined as the goal that parties pursue with the contra)[9]. For instance, Felisa Baena points out that the lack of *causa* can occur in commercial lease contracts[10].
Also, based in the lack (or the termination) of the *causa* (according to the art. 1524 of the Civil Code), professor Arturo Solarte also finds a solution to the cases where, due to the

[5] Francisco Ternera; Fabricio Mantilla, 'La crisis y la teoría de la imprevisión' in *FINANCIACIÓN DE VIVIENDA: perspectiva 20 años después de la crisis hipotecaria* (Universidad del Rosario 2020) 20-27.

[6] Bruno Rodríguez Rosado; Antonio Ruiz Arranz, '*Consecuencias de la epidemia: reequilibrio contractual y Covid-19*' (*Almacén de Derecho* Blog, 16 Apr. 2020) <https://almacendederecho.org/consecuencias-de-la-epidemia-reequilibrio-contractual-y-covid-19/> accessed 2 June 2020. Juan José Ganuza; Fernando Gómez Pomar, 'Los instrumentos para intervenir en los contratos en tiempos de COVID-19: guía de uso', (2020) 2 InDret, 561.

[7] See McKendrick, *Contract Law* (9th edn, Palagrave 2011) 255. Jan Smits, *Contract Law. A Comparative Introduction* (Edward Elgar 2014) 203.

[8] F. Baena Aramburo, *Coronavirus y los Coronation Cases: cuando el contrato pierde su razón de ser* (IARCE Blog, 22 Apr. 2020) < https://www.iarce.com/coronavirus-y-los-coronation-cases-cuando-el-contrato-pierde-su-razon-de-ser/> accessed 2 June 2020.

[9] J. Smits, *Contract Law. A Comparative Introduction* (Edward Elgar 2014) 87.

[10] F. Baena Aramburo, *Coronavirus y los Coronation Cases: cuando el contrato pierde su razón de ser* (IARCE Blog, 22 Apr. 2020) < https://www.iarce.com/coronavirus-y-los-coronation-cases-cuando-el-contrato-pierde-su-razon-de-ser/> accessed 2 June 2020.

pandemic, an impossibility to comply with the obligation to do something and with the obligation to abstain from doing something, have arisen[11].

III. The exceptional colombian measures to mitigate the effects of Covid-19, in contract law

Having declared the State of emergency in March 17 (Decree no. 417), the Colombian government enacted several decrees ordering temporary and urgent measures to mitigate the potential effects of the pandemic on issues related to contract law. However, these measures are not sufficient and only address civil and commercial lease contracts, home loan contracts, tourist contracts and contracts related to the provision of essential services (telecommunication services).

3.1. Housing and commercial leases contracts

With regard to lease contracts, the Colombian government has enacted two Decrees. The first is the *Decree 579 of April 15, 2020*[12], about Housing and commercial leases contracts. Regrettably, this decree regulates both kinds of contracts equally. Also, the government enacted the *Decree 797 of June 4, 2020*[13], about the temporary and exceptional regulation of the termination of lease contracts of commercial property.

Concerning the Decree 579, the measures are neutral and protect both parties to the contract because their purpose is to facilitate the parties reaching an agreement. The measures protect the tenants, as well as the lessors. It is important to note that rent is the main income of a significant part of our population. The elderly are overrepresented in this group and receiverent as an alternative for the retirement pension.

The decree is applicable to tenants who are individuals or companies that fall within the categories of micro-, small or medium-size enterprises (Decree 579 of 2020 art. 6). On the other hand, it doesn't say which lessors are covered by the measure, so it is applied to all.

The main measures taken by the government under this decree are:

a) The suspension of eviction procedures for restitution of the property during the period between the date of entry into force of the Decree (April 15, 2020) and June 30, 2020.

[11] See A. Solarte Rodríguez, *Imposibilidad sobrevenida de cumplimiento y asignación del riesgo en los contratos bilaterales. El caso de las obligaciones diferentes a las de dar cosas de cuerpo cierto. Apuntes para un debate* (IARCE Blog, 6 May. 2020) <https://www.iarce.com/imposibilidad-sobrevenida-de-cumplimiento-y-asignacion-del-riesgo-en-los-contratos-bilaterales-el-caso-de-las-obligaciones-diferentes-a-las-de-dar-cosas-de-cuerpo-cierto-apuntes-para-un-debate/#_edn3> accessed 2 June 2020.

[12] Legislative Decree 579 (2020) <https://dapre.presidencia.gov.co/normativa/normativa/DECRETO%20579%20DEL%2015%20DE%20ABRIL%20DE%202020.pdf > accessed 2 June 2020.

[13] Legislative Decree 797 (2020) < https://dapre.presidencia.gov.co/normativa/normativa/DECRETO%20797%20DEL%204%20DE%20JUNIO%20DE%202020.pdf>.

On the other hand, the decree doesn't establish the suspension of the termination of the contract (article 22 of the 820 act of 2003 and article 1546 of the Civil Code). This issue raises a lot of questions: Could the contract be terminated and hence, would the eviction be suspended? Could the securities given to lessors, such as guarantees be enforced? Would it be possible to file a case against the co-debtor?

b) On the payment of the rent, *article three* of the decree 579 establishes that the parties shall reach an agreement on the *specials conditions for payment* between April 15 and June 30 of 2020. Neither legal sanctions, nor default interest provisions, penalty clauses, compensation provisions and contractual sanctions agreed between the parties in those special agreements, will have an effect. In case the parties don't reach an agreement, the tenant will have to continue paying the rent. However, in case he/she fails to fulfill his/her obligations the tenant will not have to pay default interests, penalties, compensations, legal or contractual sanctions, during the period between April 15 and June 30 of 2020. Nonetheless, interest shall be paid at the current rate, reduced by 50%.

c) Article 2 of the Decree 579 extends the adjustment on the rent that would be effective between April 15 and June 30 of 2020. In order to do that, the Decree establishes a temporary suspension on the payment of those amounts. The tenant shall pay the difference between the current value of the rent and the adjustment in the months following the grace period given by the government.

d) The Decree establishes that the termination or commencement date of lease contracts, as well as the restitution or delivery of the property, *is extended to June 30 of 2020* (articles 4 and 5 of Decree 579 of 2020).

In my opinion, these measures are not sufficient in cases where it is impossible to pay the rent and the parties don't reach an agreement. For example, this situation may arise in the context of leases for commercial properties where the tenant is not allowed to work because of the State of emergency. It is possible that such se circumstances would have resulted in the termination of a lot of contracts because of the effect of Covid-19 on the economy as a result of the measures implemented by the government in response to Covid-19[14]. Therefore, I think the Colombian government should enact more measures that allocates the risks among the parties in times of crisis. For instance, government could introduce measures to suspend the termination of contracts, with an exception in favor of the lessor when their economic stability lies on this income. This is the approach taken in the German Decree[15].

[14] See J.J. Ganuza, F. Gómez Pomar, *Los instrumentos para intervenir en los contratos en tiempos de COVID-19: guía de uso*, (2020) 2 InDret, 576-579.

[15] Article 240 *Einführungsgesetz zum Bürgerliches Gesetzbuch*.
In Australia, the Prime Minister wanted the parties to agree to the terms of the leases so that the lease could continue and for the banks to support the agreements. They said it would be of greater benefit to the economy if both busi-

In relation to the second Decree, number 797, the Government has introduced specific regulation to address the termination of certain lease contracts of commercial properties (bars, nightclubs, cinemas, restaurants, massive events and accommodation properties), in cases where the parties don't reach an agreement. The Decree establishes that the tenants are allowed to terminate the contract until August 31 of 2020. In this case, the lessor has the right only to a third of the amount provided for in the penalty clause. If there is no penalty clause in the contract, the lessor has the right to a sum equivalent to the rent of one month as compensation (article 3 of the Decree 797).

3.2. Home loans

In order to mitigate the economic effects of Covid-19, article 1 of the *Decree 493 of March 29 of 2020*[16], gave grace periods for the payment of *capital and interests* in home loans. The Decree suspends the application of the anticipated termination of the loan.

3.3. Tourist contracts

To mitigate the great impact on travel agencies, article 4 of the *Decree 557 of April 15 of 2020*[17] introduced temporary regulation of the right of withdrawal and other measures related to the reimbursement of money. The decree allows that during the emergency declared by the government, the companies that provide tourist services can reimburse to the clients *services they provide themselves,* instead of money.

3.4. Contracts on telecommunication services

To guarantee the provision of minimum essential services such as telecommunication services, the Colombian government enacted the Decree 555 of April 15 of 2020[18]. In its article 2, the Decree suspends the right of service providers to terminatecontracts and to interrupt the service, based on the non-payment of the consumer during the emergency.

IV. Concluding remarks

The application of established Contract Law concepts, such as *force majeure*, imprevision and *frustration* are useful for contracts affected bythe covid-19 pandemic. Nonetheless, as

nesses of the tenant and the lessor did not go bankrupt. <https://www.pm.gov.au/media/update-coronavirus-measures-070420> accessed 8 June.

[16] Legislative Decree 493 (2020) <https://dapre.presidencia.gov.co/normativa/normativa/DECRETO%20493%20DEL%2029%20DE%20MARZO%20DE%202020.pdf.> accessed 2 June 2020.

[17] Legislative Decree 557 (2020) <https://dapre.presidencia.gov.co/normativa/normativa/DECRETO%20557%20DEL%2015%20DE%20ABRIL%20DE%202020.pdf.>

[18] Legislative Decree 555 (2020) <https://dapre.presidencia.gov.co/normativa/normativa/DECRETO%20555%20DEL%2015%20DE%20ABRIL%20DE%202020.pdf>

explained above, these principles would not be applicable in most cases. Additionally, in some cases, legal proceedings must be initiated to enliven the application and interpretation of these concepts. This is not practical or efficient in a crisis, such as the one we are facing right now, where due to the pandemic, there have been breaches of countless contracts. This is the reason why, as noted by professor Morales Moreno, it is necessary to think on "Exceptional Contract Law", on the basis of distributive justice, not on commutative justice, which underlies the "ordinary" Contract Law[19].

Consequently, the measures established by the Colombian government are not sufficent to address breaches of even the contracts specifically identified in the regulation. There is a need for more specific regulation that allocates ex-ante the risks of massive and systematic breach of contracts. These regulations must take into account the situation and vulnerability of the parties, their main interests and the different types of contracts.

V. Bibliography

Maximiliano Aramburo Calle, 'Pandemia y fuerza mayor' (Ámbito jurídico, 27 Mar 2020) <https://www.ambitojuridico.com/noticias/columnista-impreso/administrativo-y-contratacion/pandemia-y-fuerza-mayor > accessed 2 June 2020.

Felisa Baena Aramburo, 'Coronavirus y los Coronation Cases: cuando el contrato pierde su razón de ser' (IARCE Blog, 22 Apr. 2020) < https://www.iarce.com/coronavirus-y-los-coronation-cases-cuando-el-contrato-pierde-su-razon-de-ser/> accessed 2 June 2020.

Corte Suprema de Justicia (Sala Civil), 21 de febrero de 2012, M.P. William Namén Vargas; ref. 0537.

McKendrick, *Contract Law* (9th edn, Palagrave 2011) 255. Jan Smits, *Contract Law. A Comparative Introduction* (Edward Elgar 2014) 203.

Jorge Oviedo Albán, 'El caso fortuito y el incumplimiento de los contratos. A propósito del Covid – 19', (2020) (4) Boletín Estudios de Derecho Comparado, VLEX.

Bruno Rodríguez Rosado; Antonio Ruiz Arranz, '*Consecuencias de la epidemia: reequilibrio contractual y Covid-19*' (*Almacén de Derecho* Blog, 16 Apr. 2020) <https://almacendederecho.org/consecuencias-de-la-epidemia-reequilibrio-contractual-y-covid-19/> accessed 2 June 2020. Juan José Ganuza; Fernando Gómez Pomar, 'Los instrumentos para intervenir en los contratos en tiempos de COVID-19: guía de uso', (2020) 2 InDret, 561.

Jan Smits, *Contract Law. A Comparative Introduction* (Edward Elgar 2014) 87

Arturo Solarte Rodríguez, 'Imposibilidad sobrevenida de cumplimiento y asignación del riesgo en los contratos bilaterales. El caso de las obligaciones diferentes a las de dar cosas

[19] 'La Real Academia de Jurisprudencia y Legislación de España analiza el efecto del coronavirus en el Derechos' (La Razón, 20 May. 2020) <https://www.larazon.es/espana/20200520/3amuejhr7nc45evpqvx7p2njwu.html> accessed 2 June 2020.

de cuerpo cierto. Apuntes para un debate' (IARCE Blog, 6 May. 2020) <https://www.iarce.com/imposibilidad-sobrevenida-de-cumplimiento-y-asignacion-del-riesgo-en-los-contratos-bilaterales-el-caso-de-las-obligaciones-diferentes-a-las-de-dar-cosas-de-cuerpo-cierto-apuntes-para-un-debate/#_edn3> accessed 2 June 2020.

Francisco Ternera; Fabricio Mantilla, 'La crisis y la teoría de la imprevisión' in *FINANCIACIÓN DE VIVIENDA: perspectiva 20 años después de la crisis hipotecaria* (Universidad del Rosario 2020) 20-27.

Daniel Vázquez Vega, 'Oportunidad de oro para reconsiderar la teoría de la imprevisión' (Ámbito Jurídico, 8 Apr. 2020) https://www.ambitojuridico.com/noticias/ambito-del-lector/civil-y-familia/oportunidad-de-oro-para-reconsiderar-la-teoria-de-la accessed 2 June 2020.

Articles

The Impact of Covid-19 in German Contract Law

Christian Johannes Wahnschaffe*

Abstract

The Covid-19 pandemic has put the world to a halt. Not only public life but also the economy and trade partly have come to a standstill. On a global scale, the resulting impediments confront legal systems with unprecedented challenges. This country report analyses the impact of Covid-19 in German contract law. In its first part, this paper addresses the (conventional) approaches of German contract law to impediments and their effect on contractual relations in times of the pandemic. In its second part, it outlines the legislative responses to Covid-19 in the area of contract law.

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* Christian Johannes Wahnschaffe is a research assistant at the Chair for Foreign and International Law of Prof James Fowkes, LL.M., J.S.D. (Yale) at the Westfälische Wilhelms-Universität Münster, Germany, where he is also currently working on his doctoral thesis. His research focusses on arbitration in the international and domestic context, international sales law and domestic civil law. The author wishes to express his gratitude to Edward L. Rensmann for the language revision of this contribution.

The Covid-19 pandemic has put the world to a halt. Not only public life but also the economy and trade partly have come to a standstill. On a global scale, the resulting impediments confront legal systems with unprecedented challenges. This contribution analyses the impact of the pandemic in German contract law.
Firstly, the (conventional) approaches of German contract law shall be illustrated briefly (**I.**)[1], before, secondly, turning to current legislative responses to Covid-19 (**II**.).

I. Covid-19 as an Impediment to Performance under German Contract Law

Generally, German law distinguishes between impediments rendering performance impossible (**1.**) and such that render performance considerably more onerous whilst remaining, physically, possible (**2.**).

I.1. Impossibility of Performance

If performance is rendered impossible, the claim for specific performance is (temporarily)[2] suspended under s 275(1) of the *Bürgerliches Gesetzbuch* (German Civil Code, hereafter: "BGB")[3]. This section uniformly covers cases of physical (eg, closure of manufacturing plants) and legal (eg, trade restrictions) impossibility[4] as well as objective and subjective

[1] This contribution reflects the scholarly discussion and case law as of 1 July 2020. To the extent necessary, further updates have been included regarding the most significant recent developments. For an introduction to the concepts of impossibility of performance and change of circumstances under German contract law, see, eg, Larry A DiMatteo, 'Excuse: Impossibility and Hardship' in Larry A DiMatteo, André Janssen, Ulrich Magnus and Reiner Schulze (eds), *International Sales Law* (CH Beck/Hart/Nomos, Munich/Oxford/Baden Baden 2016) paras 53-56; Ewoud Hondius and Hans Christoph Grigoleit, 'Overview: concepts dealing with unexpected circumstances' in Ewoud Hondius and Hans Christoph Grigoleit (eds), *Unexpected Circumstances in European Contract Law* (CUP, Cambridge 2011) 55-63; Reinhard Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives* (OUP, Oxford 2005) 39-49.

[2] On the temporal perspective of impossibility in times of Covid-19, see Thomas Riehm, 'Corona und das Allgemeine Leistungsstörungsrecht' in Daniel Effer-Uhe and Alica Mohnert (eds), *Vertragsrecht in der Coronakrise* (Nomos, Baden Baden 2020) 27f. He rightly notes that most impediments following Covid-19 will only exist on a temporary basis. Consequently, s 275(1) BGB and other sections addressing permanent impossibility presently apply by analogy only.

[3] For instructive comments on s 275(1) BGB, see Zimmermann (n 1) 43f. For recent remarks, see Riehm (n 2) 24, 27ff.

[4] Thomas Liebscher, Stefan Zeyher and Ben Steinbrück, 'Recht der Leistungsstörungen im Lichte der Covid-19-Pandemie' (2020) 41 *Zeitschrift für Wirtschaftsrecht* 852, 857; Riehm (n 2) 24.

impossibility[5]. It is immaterial to s 275(1) BGB if impossibility traces back to the debtor's fault[6]. Whether or not performance is, *sensu stricto*, impossible depends on the content of the obligation[7]: For a contract to produce a specific work (s 631 BGB), impossibility as the result of Covid-19 seems conceivable with view to business closures or a shortfall in workforce[8]. In contrast, the threshold for literal impossibility is stricter for a market-related purchase of generic goods (cf s 433 BGB)[9]. In any event, the debtor may not plead impossibility for a shortfall in liquidity[10].

I.2. Disproportionality of Performance and Fundamental Change of Circumstances

Even if performance remains physically possible, Covid-19 may well impede contractual obligations significantly, for instance by drastically increasing the debtor's costs of performance. In principle, two provisions address such scenarios: s 275(2) BGB and s 313(1) BGB[11].

Under s 275(2) BGB, The debtor may refuse performance if his expenditure for performance is rendered manifestly disproportionate in comparison to an unchanged interest in performance on part of the obligee[12]. Since increased market prices also lead to an increased interest in performance, s 275(2) BGB does not apply if market prices increase drastically[13]. Still, s 275(2) BGB might apply if market prices remain stable whilst the costs of performance increase, eg, because of Covid-19 related safety precautions[14]. It is a futile endeavour to establish a universal threshold for s 275(2) BGB. However, as guidance for its application, a discrepancy of 5-10% between the costs and the performance interest has been suggested, provided that the obligee is able to obtain performance from a third party[15].

[5] Jens Kröger, 'Vertrags- und AGB-Recht' in Ludwig Kroiß (ed), *Rechtsprobleme durch Covid-19* (Nomos, Baden Baden 2020) para 23.

[6] Zimmermann (n 1) 44.

[7] Emphasising the importance of the case-by-case analysis: Kröger (n 5) para 29.

[8] Liebscher, Zeyher and Steinbrück (n 4) 857. The same should hold true for purchase contracts limited to the seller's stock or production, on this, see Riehm (n 2) 19.

[9] Cf Riehm (n 2) 19.

[10] Riehm (n 2) 16.

[11] On the relation between s 275(2) BGB and s 313(1) BGB, see Zimmermann (n 1) 46 who notes that the latter is regarded as a "conceptually different problem". Distinguishing both statutes in the adequate comprehensiveness is beyond the scope of this report.

[12] According to s 275(2) BGB, the claim for performance is not suspended *ipso iure*, cf BGH NJW 2014, 213 (at 214).

[13] Riehm (n 2) 22f; cf Hondius and Grigoleit, 'Overview' (n 1) 58.

[14] Riehm (n 2) 23.

[15] As suggested by Riehm (n 2) 23. If obtaining performance by a third party is not possible, as guidance, the discrepancy should be between 10-20%. Of course, Riehm himself acknowledges that the definite threshold is to be assessed on a case-by-case basis.

In contrast, s 313(1) BGB has a seemingly broader scope of application. It addresses fundamental changes regarding the circumstances that the contract is based on[16]. Yet, s 313(1) BGB serves solely as a subsidiary safety net, which is why the existence of prevailing agreements or statutes deserves careful consideration[17]. In short, s 313(1) BGB establishes three requirements[18]. Firstly, there has to be a material change of the circumstances that the contract is based on (the "factual" element). Secondly, it is then necessary to establish that if the parties had foreseen this material change, they would have contracted under different terms (the "hypothetic" element)[19]. Finally, binding the disadvantaged party to the initial contractual terms must appear unreasonable (the "normative" element). The threshold for the latter requirement is distinctively strict[20]. A constellation of s 313(1) BGB that may prove relevant under the current circumstances is the dramatic surge of procurement prices, drastically increasing the seller's costs *and* the buyer's performance interest, thereby fundamentally altering the equilibrium of the contract[21]. As the legal consequence, the disadvantaged party may request an adaptation of the contract, or – if adaption is not feasible – terminate the contract[22].

I.3. Contractual Remedies

Turning to the scenario in which the debtor fails to perform[23]: Firstly, the obligee may then withhold his contractual performance, s 320(1) BGB. Secondly, after a reasonable period of grace set by the obligee[24], he may terminate the contract by declaration, s 323(1) BGB.

[16] Or, as it is phrased in German terminology: "*Störung der Geschäftsgrundlage*", cf s 313 BGB.

[17] See Jens Prütting, 'Wegfall der Geschäftsgrundlage als Antwort des Zivilrechts auf krisenbedingte Vertragsstörungen? Systemerwägungen zu § 313 BGB und sachgerechter Einsatz in der Praxis' in Daniel Effer-Uhe and Alica Mohnert (eds), *Vertragsrecht in der Coronakrise* (Nomos, Baden Baden 2020) 60 who emphasises that the hierarchy of statutes is to be assessed on an individual basis. Interestingly, Riehm (n 2) 15f suggests that the impact of Covid-19 regularly exceeds what has been anticipated by individual and statutory provisions on risk allocation, which is why resorting to s 313(1) BGB seems adequate. See further Marc-Philippe Weller, Markus Lieberknecht and Victor Habrich, 'Virulente Leistungsstörungen – Auswirkungen der Corona-Krise auf die Vertragsdurchführung' (2020) 73 *Neue Juristische Wochenschrift* 1017, 1022 who note that s 313(1) BGB has the benefit that it does not merely provide for a "all or nothing"-solution, given that its primary legal consequence is the adaptation of the contract.

[18] For the terminology of the criteria, see, eg, Prütting (n 17) 58.

[19] Accordingly, s 313(1) BGB is inapplicable if the relevant incident was foreseeable, cf BGH NJW 2014, 3439 (at 3442).

[20] On this threshold, see BGH NJW 1984, 1746 (at 1747: "unbearable consequences"); Kröger (n 5) para 31. For an instructive case study on the application of s 313(1) BGB, see Ewoud Hondius and Hans Christoph Grigoleit, 'The case studies' in Ewoud Hondius and Hans Christoph Grigoleit (eds), *Unexpected Circumstances in European Contract Law* (CUP, Cambridge 2011) 181-185.

[21] On this constellation, see, eg, Weller, Lieberknecht and Habrich (n 17) 1021f who appear to lean towards the application of s 313(1) BGB regarding the surge in market prices for sanitizers.

[22] Liebscher, Zeyher and Steinbrück (n 4) 859. For further remarks on the particularities of enforcing these rights in court, see Prütting (n 17) 59.

[23] On the following legal consequences, see Riehm (n 2) 26ff.

[24] In German: "Nachfrist". If the parties assign particular importance to the *timing* of performance, setting a "Nachfrist" is not necessary, see s 323(2) No 1 BGB (or for merchants s 376(1) of the German Commercial Code). It is subject to debate

Thirdly, upon termination, any performance already received is to be returned by both parties, s 346(1) BGB.

Fourthly, in assessing if the obligee may claim damages for non-performance, s 280(1), 283 BGB[25], or delayed performance, s 280(2), 286 BGB, the debtor's responsibility for his contractual breach is key[26]. According to s 276(1) BGB, the debtor bears responsibility for deliberate and negligent[27] acts unless the statutes or the contracting parties' agreement provide otherwise. Regarding the latter, in contracts for the market-related purchase of generic goods, the seller is deemed to have (impliedly) assumed the risk of procurement[28]. Arguably, however, the risk of procurement covers only typical risk but not unprecedented impediments caused by a pandemic[29]. The debtor might also be found not to be responsible for non-performance caused by business closures. This likely applies to closures by authorities but could equally apply to closures on the debtor's own initiative if they followed a thorough assessment of the pandemic's risks[30].

II. Illustrative Legislative Responses in the Wake of the Covid-19 Pandemic

The German legislator has further enacted new laws to address Covid-19, including the *Act to Mitigate the Covid-19 Pandemic in Civil-, Insolvency and Criminal Procedure Law* (hereafter: "Covid-19 Mitigation Act")[31]. This act has amended Art. 240 of the German *Introductory Act to the Civil Code* (hereafter: "EGBGB"). The provision now establishes the contractual rules occasioned by the Covid-19 pandemic. It entered into force on 1 April 2020[32].

whether s 326(5) BGB also allows for termination without a "Nachfrist" if s 275(1), (2) BGB suspends the performance claim only temporarily and thus by analogy. On this debate, see, eg, Riehm (n 2) 30f.

[25] As most impediments following Covid-19 will be temporary, s 283 BGB applies by analogy (*supra* n 2).

[26] This follows from s 280(1) BGB and s 286(4) BGB. Both provisions shift the burden of proof on the debtor. Accordingly, the debtor has to prove that he is *not* responsible for the contractual breach. However, the threshold for this is not overly strict, cf BGH NJW 1953, 59f (on the former law of obligations).

[27] Note that according to the statutory standard in s 276(2) BGB, a person acts negligently if he fails to exercise reasonable care.

[28] Cf BGH NJW 1972, 1702 (at 1703).

[29] See Riehm (n 2) 28 who raises this argument.

[30] This has at least been suggested by Weller, Lieberknecht and Habrich (n 17) 1019.

[31] See (2020) *Federal Law Gazette Part I* 565 ff. The Covid-19 Mitigation Act was adopted on 27 March 2020. For instructive case studies regarding the Covid-19 Mitigation Act, see Christian Wolf, Rainer Eckert, Christian Denz, Lissa Gerking, Alina Holze, Simon Künnen and Niels Kurth, 'Die zivilrechtlichen Auswirkungen des Covid-19-Gesetzes – ein erster Überblick' (2020) 52 *Juristische Arbeitsblätter* 401-411.

[32] See Art. 6(5) of the Covid-19 Mitigation Act. For an English translation of Art. 240 s 1-4 EGBGB, see, eg, <www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.html#p0219> accessed 25 October 2020. This contribution draws upon the English translation provided by the link above.

II.1. Temporary Moratoriums on "Essential" Continuous Obligations, Art. 240 s 1 EGBGB

Firstly, Art. 240 s 1 EGBGB enacts a moratorium for B2C contracts as well as for contracts concluded by microenterprises. In substance, both moratoriums are limited to contracts for continuous obligations that are "essential". Regarding their substantive scope of application, both further do not apply to lease agreements, loan agreements and entitlements under labour law[33]. Their temporal scope of application covers such obligations that were concluded before 8 March 2020[34]. The effect of both moratoriums expired on 30 June 2020[35].

a) Moratorium on Continuous Obligations in B2C Contracts

According to Art. 240 s 1(1) EGBGB, consumers may refuse performance of a claim in connection with a contract establishing an essential continuous obligation if they are not able to render performance without endangering their own decent livelihood or that of their dependants[36].

The law defines continuous obligations as "essential" if they are necessary to ensure an adequate supply of services of general interest for consumers[37]. This threshold is subject to an objective standard[38]. The drafting materials indicate that the legislation considers in particular contracts for electricity, gas, water and telecommunications to be essential[39]. The consumer further may only refuse performance if performance would endanger his or his dependants' decent livelihood. Arguably, consumers need to first exhaust any financial reserves to satisfy this threshold[40]. Finally, the provision mandates that the inability to per-

[33] See Art. 240 s 1(4) EGBGB.

[34] See Art. 240 s 1(1) EGBGB and Art. 240 s 1(2) EGBGB.

[35] Notably, Art. 240 s 4(1) No 1 EGBGB authorises the Federal Government to extend the application until no later than 30 September 2020. However, the Federal Government did not resort to an extension, see Holger Wendtland, 'Art. 240 § 1 EGBGB' in Christine Budzikiewicz et al, *Beck-Online Grosskommentar EGBGB* (CH Beck, Munich 2020) para 4. Cf also Lorenz Llyod Fischer,'Mit heißer Nadel gestrickt? Vertragsrechtliche Fragen des neuen Covid-19-Gesetzes' (2020) 35 *Verbraucher und Recht* 203, 205 who rightfully notes that in each individual case, the moratorium might have ceased to apply earlier if one of its requirements was no longer satisfied.

[36] For the legal definition of a consumer, see s 13 BGB; for a businessperson s 14 BGB. The personal scope of the moratorium is limited accordingly, on this, see Martin Schmidt-Kessel and Christina Möllnitz, 'Coronavertragsrecht – Sonderregeln für Verbraucher und Kleinstunternehmen' (2020) 73 *Neue Juristische Wochenschrift* 1103, 1104.

[37] See Art. 240 s 1(1) EGBGB.

[38] Llyod Fischer (n 35) 204; Schmidt-Kessel and Möllnitz (n 36) 1104.

[39] German Bundestag, 'Parliamentary Documentation (BT-Drucksache) No. 19/18110' 4. See also Ann-Marie Kaulbach and Bernd Scholl, 'Die vertragsrechtlichen Regelungen in Art. 240 EGBGB: Voraussetzungen, Rechtsfolgen, offene Fragen' in Daniel Effer-Uhe and Alica Mohnert (eds), *Vertragsrecht in der Coronakrise* (Nomos, Baden Baden 2020) 99 who emphasise that this enumeration is not conclusive and may well extend to further "essential" contracts.

[40] Schmidt-Kessel and Möllnitz (n 36) 1104; Bernd Scholl, 'Die vertragsrechtlichen Regelungen in Art. 240 EGBGB aus Anlass der COVID-19-Pandemie' (2020) 74 *WM Zeitschrift für Wirtschafts- und Bankrecht* 765, 766.

form has to be attributable to the multiplications of infections caused by Covid-19. To be attributable, an indirect nexus suffices[41].

b) Moratorium on Continuous Obligations of Microenterprises

Similarly, Art. 240 s 1(2) EBGB allows microenterprises to refuse performance under a contract for "essential" continuous obligations. Yet, there are several differences. The term "microenterprise" is defined as an enterprise which employs fewer than 10 persons and whose annual turnover or annual balance sheet total does not exceed EUR 2,0 million[42]. Besides, for microenterprises, continuous obligations are "essential" if they are necessary to ensure a supply of services that is adequate to continue the business. According to the drafting materials, the practical cases, nonetheless, should be mainly the same as described above[43]. Scholarly literature, however, suggests that this definition extends to a broader variety of contracts[44].

c) Shared Legal Consequences of Both Moratoriums

Turning to the legal consequences: Art. 240 s 1 EGBGB does not exempt the debtor *ipso iure*[45]. Instead, it grants a contractual defence, allowing the debtor to refuse performance until 30 June 2020[46]. Notably, the consumer or microenterprise remains entitled to performance[47].

Still, Art. 240 s 1(3) EGBGB subjects the right to refuse performance to a reservation. Consumers cannot invoke this right if non-performance endangers the economic foundation of the obligee's business. For microenterprises, this right does also not apply if non-performance endangers the obligee's or its dependants' decent livelihood. For consumers, however, scholars expect this caveat to be irrelevant in practice, given that suppliers of "services of general interest" are regularly financially robust enterprises[48]. If the right to refuse performance was excluded, the consumer or microenterprise is given a secondary right to terminate the contract[49].

[41] Kaulbach and Scholl (n 39) 103; Schmidt-Kessel and Möllnitz (n 36) 1104; Scholl (n 40) 766.

[42] See European Commission, 'Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises' OJ L 123/36, to which Art. 240 s 1(2) EGBGB refers.

[43] German Bundestag (n. 39) 4.

[44] See Scholl (n 40) 767 who names, eg, contracts for office supplies, service contracts with IT providers or warehousing contracts.

[45] Kaulbach and Scholl (n. 39) 105, Llyod Fischer (n 35) 204; Schmidt-Kessel and Möllnitz (n. 36) 1105.

[46] Notably, this contractual defence is mandatory and not subject to individual derogations, see Art. 240 s 1(5) EGBGB.

[47] Also allowing the other party to withhold performance of essential obligations would be incompatible with the moratorium's rationale of protecting the consumer or microenterprise. On this, see Riehm (n. 2) 18; Schmidt-Kessel and Möllnitz (n. 36) 1105.

[48] Kaulbach and Scholl (n. 39) 104f; Scholl (n. 40) 767.

[49] See Art. 240 s 1(3) EGBGB.

II.2. Temporary Restrictions on the Termination of Lease Agreements, Art. 240 s 2 EGBGB

The second amendment addresses a range of lease agreements. According to Art. 240 s 2 EGBGB, lessors are not permitted to terminate leases for land or premises on the mere ground that the tenant defaulted on rental payments from 1 April to 30 June 2020. This restriction is in effect until 30 June 2022[50].

For this to apply, the default on payments must follow from the Covid-19 pandemic. Compared to Art. 240 s 1 EGBGB, this threshold is less strict[51]. It follows from the systematic comparison that the tenant does not need to demonstrate that his decent livelihood or his business' economic foundation is endangered[52]. The exact threshold, again, depends on a case-by-case analysis. So far, scholars argue that it requires a significant increase in costs or a significant decrease in income, resulting in a shortage of liquidity[53]. If the threshold was to be tried in court, the tenant would benefit from the reduced burden of proof under s 294 of the German Civil Code of Procedure when proving the causal nexus to Covid-19[54].

As its legal consequence, Art. 240 s 2(1) EGBGB *only* restricts the lessor's right to termination following the lessee's default on the rental payment[55]. Nonetheless, the rental payment remains due[56]. This means that, firstly, the lessor may in principle claim interests or damages for delay in payment[57]. Secondly, other rights of termination remain unaffected.

At the same time, the newly enacted Art. 240 s 7 EGBGB codifies a statutory presumption, covering non-residential leases for land or premises. This presumption applies if, as a result of government measures combatting Covid-19, the lessee cannot use the leased land or premises for his operations or can only do so subject to severe impairments. According to this section, it shall then be presumed that this qualifies as a material change of the circumstances in the meaning of s 313(1) BGB. In other words, it establishes the factual element of s 313(1) BGB mentioned above. Naturally, this presumption is refutable.

II.3. Temporary Deferral of Payments in B2C Loan Agreements, Art. 240 s 3 EGBGB

The third amendment enacted by the Covid-19 Mitigation Act applies to consumer loan agreements in the meaning of s 491 BGB which were concluded before 15 March 2020.

[50] See Art. 240 s 2(4) EGBGB.

[51] Schmidt-Kessel and Möllnitz (n. 36) 1105; Scholl (n. 40) 768.

[52] Scholl (n. 40) 768; cf Schmidt-Kessel and Möllnitz (n. 36) 1105.

[53] Schmidt-Kessel and Möllnitz (n. 36) 1105f; Scholl (n. 40) 768.

[54] Scholl (n. 40) 768f; Silvio Sittner, 'Mietrechtspraxis unter Covid-19' (2020) 73 *Neue Juristische Wochenschrift* 1169, 1173.

[55] Schmidt-Kessel and Möllnitz (n. 36) 1106; Scholl (n. 40) 769.

[56] Schmidt-Kessel and Möllnitz (n. 36) 1106; Scholl (n. 40) 769.

[57] Schmidt-Kessel and Möllnitz (n. 36) 1106; Sittner (n. 54) 1173.

In this regard, Art. 240 s 3(1) EGBGB grants consumers a deferral of payment for three months for payments that were initially due from 1 April to 30 June 2020.
For this deferral of payment to apply, two preconditions must be met. Firstly, there has to be a loss of revenue on the side of the consumer due to "extraordinary circumstances" caused by the spread of Covid-19. Secondly, in view of this loss, expecting the consumer to perform the payment has to be considered unreasonable. The statute further specifies that the threshold for unreasonableness is met if, again, performance endangered the consumer's or his dependants' decent livelihood. By its plain letter, the threshold of Art. 240 s 3(1) EGBGB – demanding performance to appear unreasonable – seems less strict than the standard of Art. 240 s 1(1) EGBGB, *i.e.* (economical) inability to render performance[58]. As legal consequence, each monthly rate due from 1 April to 30 June 2020 is *ipso iure* deferred by three months. Besides, if the contractual interest rates apply to the period of deferral remains to be clarified[59]. Other than the former sections, Art. 240 s 3(4) EGBGB allows for and even encourages individual agreements by stipulating a dialogue between the parties[60]. Absent an individual agreement on its status after 30 June 2020, the loan agreement is *ipso iure* extended by three months[61].
Again, the deferral of payment does not apply if it appears unreasonable towards the lender after "giving due consideration to all the circumstances, including the changes of the general circumstances of life" brought about by Covid-19. Scholars doubt that changed circumstances on the part of a banking institution will meet the reasonability standard.[62] According to the drafting materials, however, it is also possible to include any prior misconduct by the consumer in the considerations on reasonability[63].

II.4. Recreational Events and Package Travel Contracts: Vouchers Instead of Refunds, Art. 240 s 5 EGBGB and Art. 240 s 6 EGBGB

Finally, Art. 240 s 5 EGBGB addresses contracts for the attendance of cultural, sporting or other recreational events as well as recreational facilities. If an organiser is forced to cancel an event or close a facility for reasons caused by Covid-19, and if the ticket holder purchased the ticket before 8 March 2020, the organiser is not held to refund the admission price. Instead, the organiser may opt to issue a voucher for future attendance. The

[58] Notably, however, Scholl (n. 40) 770 suggests that these differences might be the result of legislative time constraints rather than a deliberal decision. See also Tobias B Lühmann, 'Das Moratorium im Darlehensrecht anlässlich der Covid-19-Pandemie' (2020) 73 *Neue Juristische Wochenschrift* 1321, 1322 who suggests that the consumer needs to expend any (potential) financial reserves.

[59] See Scholl (n. 40) 771 who affirms their applicability. For the opposing view, see Llyod Fischer (n. 35) 208.

[60] According to Schmidt-Kessel and Möllnitz (n. 36) 1107, the lender has a statutory duty to offer a meeting. For the opposing view, see Scholl (n. 40) 771.

[61] See Art. 240 s 3(5) EGBGB.

[62] Scholl (n. 40) 770.

[63] Lühmann (n. 58) 1325f; Schmidt-Kessel and Möllnitz (n 36) 1107; Scholl (n. 40) 770.

attendee may only insist on reimbursement if his personal living conditions render a voucher unreasonable[64] or if he has not redeemed it by 31 December 2021[65]. It is worth noting, however, that some early commentators doubt the provision's compatibility with the constitutional guarantee of property[66]. In addition, Art. 240 s 6 EGBGB allows travel organisers of package travel contracts (cf s 651a BGB) to offer vouchers instead of refunds to their customers. In this case, however, the customer has the right to choose between the voucher or a refund. After the voucher's expiration, the customer may, again, request a refund.[67]

III. Outlook

Covid-19 raises questions in all areas of life and German contract law is no exception. As it has been observed that force majeure clauses are not frequently incorporated in contracts subject to German law[68], the answers will be found primarily in the statues. Traditional contract law already offers several bases to suspend performance. Regarding damage claims, the debtor's responsibility for non-performance has to be carefully assessed with view to the exogenous interference by the pandemic. Besides, the legislator has swiftly responded, enacting the Covid-19 Mitigation Act. Indeed, as scholars have criticised, Art. 240 EGBGB contains a significant number of undefined legal terms[69]. Still, it may well be these undefined legal terms that allow courts to address the unprecedented challenges adequately. Of course, this comes at a price, namely an undeniable degree of legal uncertainty. In the end, when assessing the impact of Covid-19 on liability, much will depend on a case-by-case analysis. While a generalised assessment seems uncalled for, it shall be noted that exempting parties from liability in individual cases does not seem too far-fetched, given that German contract law does not provide for strict liability but considers the debtor's individual responsibility.

[64] For remarks on the standard of reasonability in this context, see Liebscher, Zeyher and Steinbrück (n. 4) 856 who suggest that this threshold will be met if the attendance of the future event leads to significant additional costs for the attendee.

[65] See Art. 240 s 5(5) EGBGB.

[66] On this, see, eg, Henrik Eibenstein, 'Verfassungswidrigkeit der "Gutscheinlösung" im Veranstaltungsvertragsrecht' (2020) 1 *Covid-19 und Recht* 249, 253; Wolfgang Voit, 'Art. 240 § 5 EGBGB' in Wolfgang Hau and Roman Poseck (eds), *Beck'scher Online Kommentar BGB* (CH Beck, Munich 2020) para 2f; contra Alexander Bömer and Philip Nedelcu, 'Die Rückwirkung der Gutscheinlösung im Lichte des Verfassungs- und Intertemporalen Privatrechts' (2020) 20 *Neue Juristische-Online-Zeitschrift* 1217, 1220-1223.

[67] For a detailed analysis of Art. 240 s 6 EGBGB, see Klaus Tonner, 'COVID 19 und Reisegutscheine' (2020) 74 *Monatsschrift für Deutsches Recht* 1032-1037.

[68] This was observed by Kröger (n 5) para 8.

[69] Kaulbach and Scholl (n 39) 99, 144; Scholl (n 40) 766.

Articles

Covid-19 Pandemic and Greek Contract Law

Zafeirios N. Tsolakidis*

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* Facultad de Derecho, Universidad Panamericana, Alvaro del Portillo 49, Zapopan, Jalisco 45010, México.

I. The Covid-19 pandemic and its impact in contracts

The legislative act[1] "Urgent measures to prevent and limit the spread of coronavirus" was issued on February 25th, 2020 and on February 26th, 2020 the first case of Covid-19 coronavirus in Greece was confirmed. The World Health Organization declared the outbreak of Covid-19 as a pandemic on March 11th, 2020. Following the first legislative act, ten more and numerous ministerial decisions were issued, imposing measures which aimed at limiting the spread of the coronavirus by restricting social and trade contacts [suspension of the operation of businesses and shops, prohibition of activities, etc (lockdown)].

The pandemic itself, as well as the drastic regulatory measures taken to limit it, have had a direct or indirect effect on contractual relations in many different aspects. To name only a few, one could mention effect of the pandemic itself on contracts (e.g. inability of an enterprise to handle orders because its staff has fallen sick), effect of measures against the pandemic on contracts (e.g. failure to perform because the debtor's business was locked down) and legislation directly affecting existent contracts (e.g. legislative acts reducing the rent when the lessee's enterprise was locked down).

The purpose of this short essay is to present how the above-mentioned consequences of the pandemic[2] on existent contracts are regulated by Greek Law. For this purpose, three topics are examined: general contract law provisions on breach of contract that are applicable to regulate the effects of the pandemic; special regulation during the pandemic period which directly affects existent contracts; means that the contracting parties may use to face the effects of the pandemic on contracts.

II. General Contract Law Provisions

II.1. Impossibility

The proper and timely performance of contractual obligations has been hindered in a great extent, either directly by the pandemic, or because of the lockdown measures implemented by the State. In such cases, the debtor was not able to perform in time.

[1] According to art. 44 of the Greek Constitution, in urgent cases, the President, on proposal of the Cabinet, can issue legislative acts, which must be submitted to Parliament's approval within forty days of their adoption. The act was approved by Parliament by Law 4682/2020.

[2] Henceforth, mention to the effects of the pandemic on contracts shall be considered to cover both the direct effects of the Covid-19 pandemic itself and the effects of the special legislation that was implemented to face the pandemic (social distancing measures, enterprise lockdown etc).

In Greek law, by "impossibility" is meant irretrievable (not temporary) impossibility[3]. As a result, the above-mentioned delay would not lead to impossibility of performance. An exception would be accepted in two instances:
(a) In the case of fixed-day contracts, when the performance of the obligation is, by its nature, in accordance with the contractual purpose only within a specific period, while late fulfilment renders the performance useless for the creditor[4].
(b) When this is demanded by the principle of good faith (Art. 288 of the Greek Civil Code, henceforth GrCC), when, for instance, the nature of the performance is such that it would be of little use to the creditor if he were to wait for an undefined period of time.
In these cases, even the temporary delay of the debtor shall be considered *an impossibility to perform*. The debtor will not be at fault[5], since the impediment (the pandemic and the State measures) are to be considered a force majeure event[6]. Therefore, in the case of reciprocal contracts, according to art. 380 GrCC the debtor is released, and the creditor is also released from the duty to fulfill the counter-performance. If the counter-performance is already fulfilled, it is sought by means of the provisions of unjust enrichment (art. 904 GrCC).

II.2. Debtor's default

When the debtor delays fulfilling the performance, he is not necessarily in default, since he must be at fault for the delay (art. 342 GrCC). As it has already been noted, the delay because of the pandemic or of the State measures cannot be attributed to the debtor's fault. As a result, the debtor is not in default and the creditor is not entitled to rescind the contract.
However, art. 401 GrCC reads: "*If it has been agreed that the performance is to be fulfilled exclusively at a specific time or within a certain period, in case of doubt the creditor is entitled to rescind the contract because of the delay, regardless of the debtor's fault*". According to the Greek Supreme Court, the rule applies when "*the delayed fulfillment of the performance is feasible, and, possibly, useful to the creditor also at a later time, although it has been agreed that it cannot constitute proper fulfillment*"[7]. If this provision is met, the

[3] Stathopoulos, *Law of Obligations, General Part*, (5th ed., Sakkoulas 2018- in Greek) § 19 nr. 70; Ap. Georgiades, *Law of Obligations*, *General Part*, (2nd ed., P.N. Sakkoulas 2015-in Greek) § 24 nr. 39; Areios Pagos (Greek Supreme Court, henceforth AP), 514-515/2010.

[4] Stathopoulos, op. cit., § 17 nr. 15, § 19 nr. 71; Ap. Georgiades, op. cit., § 24 nr. 40, § 52 nr. 36; AP 1636/2018 1369/2007.

[5] However, it has to be noted that, as far as the lockdowns of autumn and winter of 2020 are concerned, this judgment is not certain. If contracts were concluded after the first lockdown (for example in the summer of 2020), the parties may have been expected to predict that the pandemic would continue and that financial operations would again be suspended in the future. As a result, the impossibility or the delay could be attributed to their fault.

[6] According to Greek jurisprudence, force majeure events are events that cannot be predicted or averted even by measures of extreme care and prudence. Indicatively AP 1059/2019; 275/2019; 599/2018.

[7] AP 1636/2018; 1369/2007. See also Stathopoulos, op. cit., § 21 nr. 104 ff.

creditor will be entitled to rescind, even though the delay because of the pandemic will not lead to the debtor's default.
Otherwise, the only solution for the creditor would be to refer to the principle of good faith and claim that, given the specific circumstances, it cannot be reasonably expected from him to tolerate the delay. However, given that, according to Greek Law, breach of contract requires fault, rescission grounded exclusively in the principle of good faith will only be accepted in exceptional cases.

II.3. Creditor's default

Non acceptance of the performance is termed "creditor's default". If the creditor does not accept the performance, or if he does not co-operate in the preparation of the offer and the fulfilment, he is in default, even if he is not at fault for the non-acceptance. Fault is not a condition for creditor's default[8]. As a result, if the creditor were unable to accept the performance because of the pandemic and the State measures (e.g. his enterprise was locked down), he would nonetheless be considered in default.
According to art. 381 par. 2 GrCC (which governs reciprocal contracts), if an impossibility of performance occurs while the creditor is in default, the debtor of the impossible performance is released, but the creditor continues to owe the counter-performance. This rule, however, is obviously disproportionate when the creditor was in default without being at fault, especially if the non-acceptance of the performance was a result of force majeure. As a result, the prevailing view accepts that, if the performance becomes impossible while the creditor was in default due to force majeure both the debtor and the creditor are released[9]. For instance, if a farm agreed to supply a hotel group with meat for Easter meals, and the hotels were unable to accept the performance due to the lockdown, not only will the farm be released from the obligation to provide the meat (since that was a fixed-day contract), but the hotel group will also be released from its obligation to pay the agreed price.

III. New regulatory provisions

In certain cases, the extraordinary legislative acts were not limited in restrictive measures, but directly regulated private law relations, establishing or altering existing rights and obligations. The purpose of the legislation in such cases was not the limitation of the pan-

[8] Stathopoulos, Op. cit., § 20 nr. 5; Ap. Georgiades, op. cit., § 27 nr. 2; Tsolakidis, in *Georgiades (ed.)*, Short Commentary of the GrCC I, Introd. 349-360 nr. 5.

[9] Stathopoulos, Op. cit., § 21 nr. 92 ff.; Ap. Georgiades, Op. cit., § 29 nr. 23; Chelidonis, in *Georgiades (ed.),* Short Commentary of the GrCC I, 381 nr. 15.

demic, but mainly the treatment of the economic consequences of the restrictive measures on certain categories of citizens, who are "severely affected"[10]. Indicatively[11]:

III.1. Contracts of Lease

According to the second article of the Legislative Act of 20.3.2020 (as amended by art. 26 of L. 4683/2020 and expanded by several laws, legislative acts and ministerial decisions) lessees in certain contracts of lease[12] are released from the obligation to pay the 40% of the total lease for the months of March and April 2020. Thus, the provision alters existing obligations, regarding *the object of the performance*. It is explicitly stated that "The partial non-payment of the rent referred to in the first subparagraph shall not give the lessor the right to terminate the contract or raise any other civil claim against the lessee". The legislator seems to have "split the damage" of the lockdown between the lessor and the lessee, since the lessee is not completely released, even if he was locked down[13]. The question whether either part may seek a (further) judicial adjustment of the rent remains open (see IV, 2).

III.2. Commercial papers

According to the second article of the Legislative Act of 30.3.2020, between March 30th and May 31st, all maturity dates and terms for presentation or payment of commercial papers (checks, bills of exchange, promissory notes etc) owed by enterprises which were locked down or "severely affected" by lockdown measures are prolonged for 75 days after the maturity date contained in each paper. In these cases, the obligation is not affected regarding its amount, but only regarding the day it falls due. However, the debtor is not hindered to pay before the prolonged maturity date. The provision was repeated in legislative acts, during the next lockdowns.

III.3. Flights, sea trips and travels

As mentioned above (II, 1), in case of an impossibility to perform in reciprocal contracts, if the debtor is not at fault, both he and the creditor are released. Performances already fulfilled are sought by means of the provisions of unjust enrichment. The provision of art.

[10] Enterprises which are considered "severely affected" and are entitled to several forms of State aid are defined by ministerial decisions; Karampatzos, State intervention in contracts and private law, Athens, 2020, p. 353 ff.

[11] See further Tsolakidis, Pandemic and private law: legislative intervention in existing relationships, Chronicles of Private Law (Journal) [2020], p. 391 ff.

[12] Lease of an immovable used for the carrying on in it a trade or other occupational activity, if the enterprise was locked down or severely affected by lockdown measures; financial leasing contracts of movables and immovables concluded by such enterprises; lease of an immovable used as a main residence of employees working in the above-mentioned enterprises, whose employment contract has been suspended by their employer during the lockdown; etc.

[13] According to art. 596 GrCC "*The lessee shall not be released from the obligation to pay the rent if he is prevented from using the leased thing for reasons relating to him*". Greek theory and jurisprudence conclude an e-contrario rule, that the lessee is released if he is prevented to use the leased thing by force majeure.

908 GrCC imposes the return of the "thing received": the enrichment is to be returned in natura.

According to the Legislative Act of 13.4.2020 (art. 61, 65, 70, 71) in case of a cancellation or termination of a flight, a sea trip, a package travel or a contract between tourist enterprises, the entity (airline, tour operator etc) that has received a counter payment has the right, instead of returning the counter payment, to issue a voucher with a duration of 18 months. It must be noted that the consent of the creditor for the issue of a voucher instead of the return of the enrichment in money is not necessary[14]. The effect of the issue of the voucher is that the monetary claim is not considered due and actionable. Henceforth, there are two options: If the receiver of the voucher uses it, the monetary claim is discharged; if the receiver does not use the voucher within the 18 month period, the monetary claim becomes due and actionable again and the creditor is entitled to seek the reimbursement.

III.4. Employment Contracts

Certain extraordinary provisions aim to aid employers that have been locked down, or seriously affected by the restrictive measures. For instance, they had to right to suspend the employment contracts of their staff during the lockdown (indicatively, art. 11 par. 2 of the Legislative Act of 20.3.2020). However, if they exercise that right, they are not allowed to terminate the employment contracts and are also obliged, after the suspension, to keep the same number of employees for a period equal to the suspension period. Respectively, employers who adopted a system of distance-(tele)working or exercised the right to move employers to other companies of a group are, as long as they retain the measure "expressly prohibited to terminate employment contracts for all their staff, and if they do so the termination is void". Similar provisions have been repeated throughout 2020, connecting State Aid to suspended enterprises with the protection of employment.

IV. Pandemic and contractual clauses

IV.1. Force majeure clauses

The contracting parts might have regulated the effect of force majeure events in their contract by adopting provisions regarding the adjustment of rights and obligations in case of unpredicted or unavoidable events. This would be the case with the internationally

[14] In this sense, it is highly likely that the regulation under discussion will be judged to contravene the European Union Legislation, since its provisions read that the issue of a voucher instead of monetary reimbursement requires the consent of the creditor [Art. 7 par. 3 of Regulation (EC) No 261/2004 of 11 February 2004; Art. 18 par. 3 of Regulation (EU) No 1177/2010 of 24 November 2010].

known as "hardship clauses" or "MAC clauses"[15]. Such clauses were really included in most contracts concluded during the second half of 2020, as a comeback of the pandemic was expected. The predictability of future lockdowns raises the question whether the pandemic could still be considered a force majeure event. However, it has to be noted that Greek jurisprudence, when defining force majeure events, emphasizes not mainly in their unpredictable but in their *unavoidable* nature "even with measures of extreme diligence and prudence"[16].

Art 332 par. 1 GrCC forbids clauses that exclude liability from willful conduct or gross negligence. Par. 2 extends the prohibition to limitation of liability for slight negligence, when, among others the exoneration was contained in a contract term which was not an object of individual negotiation. Art. 2 par. 7 L. 2251/1994 (on the protection of consumers) regards General Terms of Business as void if, among others, they "excessively preclude or limit the liability of the supplier". However, contractual regulation of the effects of force majeure events, as the current pandemic, will not probably be considered to be forbidden by these rules.

It is not certain that any hardship or MAC clause also covers the current pandemic. This judgement requires an interpretation of the clause, which (when Greek Law is applicable) is regulated by art 173 and 200 GrCC[17]. For instance, it is a matter of interpretation if the parts, that did not refer to a "pandemic" or a "health emergency", nor did they include a "catch-all provision" (such as "any similar cause beyond the debtor's control"), meant to exclude or limit liability also for cases similar to the covid-19 lockdown.

IV.2. Judicial adjustment

As has already been mentioned, the pandemic and the lockdown measures are to be considered events beyond the parties' control. Greek Law provides possibilities for a party to seek the judicial adjustment of an existing contract, under certain conditions. Specifically:

(a) Art. 388 GrCC lays down that when a change in the circumstances upon which the parties based the conclusion of a reciprocal contract has subsequently occurred, if the cases that have brought about the change were exceptional and unforeseen and, as a consequence, the performance of one of the parties has become excessively onerous, that party has the right to seek judicial adjustment or (total or partial) dissolution of the contract.

(b) The Greek jurisprudence accepts that, whenever the conditions of art. 388 GrCC are not met, there is a possibility of resorting to art. 288 GrCC (obligation to perform accord-

[15] See Karampatzos, Pandemic (Covid-19): Contractual relations and emergency law – in particular force majeure clauses, Chronicles of Private Law [2020], 378 ff.

[16] AP 1059/2019; 275/2019; 599/2018.

[17] Art. 173 reads: "When interpreting a declaration of will, the true intention shall be sought, without adherence to the words". Art. 200 reads: "Contracts shall be interpreted according to the requirements of good faith, considering also common usage".

ing to the principle of good faith). This is considered the case when the change was not completely unforeseen, but the turn of events exceeded the risk that the parties calculated and undertook, or when the performance has not become impossible, but still the balance between performance and counter performance has changed to an extent that contravenes good faith[18].

The above mentioned rules will most probably ground claims for adjustment of continuous contracts (long term-leases, credit contracts, service contracts) on the basis that the pandemic, and the financial recession which will follow constitutes a material, unforeseen change of circumstances, which severely altered the balance between performance and counter-performance, and justifies the judicial (ex nunc) adjustment of the contract.

[18] AP (plenum) 3/2014; AP 1396/2019; 1088/2017; 334/2015; 1353/2013; 806/2012.

Articles

The Impact of Covid-19 in Mexican Contract Law

Edgardo Muñoz, Romina Guarneros*

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* Universidad Panamericana, Guadalajara

I. Introduction

This report will briefly examine the impact that the pandemic of Covid-19 is having on Mexican contract law in three levels: business to business (B2B), consumer to consumer (C2C) and business to consumer (B2C) transactions. Section II of this report will focus on new regulations enacted, particularly from some administrative agencies, as well as measures taken, in particular by banks and financial institutions, to deal with the circumstances brought by Covid-19 and their possible impact on current contracts[1]. And finally, section III will analyze whether Mexican contract law, in its different statutes and case law, could be applied to deal with those new circumstances.

The health crisis is putting pressure on Mexican law aiming at addressing impediments to perform existing contracts. Mexican law endorses the principle of *pacta sunt servanda*, whereby contracts must be followed irrespective of any change in circumstances affecting their performance. However, Mexican regulatory agencies and important private stakeholders have issued different directives and guidelines that would allow the postponement or modification of some current contractual terms. Similarly, some rules of exception exist, under Mexican contract law, that may release one party from liability due to impediments to perform under doctrines of force majeure, fortuitous event or hardship.

II. Administrative regulations enacted and private stakeholders' initiatives to encourage or force contract performance in times of Covid-19

Except for the State of *Baja California Norte*[2], there has not been statutory law changes in Mexico to deal with the circumstances brought by Covid-19. This lack of legislation has been contrasted with other legal systems[3]. However, some regulatory agencies have enacted special directives that will be examined relevant to the performance of existing contracts. Also, some important private stakeholders' in Mexico's economy have voluntarily made concessions in order to promote contract performance. We will analyse these public and private measures in the following subsections.

[1] The report is updated until 15 July, 2020.

[2] Baja California Norte's State Congress approved a reform in a transitory article 1986 of the Civil Code of said state, to establish the suspension of payments in housing and business leases, during the months of April and May 2020.

[3] Lexlatin, 'Resumen Legal Covid-19 Latinoamérica: 13 de julio de 2020', <https://lexlatin.com/noticias/medidas-legales-covid-19-latinoamerica> accessed 14 July 2020.

2.1. The main Federal Directive by the Federal Health Secretariat

By Directive dated 24 March 2020, the General Health Secretariat considered the epidemic caused by Covid-19 in Mexico as a serious disease of priority and enacted different measures of preparation, prevention and control of the epidemic[4]. The General Health Secretariat announced that its Department of Health would be responsible for defining the modalities, dates and territorial cooperation with other Secretariat of the Federal Government and the Federal Legislative and Judicial Branches. In addition, it urged the governments of the 32 Mexican States to establish hospital reconversion plans and immediate expansion of capacity, in order to guarantee timely attention to patients in need of hospitalization. It is noted that in Mexico, the Department of Health is the federal public administration unit that plays the most important role in contingencies and is entrusted with the vast majority of decisions.

On 30 March 2020, the Mexican Federal Government declared a "Health Emergency due to Force Majeure" caused by Covid-19[5]. It confirmed that the Department of Health of the Health Secretariat was to be responsible for determining all actions that may be necessary to address the emergency[6]. Since then, the country has transited through all three phases of contagion and the number of infections and death continues to increase[7]. Among the measures for contenting the spread of Covid-19, the Federal Government announced the start of a contingency program called *Jornada de la Sana Distancia* (healthy distance journey)[8]. This program provides for a temporary suspension of non-essential activities of the public, social and private sectors, during the period from 23 March until 15 June 2020[9]. As in other countries, this contingency program has caused a considerable deficit in the

[4] Official Journal of the Federation 'Acuerdo por el que el Consejo de Salubridad General reconoce la epidemia de enfermedad por el virus SARS-CoV2 (Covid-19) en México, como una enfermedad grave de atención prioritaria, así como se establecen las actividades de preparación y respuesta a dicha epidemia', <https://www.dof.gob.mx/nota_detalle.php?codigo=5590161&fecha=23/03/2020> accessed 16 April 2020.

[5] Official Journal of the Federation 'Acuerdo por el que se declara como emergencia sanitaria por causa de fuerza mayor, a la epidemia de enfermedad generada por el SARS-CoV2 (Covid-19)', <https://www.dof.gob.mx/nota_detalle.php?codigo=5590745&fecha=30/03/2020> accessed 16 April 2020.

[6] Inter-American Human Rights Commission, 'Resolución 1/2020 Pandemia y Derechos Humanos en las Américas' <https://www.oas.org/es/cidh/decisiones/pdf/Resolucion-1-20-es.pdf> accessed 17 April 2020; indicates that in terms of containment measures to confront and prevent the effects of the pandemic, the IACHR has observed that some rights have been suspended and restricted, and in other cases 'states of emergency', have been declared through presidential decrees in order to protect public health and avoid an increase in contagion. In addition, measures of various kinds have been established that restrict the rights of freedom of expression, the right of access to public information, personal freedom, the inviolability of the home and the right to private property; and it has been required to use surveillance technology to track the spread of coronavirus, and the storage of data on a massive scale.

[7] Data as of 15 July 2020, see Government of Mexico, 'Covid-19 México- Mapa Municipal' <https://coronavirus.gob.mx/fHDMap/mun.php> accessed 14 July 2020.

[8] Government of Mexico 'Jornada Nacional de Sana Distancia' <https://www.gob.mx/cms/uploads/attachment/file/541687/Jornada_Nacional_de_Sana_Distancia.pdf> accessed 18 April 2020.

[9] Forbes, 'Se extiende cuarentena por coronavirus hasta el 30 de mayo: López-Gatell' <https://www.forbes.com.mx/noticias-cuarentena-hasta-30-mayo-coronavirus-covid-19/> accessed 17 April 2020.

economy; companies have gone bankrupt or/and breached their contracts due to cash flow problems and unexpected expenses.

The catalogue of essential activities included only basic supplies and inputs, private and public security, financial and collection systems, public transport and telecommunications, shelters and emergency services, and medical and funeral services[10]. Most micro, small and medium businesses were unable to operate during the contingency, and many people had to stay at home[11] and comply with health measures. This caused both temporary and permanent problems, since a large part of employment and economy in the country has already been suffering the consequences of economic recession[12]. Consequently, on 14 May 2020, the Federal Government issued an resolution establishing a strategy for the reopening of social, educational and economic activities, through a system of 'traffic lights' by regions to weekly evaluate the epidemiological risks related to the reopening of activities in each state[13]. However, the possibility to reopen the economy and to what extent to do so is currently being discussed, and new emergency measures are being considered to combat the spread of the virus. For example, the implementation of an 'emergency button' by the governor of the State of Jalisco, which would stop all economic activities in the State for a 14-day period if hospital occupancy reaches 50%[14].

2.2. Real estate and business loan contracts with banks

In April 2020, Mexico's National Banking and Securities Commission (CNBV) and the main banks and financial institutions agreed on the issuance of provisional measures to address the contingency caused by Covid-19 on loans. Under the package of measures, banks agreed to the partial and/or total deferral of capital and interest payments for up to four months, with the possibility of extending it for an additional two months, with respect to the total amount due including accessories. In addition, balances would be frozen with-

[10] Official Journal of The Federation, 'Acuerdo por el que se establecen acciones extraordinarias para atender la emergencia sanitaria generada por el virus SARS-CoV2' <https://www.dof.gob.mx/nota_detalle.php?codigo=5590914&fecha=31/03/2020&print=true.> accessed 17 April 2020.

[11] Department of Health, 'Quédate en casa' <https://coronavirus.gob.mx/quedate-en-casa> accessed 17 April 2020.

[12] National Institute of Statistics and Geography, 'INEGI presenta resultados de la Encuesta Nacional sobre Productividad y Competitividad de las Micro, Pequeñas y Medianas Empresas (ENAPROCE) 2018. Comunicado de prensa núm. 448/19. Septiembre 2019', <https://www.inegi.org.mx/contenidos/saladeprensa/boletines/2019/especiales/ENAPROCE2018.pdf> accessed 17 April 2020.

[13] Official Journal of the Federation, 'ACUERDO por el que se establece una estrategia para la reapertura de las actividades sociales, educativas y económicas, así como un sistema de semáforo por regiones para evaluar semanalmente el riesgo epidemiológico relacionado con la reapertura de actividades en cada entidad federativa, así como se establecen acciones extraordinarias', <https://dof.gob.mx/nota_detalle.php?codigo=5593313&fecha=14/05/2020> accessed 14 July 2020.

[14] El Informador, 'El gobernador activará el Botón de Emergencia', <https://www.informador.mx/ideas/El-gobernador-activara-el-Boton-de-Emergencia-20200714-0025.html> accessed 14 July 2020.

out interest as long as the credit was classified as current and there was no delay in the monthly payments[15].

The supporting measures were to be applicable to housing loans with mortgage as security, revolving and non-revolving loans addressed to individuals, such as automobile loans, personal loans, payroll loans, credit cards and microcredits[16]; as well as business loans addressed to legal entities or individuals with business activities in different modalities, including agricultural ones[17]. On the other hand, loan contracts with public housing organisms such as INFONAVIT continue to offer credits with the aim of boosting the real estate market; the possibility of contracting exists, however derived from the uncertainty in the general economy, there was reticence from people to hire new loans[18].

The above measures proved to be necessary in light of the already difficult economic scenarios forecasted for Mexico. Mexico is expected to experience an economic drop of 10.5% in its GDP by the end of 2020 by the International Monetary Fund[19]. Mexico's Federal Government has invested a very law percentage of its annual budget in an containment plan to tackle the health crisis[20]. Therefore, even with postponement of interest payments in housing and business, many people in this country will be unable to meet their contractual obligations in the near future.

2.3. Housing and business lease agreements

Many parties to a lease contract, both in C2C and B2B relationships, have been seriously affected during the health crisis. No specific legislative measures have been taken by the Federal or State Governments to support or to stabilize the rental real estate market dur-

[15] Government of Mexico, 'Medidas implementadas por diversas autoridades financieras en beneficio de la situación económica de los usuarios de Productos y Servicios Financieros', <https://www.gob.mx/condusef/articulos/diversas-autoridades-financieras-implementan-medidas-en-beneficio-de-los-usuarios-de-productos-y-servicios-financieros?idiom=es> accessed 18 April 2020.

[16] Official Journal of The Federation, 'Acuerdo por el que se adicionan los transitorios de las Reglas de Operación del Programa de Microcréditos para el Bienestar 2020', <https://www.dof.gob.mx/nota_detalle.php?codigo=5591656&fecha=15/04/2020> accessed 18 April 2020.

[17] Mexican Bank Association, 'Medidas de Apoyo en la Banca Mexicana en beneficio de acreditados afectados por COVID-19', <https://www.abm.org.mx/sala-de-prensa/comunicados-prensa.htm> accessed 17 April 2020.

[18] Official Journal of The Federation, 'Reglas de Operación del Programa de Vivienda Social 2020' <https://www.dof.gob.mx/nota_detalle.php?codigo=5585435&fecha=04/02/2020> accessed 18 April 2020; CONEVAL highlights that approximately 73.6 million Mexicans are practically excluded from the formal housing market by not receiving household income equivalent to more than five minimum wages.

[19] International Monetary Fund, 'World Economic Outlook Update, June 2020', <https://www.imf.org/en/Publications/WEO/Issues/2020/06/24/WEOUpdateJune2020> accessed 14 July 2020.

[20] El Financiero, 'Gobierno triplica gasto en salud para atender COVID-19', <https://www.elfinanciero.com.mx/economia/gobierno-triplica-gasto-en-salud-para-atender-covid-19> accessed 14 July 2020. However, it still remains among the 5 countries in Latin America with the least resources allocated to contain the crisis by Covid-19. See El Financiero, 'México está entre los 5 países de Latinoamérica que menos recursos destina a contener crisis por Covid-19', < https://www.elfinanciero.com.mx/economia/mexico-esta-entre-los-5-paises-de-latinoamerica-que-menos-recursos-destina-a-contener-crisis-por-covid-19> accessed 14 July 2020.

ing the pandemic[21]; except for Congress in the State of Baja California Norte, where article 1986 of the local Civil Code was amended in order to establish the suspension of payments in housing and business leases during the months of April and May 2020[22].

The lack of measures in the rental market has caused a considerable deficit in the economy. Companies have gone bankrupt or temporary closed their businesses after firing some or all of its employees. Some businesses have identified the fixed rental costs of their premises and the lack of cash flow from sales as the major elements that cause them to breach their payment obligations under lease contracts. The **excessive onerosity** in performing the payment obligation under many lease contracts could be assessed pursuant to State civil codes' provisions on hardship. However, most State courts remain closed from mid-March to this date, making it impossible for affected parties to seek remedies, renegotiation or adaptation of those lease contracts in State statutory laws.

In practice, tenants have appealed to the magnanimity of landlords to renegotiate their lease agreements on the basis of the force majeure or acts of God circumstances brought by the spread of Covid-19 and the consequential measures taken by the government to protect the health of the population. Many tenants, advised by their lawyers, have relied on existing case law, specifically *tesis aislada* number 2020827 by a Collegiate Circuit Court, that upheld the possibility in State civil codes to terminate the lease without liability for the parties or to request a reduction of rents in cases of acts of God or force majeure; however, such precedent is not yet binding in other courts[23].

2.4. Medical and Unemployment Insurance Agreements

Insurance contracts are regulated in Mexico by the Insurance Contract Act. Due to the fact that about half of Mexico's population lives in poverty[24], the standard cost of medical and

[21] El Sol de México, 'Buscan dar prórroga a renta habitacional y empresarial ante Covid-19: Sheinbaum' <https://www.elsoldemexico.com.mx/metropoli/cdmx/buscan-dar-prorroga-a-renta-habitacional-y-empresarial-cdmx-ante-covid-19-coronavirus-claudia-sheinbaum-5051140.html> accessed 18 April 2020; the Head of Government of Mexico City, called on the landlords to make extensions at these times when people need them and to allow people and companies not to have this additional pressure to what is being experienced by the lower income that many families are receiving because of the Coronavirus: .

[22] Congress of Baja California, Legislative Branch, 'Decreta Congreso suspender obligaciones de pago de arrendamiento de vivienda y negocios de servicios al público para los bajacalifornianos', <https://www.facebook.com/congresobc.poderlegislativo/photos/a.523519737768139/2819191394867617/?type=3> accessed 18 April 2020.

[23] Semanario Judicial de la Federación, 'Arrendamiento Inmobiliario. La acción de rescición procede sin responsabilidad para ninguna de las partes cuando la cosa arrendada se ve afectada por un hecho fortuito o causa de fuerza mayor', Tribunales Colegiados de Circuito, Tesis Aislada 2020827, Libro 71, October 2019, Tomo IV. <https://sjf.scjn.gob.mx/sjfsist/paginas/DetalleGeneralV2.aspx?Epoca=1e3e10000000000&Apendice=1000000000000&Expresion=arrendamiento%2520inmobiliario.%2520Caso%2520fortuito&Dominio=Rubro,Texto&TA_TJ=2&Orden=1&Clase=DetalleTesisBL&NumTE=1&Epp=20&Desde=-100&Hasta=-100&Index=0&InstanciasSeleccionadas=6,1,2,50,7&ID=2020827&Hit=1&IDs=2020827&tipoTesis=&Semanario=0&tabla=&Referencia=&Tema=> accessed18 April 2020.

[24] With some 120 million inhabitants, official numbers from 2018 indicate that there are 52.4 million people living in poverty in Mexico and 9.3 million in extreme poverty. See Consejo Nacional de Evaluación de la Política de Desarrollo Social, 'Pobreza en México', <https://www.coneval.org.mx/Medicion/Paginas/PobrezaInicio.aspx> accessed 14 July 2020.

unemployment insurance is not affordable for all citizens. In fact, a low percentage of the population holds a private health insurance[25]. Still, on 26 March 2020, the National Insurance and Bonding Commission (CNSF) and the Mexican Insurance Institutions Association (AMIS) entered into an agreement whereby an extension of deadlines for compliance with AMIS' regulatory obligations was granted by the CNSF so that the former could focus on the attention of their policy holders during Covid-19 times. CNSF granted several concessions to AMIS in return for AMIS' inclusion of coverage of illness derived from the Covid-19 in their insurance policies and the extension of deadlines for the payment of insurance fees by loyal and vulnerable policyholders without penalty or cancellation of policies[26].
On 31 March 2020[27], CNSF released a series of recommendations to insurance companies aiming the continuing of their role to support the economy during the Covid-19 pandemic. CNSF requested insurance companies to stop any payment of gains and profits to their shareholders, as well as any mechanism that would entail a transfer of capital benefits to them or an irrevocable commitment to pay any amount for the fiscal years 2019 and 2020, including the distribution of reserves, or to carry out share buybacks or any other mechanism aimed at rewarding shareholders. It is important to mention that such guidelines are not mandatory; therefore, it is up to the insurance companies to follow the suggestions made by the Commission.
Upon CNSF's recommendation, some insurance companies announced a full coverage for medical expenses caused by Covid-19, except if the policyholder would move to a place considered a State of Emergency by the World Health Organization[28]. Others announced that they would cover the illness caused by Covid-19 but subject to the insurance plan contracted by the policyholder, which could have been of multiple costs and categories[29].
In conclusion, CNSF has offered different concessions to insurance companies in consideration of Covid-19 being covered in individual policies. However, the current eco-

[25] Puentes-Rosas, E., Sesma, S., Gómez-Dantés, O. 'Estimación de la población con seguro de salud en México mediante una encuesta nacional', Salud Pública de México, <http://saludpublica.mx/index.php/spm/article/view/4685/5157> accessed 14 July 2020.

[26] Government of Mexico, 'Comunicado No. 30 CNSF informa facilidades regulatorias temporales para instituciones de Seguros por Contingencia del Covid-19', <https://www.gob.mx/shcp/prensa/comunicado-no-030-cnsf-informa-facilidades-regulatorias-temporales-para-instituciones-de-seguros-por-la-contingencia-del-covid-19> accessed 18 April 2020.

[27] Government of Mexico, 'Comunicado No. 032 CNSF informa las recomendaciones realizadas a Instituciones de Seguros y de Fianzas derivadas de la contingencia Covid-19', <https://www.gob.mx/shcp/prensa/comunicado-no-032-cnsf-informa-las-recomendaciones-realizadas-a-instituciones-de-seguros-y-de-fianzas-derivadas-de-la-contingencia-covid-19> accessed 18 April 2020.

[28] For instance, Allianz Mexico, AXA, METLIFE, PAN-AMERICAN and *Plan Seguro, see* Government of Mexico, 'Programas de Apoyo a Clientes de Instituciones de Seguro', <https://www.gob.mx/cms/uploads/image/file/576905/APOYO_ASEGURADORAS_8_abril.jpg> accessed 17 April 2020.

[29] For instance, on the other hand, the insurance companies Prevem Seguros, *Seguro Ve Por Más*, *Seguro Integral Salud Nova*, *Seguros Monterrey, Seguros Sura* and Zurich, see Government of Mexico, 'Programas de Apoyo a Clientes de Instituciones de Seguro', <https://www.gob.mx/cms/uploads/image/file/576905/APOYO_ASEGURADORAS_8_abril.jpg> accessed 17 April 2020.

nomic recession continues to be an obstacle for the access to high quality health services. Most people in Mexico hold public health insurance. In 2018, around 42.2 percent of the Mexican population was covered by the public health insurance program called "*Seguro Popular*", while almost 37 percent were insured with the Mexican Social Security Institute (IMSS), including its "*Prospera*" program. This public health insurance is, nevertheless, insufficient to protect the health of the population.

2.5. Domestic service contracts

In Mexico, persons who carry out paid care, cleaning, assistance or any other activity inherent to a household on a permanent basis are entitled to the benefits and rights afforded under the Federal Labour Act, including a written collective labour contract, access to medical services by the IMSS and support for housing by the Workers' Housing Fund Institute, etc. In addition, persons who provide support for household cleaning only sporadically and occasionally must sign a domestic service contract, which is regulated by section 2,605 of the local State civil codes.

The Directive[30] and the Decree[31] of 24 March 2020 contained rules for the prevention of Covid-19 affecting domestic workers and providers of domestic services. The rules provide for the temporary suspension of activities involving the transit or displacement of persons, mainly those who are 65 years old, pregnant women or women who are breastfeeding, and who suffer from chronic diseases such as high blood pressure, pulmonary disease, renal failure, lupus, cancer, diabetes *mellitus*, obesity, liver or metabolic failure, heart disease, or any disease or drug treatment that suppresses their immune system. It should be mentioned that while these rule are applicable to persons engaged in other types of activity, domestic helpers are mostly exposed when travelling on public transport and are required to come into contact with surfaces that could contain the virus.

The underlying problem with this rule is that it cannot be easily enforced against employers. In Mexico, the labour or civil relations for this type of activity are rarely formalised in a document with evidential value. Sometimes, no reliable evidence exits to prove the scope or terms of the labour or service relationship. On this matter, empirical experience has shown that during the pandemic transit restrictions, some vulnerable household workers continue to attend their jobs fearing to lose them in case of absence, though such an absence would be justified under the Government's directive and decree. On the other hand, some employers simple dispense with the services of their domestic employees fear-

[30] Official Journal of The Federation, 'Acuerdo por el que se establecen las medidas preventivas que se deberán implementar para la mitigación y control de los riesgos para la salud que implica la enfermedad por el virus SARS-CoV2 (Covid-19)', <https://www.dof.gob.mx/nota_detalle.php?codigo=5590339&fecha=24/03/2020> accessed 16 April 2020.

[31] Official Journal of The Federation, 'Decreto por el que se sanciona el Acuerdo por el que se establecen las medidas preventivas que se deberán implementar para la mitigación y control de riesgos para la salud que implica la enfermedad por el virus SARS-CoV2 (Covid-19)', <https://www.dof.gob.mx/nota_detalle.php?codigo=5590340&fecha=24/03/2020> accessed 18 April 2020.

ing to get infected by them, suspending their payment obligations at will or because the employers had also been economically affected by the pandemic.

III. General Contract Law

The Mexican Government's Declaration of Health Emergency due to Force Majeure meant that many businesses, channels of communication, the transport of goods and other society's stakeholders would temporary stop, or at least slowdown, their activities.[32] Contracts, which performance was expected to take place in the weeks or months to come after such Declaration, were affected by uncertainty. Jurists in the country, as elsewhere as around the world, immediately focused their attention at the provisions on impediments to perform in different statutory laws and the scared public precedents on the matter. In this section, we will present the current rules that govern unexpected impediments and change of circumstance in the performance of contracts in Mexico and their potential application in times of Covid-19. There are four different layers of statutes relevant to this question in Mexico, which application depends on the type of parties involved, either Consumer to Consumer (C2C), Business to Business (B2B), Business to Consumer (B2C) or international traders. We will address them in turn.

3.1. C2C domestic contracts and impediments to perform

Mexico is a Federal Republic composed of 32 independent States[33]. Each State of the Federation has an exclusive prerogative to legislate on civil matters, including C2C contract law, family law, property law, personal status, etc., through their own Civil Code[34]. For instance, contracts of lease between a landlord who may not be constantly in the leasing business and a tenant of property for personal or family use is considered a C2C contract governed by a local Civil Code. The same applies to the sale of land or goods between two individuals who are not regularly in the real estate business or trade for profit. The State civil codes in Mexico contain general provisions on the law of obligations and govern different types of contracts like sale, lease, turnkey, barter, service, etc.

All States' Civil Codes contain the traditional rule on force majeure and fortuitous event that excuse a party from liability due to impossibility to perform its obligations. For instance, Article 2111 of the Civil Code for the State of Mexico City provides that "no party is bound to perform in case of fortuitous event, except when it has contributed to it or

[32] Official Journal of the Federation 'Acuerdo por el que se declara como emergencia sanitaria por causa de fuerza mayor, a la epidemia de enfermedad generada por el SARS-CoV2 (Covid-19)', <https://www.dof.gob.mx/nota_detalle.php?codigo=5590745&fecha=30/03/2020> accessed 16 April 2020.

[33] Mexico City is the Capital of Mexico, where the Government hosts the powers of the union, that is the executive, legislative and judicial branches. Political division of Mexico consists of 32 states.

[34] In Mexico there are as many civil codes as Federated States.

when it has expressly accepted such risks or when the law imposes such risks on it"[35]. This provision was influenced by former Article 1148 of the French Civil Code of 1804[36]. In addition, Article 2431 of the Civil Code for the State of Mexico City provides that "[i]f, by fortuitous event or force majeure, the tenant is totally prevented from using the leased object, no rent will be incurred for the duration of the impediment, and if it lasts more than two months, he may request the termination of the contract".

In view of the lack of definition of "fortuitous event" and "force majeure" in these and similar statutory provisions, Mexican courts have been drawing the contours of these notions throughout the years. Today, there is consensus that "fortuitous event" and "force majeure" are synonymous to the extent that both relate to an absolute impossibility to perform since "it is not enough that performance of obligations is made more difficult"[37].

In that regard, Mexican courts have considered that:

"[i]rrespective of the doctrinal understanding that may be adopted regarding the concepts of force majeure and fortuitous event, it cannot be denied that their essential elements and their effects are the same. They refer to incidents of the nature or human conduct, unknown by the debtor, that affect him in his legal relationships; that prevent him, temporally or definitively, to perform, partially or totally, an obligation; being such fact non-imputable, directly or indirectly, to his fault, and which effects cannot be avoided with the means that his social environment would provide him with, in order to prevent the event or to oppose it and resist it"[38].

Mexican law requires that the impossibility appears after the formation of the contract and from an unforeseeable event[39]. This means that if the performance of the obligation was already impossible before the contract's formation, the rule of fortuitous event or force majeure does not apply but rather that on initial impossibility that renders the contract void. It also means that within the ordinary understanding of an average man, it was not possible to foresee at that time that the event would occur. In addition, it must be an event insurmountable or irresistible. This means that the same event or fact impedes the debtor or any other person to perform under all circumstances. In spite of such a case law evolu-

[35] Article 2110 Civil Code for Mexico City: "Nadie está obligado al caso fortuito sino cuando ha dado causa contribuido a él, cuando ha aceptado expresamente esa responsabilidad, o cuando la ley se la impone".

[36] Former Article 1148 of the French Civil Code: '*Il n'y a lieu à aucuns dommages et intérêts lorsque, par suite d'une force majeure ou d'un cas fortuit, le débiteur a été empêché de donner ou de faire ce à quoi il était obligé, ou a fait ce qui lui était interdit*'.

[37] Collegiate Circuit Tribunals, Registry: 197162, Source, *Semanario Judicial de la Federación*, Vol. VII, January 1998, Thesis: II.1o.C.158 C, pag.1069.

[38] Supreme Court of Justice, Auxiliar Chamber, Registry: 245709, Source, *Semanario Judicial de la Federación*, Volumen 121-126, p. 81.

[39] Mexico Collegiate Tribunals, *Novena Época,* Registry 197'162, SFJ VII, January 1998, at 1069.

tion on the notion and elements of force majeure and fortuitous event, parties are free to redefine these concepts and by assuming certain risks under their contract[40].

Under Mexican law, the effect of a 'legitimate' impossibility under force majeure or fortuitous event discharges the debtor of his obligation to perform. The impossibility extinguishes the contracted obligations and releases the debtor from any liability for breach of contract[41]. The consequence is clearly stated in Article 1847 of the Civil Code of Mexico City whereby a penalty clause cannot be enforced, and other damages cannot be claimed, when the debtor was unable to fulfil his obligations under the contract due to fortuitous event or insurmountable force[42]. On the basis of a contractual relationship, the unwinding of the contract operates automatically and retroactively. The restitution of the already performed obligations is then due and subject to the rules on unjustified enrichment. Judicial intervention only takes place if one of the parties refuses to give back the received performance.

In addition, fourteen of the 32 States' Civil Codes contain a rule addressing change of circumstances that occurred after the conclusion of the contract that make performance excessively onerous or difficult (*teoría de la imprevisión*)[43]. For instance, Article 1787 of the State of Jalisco's Civil Code allows for the review or termination of contracts in civil matters when extraordinary, unforeseeable events beyond the parties control arise that unbalance the agreement, making it more burdensome to comply with its obligations[44].

A party whose performance of obligations in a C2C contract has been affected by an absolute impediment may rely upon the force majeure and fortuitous event provisions in the different States' civil codes. An example may be the factory of non-essential products or services that has been forced to close by the Federal Government's Decree. In addition, a party in a C2C long term contract which has become too unbalanced, may explore the possibility to claim readjustment of its terms under the doctrine of hardship.

[40] Collegiate Tribunals, *Novena Época,* Registry 197163, SJF VII, January 1998, at 1069.

[41] Mexico Supreme Court, *Séptima Época, Tercera Sala,* SJF 139-144, Part 4, at 80.

[42] Mexico Collegiate Tribunals, *Novena Época,* Registry 173722, SJF XXIV, December 2006, at 1378.

[43] See the civil codes of Aguascalientes (arts. 1733-1734), Chihuahua (art. 1691 a-f), Ciudad de México (arts. 1796-1797), Coahuila (arts. 2147-2159), Estado de México (arts. 7.35-7.36), Guanajuato (art. 1351.III), Jalisco (arts. 1787-1788), Sinaloa (Arts. 1735 Bis-Bis B), San Luis Potosí (arts. 1633.2-.3) and Tamaulipas (art. 1261); see also the civil codes of Veracruz, Quintana Roo, Guerrero and Morelos; see also Fausto Rico Álvarez, Patricio Garza Bandala, 'Teoría de la Imprevisión' [2010] Revista Mexicana de Derecho <https://revistas-colaboracion.juridicas.unam.mx/index.php/rev-mexicana-derecho/article/view/14083/12572> accessed 18 April 2020; the authors point out that the principle *pacta sunt servanda* determines the obligatory nature of legal conventions. 'Agreements are made to be kept', the original purpose of which was to compel the parties to honour their word even when it was not covered by the formalities required by the legal system. The principle or clause *rebus sic stantibus* authorises the non-observance or alteration of an agreement under the law when the conditions existing at the time of its fulfilment are significantly different from those prevailing at the time of its conclusion.

[44] Article 1787 Civil Code of Jalisco: "when in long-term or successive deal businesses, extraordinary events arise breaking with the reciprocity, equity or good faith of the parties, a party may claim the rebalance of the terms and if the does not agree, may choose to terminate the contract.

3.2. B2B domestic contracts and impediments to perform

A contract is categorized as B2B, when as such it constitutes an act of commerce, within the definition established by the Federal Code of Commerce, irrespective of the type of persons performing such acts[45]. Generally, an act of commerce pursues a goal of economic speculation or a profit purpose[46], which does not need to be expressed in the contract but which is rather assessed on a case by case basis[47]. In practice, most transactions passed between traders or companies are B2B and hence primarily governed by the provisions of the Code of Commerce[48]. Ordinarily, traders are defined as persons and/or commercial companies that make commerce their ordinary profession[49]. But even though contracts passed between traders are presumed to be B2B ones, a trader may be able to demonstrate that he did not pursue a goal of economic speculation or intended a profit purpose for a particular transaction, so that the transaction can be characterized as C2C or B2C.

B2B issues are considered Federal matters under Mexico's Constitution and, accordingly, the Code of Commerce applies throughout the country's territory to contracts made between traders. As the Code of Commerce is not comprehensive regarding all matters that can arise under a contractual relationship, a Federal Civil Code supplements it. The Federal Civil Code also contains provisions identical to Articles 2111 and 2431 of the Civil Code for the State of Mexico City[50]. The case law reviewed above about the notions of force majeure and fortuitous event also applies to the Federal Civil Code. This is true with regard to its requirements and consequences: only impossibility releases a party from its obligations and exempts it from damages for failure to perform.

Neither the Code of Commerce nor the Federal Civil Code contain provisions on hardship. Accordingly, it has been considered that one of the general principles of B2B deals in Mexico is that the circumstances that modify the economy of the contract do not affect its validity or enforceability[51]. In other words, the parties are bound by the obligations agreed upon during and until the complete fulfilment of the B2B contract, irrespective of any change of the circumstances[52].

Therefore, in the face of unforeseeable circumstances brought by Covid-19 that make performance impossible, a party in a B2B contract may claim an exemption to perform under

[45] Article 75 Code of Commerce.

[46] Articles 75 (I, II, II), 371 Code of Commerce.

[47] Collegiate Tribunals, *Novena Época*, Registry 174'773, SJF XXIV, July 2006, at 1169.

[48] Collegiate Tribunals, *Novena Época*, Registry 186'332, SJF XVI, August 2002, at 1256.

[49] Art. 3(I) Code of Commerce.

[50] Articles 2111 and 2431 Federal Civil Code.

[51] Mexico Supreme Court, *Séptima Época*, *Tercera Sala*, Registry 240782 SJF 139-144, part 4, at 29; Mexico Collegiate Tribunals, *Novena Época*, Registry 195622, SJF VIII, September 1998, at 1217; Mexico Collegiate Tribunals, *Novena Época*, Registry 195621, SJF VIII, September 1998, at 1149.

[52] Collegiate Tribunals, *Novena Época*, Registry: 186972, Source: Semanario Judicial de la Federación y su Gaceta, Tomo XV, may de 2002, Tesis: I.8o.C. J/14, p. 951.

the rules on force majeure and fortuitous event in the Federal Civil Code. However, an unforeseeable unbalance or excessive onerousness in a B2B Contract may be insufficient to be exempted, since the theory of hardship does not apply in B2B transactions governed by Mexican law.

3.3. B2C domestic contracts and impediments to perform

B2C issues are considered Federal matters under Mexico's Constitution and, accordingly, the Federal Act for Consumers' Protection applies throughout the country's territory. As the Act for Consumers' Protection is not comprehensive regarding all matters that can arise under a B2C contract relationship, the Federal Civil Code supplements it. The Federal Civil Code also contains provisions identical to Articles 2111 and 2431 of the Civil Code for the State of Mexico City. The case law reviewed above, regarding the notions of force majeure and fortuitous event, also applies to the Federal Civil Code. The same is true with regard to the requirements and consequences: only impossibility releases a party from its obligations and exempts it from damages for failure to perform.

Accordingly, in the face of unforeseeable circumstances brought by Covid-19 that make performance impossible, a party in a B2C contract may claim an exemption to perform under the rules on force majeure and fortuitous event in the Federal Civil Code. However, an unforeseeable unbalance or excessive onerousness in a B2C Contract may be insufficient to be exempted, since the theory of hardship does not apply in B2C transaction governed by Mexican law.

3.4. International Sale of Good Contract (CISG) and impediments to perform

The Mexican Government Directive dated 24 March 202[53], foresaw the conclusion of Government contracts that allow for the acquisition, at a national or international level, of medical equipment, diagnostic agents, surgical and curative material and hygiene products, as well as all types of goods that are necessary to deal with the contingency.

The implementation of this measure is essential, since the health system needs to have sufficient medical supplies to manage the contingency; in this regard, it has been identified that on 10 April 2020, the second shipment was received with medical supplies from China, consisting of one million nine hundred thousand surgical masks and one hundred and eighty thousand KN95 masks, which were intended to supply the Institute of Health for Welfare[54].

[53] Official Journal of The Federation, 'Decreto por el que se declaran acciones extraordinarias en las regiones afectadas de todo el territorio nacional en materia de salubridad general para combatir la enfermedad grave de atención prioritaria generada por el virus SARS-CoV2', <https://www.dof.gob.mx/nota_detalle.php?codigo=5590673&fecha=27/03/2020> accessed 18 April 2020.

[54] Government of Mexico, 'Frente a COVID-19, llega a México segundo embarque con equipo de protección para personal de salud', <https://www.gob.mx/presidencia/prensa/frente-a-covid-19-llega-a-mexico-segundo-embarque-con-equipo-de-proteccion-para-personal-de-salud?idiom=es> accessed 18 April 2020.

In addition to these international contracts aim at acquiring goods to tackle the pandemic, other existing deals could have been affected by Covid-19. A global pandemic like Covid-19, an earthquake, a flood, a terrorist attack, may suddenly increase import tariffs in one of the production countries, force the producer to resort to countries with much higher production costs; import or export bans due to Covid-19 may hinder the envisaged flow of goods; or price fluctuations that were not foreseeable at the time of the conclusion of the contract may make the performance by the seller unduly burdensome or may devaluate the contract performance for the buyer. Unexpected changes of circumstances may constitute one of the major problems parties face in international trade, especially for those in long term or complex contracts. Covid-19 has augmented the likelihood for greater imponderables given the involvement of multiple actors and elements from different countries.

The 1980 UN Convention on the International Sale of Goods (CISG) does not contain a specific provision dealing with questions of hardship. Article 79 CISG relieves a party from paying damages only if the breach of contract was due to an impediment beyond its control.

However, the terms of the contract should be the starting point to determine whether impediments to perform exist and their consequences. The parties may expressly or impliedly agree upon the allocation of the risk of events leading to force majeure or hardship. They may also agree upon the relevant threshold of impediments and the remedies that the aggrieved party may be entitled to. Different hardship model clauses are available for this purpose[55], including the 1985, 2003 and 2020 editions of the ICC Force Majeure Hardship Clause[56]. This determination is done by contract interpretation pursuant to Article 8 CISG. The CISG Advisory Council Opinion No. 7 already determined that Article 79 CISG covers both force majeure and hardship situations[57]. Opinion No. 7 addresses the drafting history of Article 79[58], where the question whether economic difficulties should give rise to an

[55] See for example, Clause 16.3 (Hardship) of Standard Model Contract for International Commercial Sale of Goods and Clause 9.4 of the International Long-Term Supply of Goods, by International Trade Centre (ITC), 'Model Contracts for Small Firms: Legal Guidance for Doing International Business' [Geneva: ITC, 2010] 54, 55, 70, 71, <http://www.intracen.org/WorkArea/DownloadAsset.aspx?id=37603> accessed 14 July 2020; See clauses in Patrick Ostendorf, 'International Sales Terms' [München: Hart Publishing, 2014] 121; and Ulrich Magnus 'Application of Boilerplate Clauses under German Law', in Giuditta Cordero-Moss (ed.), *Boilerplate Clauses, International Commercial Contracts and Applicable Law* (London: Cambridge University Press, 2011) 206, 07.

[56] ICC, Force Majeure and Hardship, Paris 1985 [ICC Publ No. 421]; ICC Force Majeure Clause 2003 and ICC Hardship Clause 2003, Developed by the ICC Commission on Commercial Law and Practice, Draftsman-in-chief: Charles Debattista, ICC Publication No. 650, ICC Publishing, 2003 (ICC Force Majeure and Hardship Clause 2003); 'ICC Force Majeure And Hardship Clauses March 2020', <https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf> accessed 14 July 2020.

[57] CISG AC Opinion No. 7, 'Exemption of Liability for Damages Under Article 79 of the CISG', Rapporteur: Professor Alejandro Garro [12 Oct 2007], Rule 3.2. Comment para. 38.

[58] CISG AC Opinion No. 7, *op. cit.*, Rule 3.1. Comment paras. 29 and 30. See also Christoph Brunner, 'Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration', 216; Yeşim Atamer, 'Article 79', in Stefan Kröll, Loukas Mistelis, and Pilar Perales Viscasillas (eds.), *UN Convention on Contracts for the International Sale of Goods – Commetary* [2nd ed., München: Hart Publishing, 2018] 1088, para. 78.

exemption was highly controversial[59]. This background led some scholars to argue that there was no room to consider hardship under Article 79 CISG[60], specially during the first years after the coming into force of the Convention[61]. Yet, there was no clear exclusion of hardship among the events leading to exemption under Article 79 CISG[62].

Today, however, it is more or less unanimously accepted in court and arbitral decisions[63], as well as in scholarly writings[64], that Article 79 CISG governs different types of impediments to perform, including hardship. Accordingly, there are no legal grounds to resort to domestic concepts of force majeure or hardship[65], as there is no gap in the CISG regarding the debtor's invocation of economic impediments[66].

Article 79(1) CISG provides that a party is exempted from liability for damages only if the failure to perform is due, first, to an impediment beyond its control, second, that it could

[59] See Brunner, *op. cit.*, 1088, para. 78.

[60] CISG AC Opinion No. 7, *op. cit.,* Rule 3.1. Comment para. 26, citing Barry Nicholas, 'Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods', in *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, § 5.02, 5-4, Parker School of Foreign and Comparative Law, Columbia University, Galston N.M., Smit, H. (eds.), [1984], <http://cisgw3.law.pace.edu/cisg/biblio/nicholas1.html> accessed 14 July 2020 .

[61] Scholars taking this view include: Bernard Audit, 'La Vente Internationale de Marchandises. Convention des Nations Unies du 11 avril 1980', [Paris, LGDJ], 174,75 cited by Brunner, *op. cit.*, 216, fn. 1100; Nicholas, *op. cit.*, 5-4; Denis Tallon, in Michael Bianca-Bonell, *Commentary on the International Sales Law*, [Giuffrè: Milan, 1987], para. 3.1.2, <http://www.cisg.law.pace.edu/cisg/biblio/tallon-bb79.html> accessed 14 July 2020.

[62] The Norwegian delegation proposed that paragraph 3 of Article 65 of the 1978 UNCITRAL Draft Convention should be changed in the following way: "[…] Nevertheless, the party who fails to perform is permanently exempted to the extent that, after the impediment is removed, the circumstances are so radically changed that it would be manifestly unreasonable to hold him liable". See the Norwegian proposal (A/CONF.97/C.1/L.191/Rev.1) in United Nations Conference on Contracts for the International Sales of Goods, Vienna, 10 March-11 April 1980 [Official Records, New York, 1981] 381.

[63] However, courts have often decided that the equilibrium of the contract was not fundamentally altered. Therefore, the alleged impediment was non-existent. See Bulgarian Chamber of Commerce and Industry, [12 February 1998], CISG-online Case No. 436; Rechtbank van Koophandel, Hasselt, [2 May 1995], CISG-online Case No. 371; Tribunale Civile di Monza, [29 March 1993], CISG-online Case No. 102; Cour d'Appel de Colmar, [12 Jun 2001], CISG-online Case No. 694; Hof van Cassatie, [19 June 2009], CISG-online Case No. 1963 granting a right to renegotiate the contract to a seller for a 70% price increase in steel after the conclusion of the contract, Separate Award, SCC Arbitration No. V2014/078/080, [31 May 2017], CISG-online Case No.4683. para.2662

[64] In addition to CISG AC Opinion No. 7 see Ingeborg Schwenzer, 'Article 79', *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG),* 4th ed., Oxford University Press [2016], 1142, para. 31; Peter Schlechtriem, Petra Butler, 'UN Law on International Sales at 203, para. 91; Brunner, *op. cit.,* 213; Atamer, *op. cit.,* 1088, para. 79; John Honnold, Harry Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention,* 4th edition, Kluwer Law International, 627, para. 432.2; John Lookofsky, *Understanding the CISG*, 4th ed., [Law & Business: Wolters Kluwer, 2012] 150, para. 6.32; Yasutoshi Ishida, 'CISG Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness – Full of Sound and Fury, but Signifying Something', [Pace International Law Review 331 2018], 364, 65.

[65] Honnold & Flechtner, *op. cit.* 615, 27, paras. 425, 32.2; Schwenzer, 'Article 79', *op. cit.,*1142, para. 31; Separate Award, SCC Arbitration No. V2014/078/080, [31 May 2017], CISG-online Case No.4683. para.2662 (as an argument of the Respondent [Gazprom] that the Arbitral Tribunal neither contradicted nor expressly accepted).

[66] Harry Flechtner, 'The Exemption Provisions of the Sales Convention Including Comments on Hardship Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court', 97; taking a different view see Tribunale Civile di Monza, [14 January1993], CISG-online Case No. 540.

not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract and, third, to have avoided or overcome it or its consequences[67]. Hardship may be regarded as a special type of "impediment" under Article 79 CISG; all that is added on the level of prerequisites is a clarification of the term impediment. The mere fact that performance has been rendered more onerous than could reasonably have been anticipated at the time of the conclusion of the contract does not exempt a party from performing the contract[68].

Pursuant to Article 79(4) CISG, a party failing to perform shall provide timely notice of the impediment and its effect on his ability to perform[69]. This requirement is an expression of the underlying principle of cooperation in CISG contracts; it is intended to alert the other party on whether it should itself take remedial action, reduced damages and/or – when a fundamental breach exists – avoid the contract[70]. This notice requirement applies to hardship situations and follows the same objectives as other types of impediments[71].

Article 79(5) CISG relieves the disadvantaged party only from the obligation to pay damages[72]. Other CISG principles, including reasonableness of performance (Articles 46 and 48 CISG) and the need to interpret in good faith the remedies available to the parties (Article 7(1) CISG)[73] may also have an impact on releasing the disadvantaged party from its obligation to perform the contract while the impediment exists. Among the remedies not affected by an exemption under Article 79 CISG are the other party's right to suspend performance (Art. 71 CISG), reduce the contract price (Art. 50), avoid the contract (Arts. 48(1) and 64(1) CISG) or any of its installments (Art. 73 CISG), claim interest (Art. 78 CISG) or expenses incurred in the preservation of the goods (Arts. 85 and 86 CISG)[74].

As stated in CISG-AC Opinion No. 7, if the non-performance is due to an impediment under Article 79 CISG, the disadvantaged party is relieved, first and foremost, from its obligation to pay damages during the time such impediment exists[75]. The same damages'

[67] Regarding force majeure, Art. 7.1.7(1) UNIDROIT PICC; Art. 8:808(1) PECL; Art. III – 3:104(1) DCFR are practically identical to Article 79(1); Art. 89 PLACL. The same holds true for the ICC Force Majeure Clause. However, the latter gives a list of events that may amount to an impediment.

[68] Ewan Mckendrick, 'Article 6.2.1' in Stefan Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2nd ed., Oxford University Press, 2015, 812, para. 1; Schwenzer, 'Article 79', *op. cit.,* 1135, para 15.

[69] CISG AC Opinion No. 7 *op. cit.,* Comment para. 1.

[70] Atamer, *op. cit.,* 1077, para. 95; Brunner, *op. cit.* 342.

[71] Ingeborg Schwenzer, Pascal Hachem, Christopher Kee, *Global Sales and Contract Law*, Oxford University Press [2012] 672, para. 45.108.

[72] Flechtner, *op. cit.*, 201.

[73] Diana Akikol, 'Article 46', in Benjamin Gottlieb, Christoph Brunner (eds.), *Commentary on the Un Sales Law* [The Netherlands: Wolters Kluwer, 2019] 348, para. 14; Atamer, *op. cit.,* 1053, para. 39.

[74] Schwenzer, 'Article 79', *op. cit.* 1151, para. 56; Honnold & Flechtner, *op. cit.*, 640, para. 435.4; Brunner, *op. cit.*, 366.

[75] CISG AC Opinion No. 7 *op. cit.*, Rule 1. Comment para. 6; Brunner, *op. cit.*, 345; Atamer, *op. cit.*, 1060, para.13; Schwenzer, 'Article 79', *op. cit.*, 1148, para. 50; Schwenzer, *Global Sales*, *op. cit.,* 663, para. 45.60. One author asserts that express exemption to pay damages was not necessary because an impediment under article 79 CISG would fall under the cat-

exemption should follow from a court's or arbitral tribunal's determination of hardship[76]. As stated in CISG-AC Opinion No. 10, the exemption to pay damages under Article 79 CISG includes an exemption to pay the so-called "agreed sums", *i.e.* penalty clauses or liquidated damages (if they are at all valid under the governing domestic law), unless the parties have agreed otherwise in their contract[77].

Whether the exemption under Article 79 CISG also extends to the right to request performance has been a subject of considerable debate because of the wording of Article 79(5) CISG[78]. This provision states that nothing prevents either party from exercising any right other than to claim damages under the Convention[79]. The wording of 79(5) CISG would suggest that a party to the contract may claim, in principle, specific performance in spite of the impediment endured by the other. At the Vienna Conference, a proposal by the German delegation aimed at clarifying that performance could not be insisted on in case of a continued impediment was rejected[80]. It was considered that no problem would arise in practice in case the disadvantaged party suffered actual impediments, whereas the categorical removal of the right to performance could impair the accessory rights of the other party[81]. Nowadays it seems to be undisputed that performance cannot be demanded as

egory of unforeseeable damages under 74 CISG, see Ishida, *op. cit.*, 340. However, Ishida seems to miss the point that the foreseeability requirement in Article 74 CISG regards the damages as a possible consequence of the breach rather than the breach itself or the impediment causing the latter. He also forgets that the CISG remedies system follows the strict liability approach and that Article 79 works as an exoneration of liability rather than a damages' limitation provision.

[76] Regarding the UNIDROIT PICC some authors seem to have a different view. Commenting Article 6.2.3 PICC, McKendrick considers that hardship does not in itself exclude the defendant's liability for non-performance, see Mckendrick, *op. cit.*, 821, para. 10. He cites a CAM Arbitral Award, holding that Article 6.2.3 PICC does not provide the remedy of damages' exemption but a duty to renegotiate, the remedy of contract adaptation or termination by the Tribunal; and since the breaching party did not request any of those remedies, the Tribunal decided not to exempt it from damages, skipping a determination of whether hardship had taken place. In spite of such incorrect understanding, it seems clear that once hardship is found and a court or tribunal decides to adapt a contract or terminate it upon a party's request, the latter should be exempted to pay any damages arising out of the contract modification or termination, see Arbitral Award [30 November 2006], Centro de Arbitraje de México, para. 251, UNILEX, <http://www.unilex.info/case.cfm?pid=1&do=case&id=1149&step=FullText> accessed 14 July 2020.

[77] CISG-AC Opinion No. 10, 'Agreed Sums Payable upon Breach of an Obligation in CISG Contracts', Rapporteur: Dr. Pascal Hachem, [2012], Rule 5; see also Pascal Hachem, 'Agreed Sums Payable Upon Breach of an Obligation: Rethinking Penalty and Liquidated Damages Clauses', *International Commerce and Arbitration*, Eleven International Publishing, 2011, 138; Brunner, *op. cit.*, 346, 47.

[78] Atamer, *op. cit.*, 1061, paras. 16, 17; Schwenzer, 'Article 79', *op. cit.*, 1050, para. 53.

[79] Article 8:101(2) PECL clearly states that where a party's non-performance is excused, alongside with the right to claim damages, the right to performance is likewise excluded. See Article 8:101 PECL '(2) Where a party's non-performance is excused under Article 8:108, the aggrieved party may resort to any of the remedies set out in Chapter 9 except claiming performance and damages.'

[80] Ishida, *op. cit.*, 343, 44.

[81] See Document A/CONF.97/C.1/L.191/Rev.1 in United Nations Conference on Contracts for the International Sales of Goods, Vienna, 10 March-11 April 1980 (Official Records, New York, 1981) 381. Schwenzer, 'Article 79',*op. cit.*, 1050, para. 53.

long as the impediment exists[82]. The same consequences should follow in case of hardship, which is a type of impediment[83].

IV. Conclusion

As of today, no drastic combat measures have been issued in Mexico for Covid-19, such as the absolute closure of borders (either land, sea and/or air, as other countries in the region have done), or restricting the transit and freedom of Mexicans through, for example, a suspension of individual constitutional guarantees. However, the Federal Government's Decree that temporarily limited the production, commerce and social events with a catalogue of essential and non-essential activities could have impaired the ability of many parties to perform their obligations under existing contracts. At an international level, similar or more drastic measures from other governments (such as border closure or mandatory quarantine) could also directly affect the performance of contracts under Mexican law, including the CISG. Complications derived from these measures could be considered as impediments under Mexican law, either under the notions of force majeure, fortuitous event or hardship depending on the availability of each doctrine for the type of transaction, *i.e.* C2C, B2B or B2C.

In light of the current situation, where Governments' around the world are enacting emergency directives or new measures to stop, again, the spread of Covid-19, new extraordinary circumstances may justify the update of a "hardhsip" also for B2B contracts in Mexico. As the law stands today, each contract must be analyzed and determined whether it is affected by impediments under Mexican law on a case-by-case basis. Perhaps the most prudent advice is to carry out an exhaustive review of the Covid-19 effects on current business relationships and negotiate a way out that is favorable to all affected contractual parties.

V. References

Akikol, D., 'Article 46', in Gottlieb, B., Brunner, C. (ed.), Commentary on the Un Sales Law [The Netherlands: Wolters Kluwer, 2019].

[82] Atamer, *op. cit.,* 1065, para. 27; Honnold & Flechtner, *op. cit.*, 642, para. 435.5; Ishida, 449-51; Peter Huber, 'Article 46', in Loukas Mistelis, Stephan Kroll, Pilar Perales-Viscasillas (eds.), *UN Convention on Contracts for the International Sale of Goods* [Hamburg: C.H.BECK, HART, NOMOS, 2018] 678, para. 19.

[83] Schwenzer, 'Article 79', *op. cit.*, 1150, 51, para. 55; Huber, *op. cit.,* 879, para. 23; Akikol, *op. cit.*, 348, 49, para. 14; Atamer, *op. cit.,* 1052, para. 35.

Atamer, Y. 'Article 79', in Stefan Kröll, Loukas Mistelis, and Pilar Perales Viscasillas (eds.), UN Convention on Contracts for the International Sale of Goods – Commetary' [Second ed.; München: Hart Publishing, 2018].
Audit B., 'La Vente Internationale de Marchandises. Convention des Nations Unies du 11 avril 1980' [Paris, LGDJ].
Brunner, C., 'Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration'.
CISG AC Opinion No. 7, 'Exemption of Liability for Damages Under Article 79 of the CISG', Rapporteur: Professor Alejandro Garro [12 Oct 2007].
CISG-AC Opinion No. 10, 'Agreed Sums Payable upon Breach of an Obligation in CISG Contracts', Rapporteur: Dr. Pascal Hachem, [2012].
Collegiate Circuit Tribunals, Registry: 197162, Source, Semanario Judicial de la Federación, Vol. VII, January 1998, Thesis: II.1o.C.158 C, pag.1069.
Collegiate Tribunals, Novena Época, Registry 174'773, SJF XXIV, July 2006, at 1169.
Collegiate Tribunals, Novena Época, Registry 186'332, SJF XVI, August 2002, at 1256.
Collegiate Tribunals, Novena Época, Registry 197163, SJF VII, January 1998, at 1069.
Collegiate Tribunals, Novena Época, Registry: 186972, SJF XV, May 2002, Tesis: I.8o.C. J/14, p. 951.
Congress of Baja California, Legislative Branch, 'Decreta Congreso suspender obligaciones de pago de arrendamiento de vivienda y negocios de servicios al público para los baja-californianos', <https://www.facebook.com/congresobc.poderlegislativo/photos/a.523519737768139/2819191394867617/?type=3> accessed 18 April 2020.
Consejo Nacional de Evaluación de la Política de Desarrollo Social, 'Pobreza en México', <https://www.coneval.org.mx/Medicion/Paginas/PobrezaInicio.aspx> accessed 14 July 2020.
Department of Health, 'Quédate en casa' <https://coronavirus.gob.mx/quedate-en-casa> accessed 17 April 2020.
El Financiero, 'Gobierno triplica gasto en salud para atender COVID-19', <https://www.elfinanciero.com.mx/economia/gobierno-triplica-gasto-en-salud-para-atender-covid-19> accessed 14 July 2020.
El Financiero, 'México está entre los 5 países de Latinoamérica que menos recursos destina a contener crisis por COVID-19', < https://www.elfinanciero.com.mx/economia/mexico-esta-entre-los-5-paises-de-latinoamerica-que-menos-recursos-destina-a-contener-crisis-por-covid-19> accessed 14 July 2020.
El Informador, 'El gobernador activará el Botón de Emergencia', <https://www.informador.mx/ideas/El-gobernador-activara-el-Boton-de-Emergencia-20200714-0025.html> accessed 14 July 2020.
El Sol de México, 'Buscan dar prórroga a renta habitacional y empresarial ante COVID-19: Sheinbaum' <https://www.elsoldemexico.com.mx/metropoli/cdmx/buscan-dar-prorroga-a-renta-habitacional-y-empresarial-cdmx-ante-covid-19-coronavirus-claudia-sheinbaum-5051140.html> accessed 18 April 2020.

Flechtner, H., 'The Exemption Provisions of the Sales Convention Including Comments on Hardship Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court'.
Forbes, 'Se extiende cuarentena por coronavirus hasta el 30 de mayo: López-Gatell' <https://www.forbes.com.mx/noticias-cuarentena-hasta-30-mayo-coronavirus-covid-19/> accessed 17 April 2020.
Government of Mexico 'Jornada Nacional de Sana Distancia' <https://www.gob.mx/cms/uploads/attachment/file/541687/Jornada_Nacional_de_Sana_Distancia.pdf> accessed 18 April 2020.
Government of Mexico, 'Comunicado No. 032 CNSF informa las recomendaciones realizadas a Instituciones de Seguros y de Fianzas derivadas de la contingencia COVID-19', <https://www.gob.mx/shcp/prensa/comunicado-no-032-cnsf-informa-las-recomendaciones-realizadas-a-instituciones-de-seguros-y-de-fianzas-derivadas-de-la-contingencia-covid-19> accessed 18 April 2020.
Government of Mexico, 'Comunicado No. 30 CNSF informa facilidades regulatorias temporales para instituciones de Seguros por Contingencia del COVID-19', <https://www.gob.mx/shcp/prensa/comunicado-no-030-cnsf-informa-facilidades-regulatorias-temporales-para-instituciones-de-seguros-por-la-contingencia-del-covid-19> accessed 18 April 2020.
Government of Mexico, 'Covid-19 México- Mapa Municipal' <https://coronavirus.gob.mx/fHDMap/mun.php> accessed 14 July 2020.
Government of Mexico, 'Frente a COVID-19, llega a México segundo embarque con equipo de protección para personal de salud', <https://www.gob.mx/presidencia/prensa/frente-a-covid-19-llega-a-mexico-segundo-embarque-con-equipo-de-proteccion-para-personal-de-salud?idiom=es> accessed 18 April 2020.
Government of Mexico, 'Medidas implementadas por diversas autoridades financieras en beneficio de la situación económica de los usuarios de Productos y Servicios Financieros', <https://www.gob.mx/condusef/articulos/diversas-autoridades-financieras-implementan-medidas-en-beneficio-de-los-usuarios-de-productos-y-servicios-financieros?idiom=es> accessed 18 April 2020.
Government of Mexico, 'Programas de Apoyo a Clientes de Instituciones de Seguro', <https://www.gob.mx/cms/uploads/image/file/576905/APOYO_ASEGURADORAS_8_abril.jpg> accessed 17 April 2020.
Government of Mexico, 'Programas de Apoyo a Clientes de Instituciones de Seguro', <https://www.gob.mx/cms/uploads/image/file/576905/APOYO_ASEGURADORAS_8_abril.jpg> accessed 17 April 2020.
Hachem. P., 'Agreed Sums Payable Upon Breach of an Obligation: Rethinking Penalty and Liquidated Damages Clauses', *International Commerce and Arbitration*, Eleven International Publishing, 2011.
Honnold, J., Flechtner, H., 'Uniform Law for International Sales'.
Huber, P., 'Article 46', in Mistelis, L., Kroll, S., Perales-Viscasillas, P. (ed.), UN Convention on Contracts for the International Sale of Goods [Hamburg: C.H.BECK, HART, NOMOS, 2018].

Inter-American Human Rights Commission, 'Resolución 1/2020 Pandemia y Derechos Humanos en las Américas' <https://www.oas.org/es/cidh/decisiones/pdf/Resolucion-1-20-es.pdf> accessed 17 April 2020.
International Monetary Fund, 'World Economic Outlook Update, June 2020', <https://www.imf.org/en/Publications/WEO/Issues/2020/06/24/WEOUpdateJune2020> accessed 14 July 2020.
International Trade Centre (ITC), 'Model Contracts for Small Firms: Legal Guidance for Doing International Business' [Geneva: ITC, 2010], <http://www.intracen.org/WorkArea/DownloadAsset.aspx?id=37603> accessed 14 July 2020.
Ishida, Y., 'CISG Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness - Full of Sound and Fury, but Signifying Something', at 364, 65.
Lexlatin, 'Resumen Legal COVID-19 Latinoamérica: 13 de julio de 2020', <https://lexlatin.com/noticias/medidas-legales-covid-19-latinoamerica> accessed 14 July 2020.
Lookofsky, J., 'Understanding the CISG', [Fourth Worldwide Edition edn., Law & Business: Wolters Kluwer, 2012].
Magnus, U. 'Application of Boilerplate Clauses under German Law', in Cordero-Moss, G. (ed.), Boilerplate Clauses, International Commercial Contracts and Applicable Law [London: Cambridge University Press, 2011].
Mckendrick, E., 'Article 6.2.1', in Stefan Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2nd ed., Oxford University Press, 2015.
Mexican Bank Association, 'Medidas de Apoyo en la Banca Mexicana en beneficio de acreditados afectados por COVID-19', <https://www.abm.org.mx/sala-de-prensa/comunicados-prensa.htm> accessed 17 April 2020.
Mexico Collegiate Tribunals, Novena Época, Registry 173722, SJF XXIV, December 2006.
Mexico Collegiate Tribunals, Novena Época, Registry 195621, SJF VIII, September 1998.
Mexico Collegiate Tribunals, Novena Época, Registry 195622, SJF VIII, September 1998.
Mexico Collegiate Tribunals, Novena Época, Registry 197'162, SFJ VII, January 1998.
Mexico Supreme Court, Séptima Época, Tercera Sala, Registry 240782 SJF 139-144, part 4.
Mexico Supreme Court, Séptima Época, Tercera Sala, SJF 139-144, Part 4.
Nicholas, B., 'Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods', in International Sales: The United Nations Convention on Contracts for the International Sale of Goods, § 5.02, Parker School of Foreign and Comparative Law, Columbia University, Galston N.M., Smit, H. (eds.), [1984], <http://cisgw3.law.pace.edu/cisg/biblio/nicholas1.html> accessed 14 July 2020 .
Official Journal of the Federation 'Acuerdo por el que el Consejo de Salubridad General reconoce la epidemia de enfermedad por el virus SARS-CoV2 (COVID-19) en México, como una enfermedad grave de atención prioritaria, así como se establecen las actividades de preparación y respuesta a dicha epidemia', <https://www.dof.gob.mx/nota_detalle.php?codigo=5590161&fecha=23/03/2020> accessed 16 April 2020.
Official Journal of the Federation 'Acuerdo por el que se declara como emergencia sanitaria por causa de fuerza mayor, a la epidemia de enfermedad generada por el SARS-

CoV2 (COVID-19)', <https://www.dof.gob.mx/nota_detalle.php?codigo=5590745&fecha=30/03/2020> accessed 16 April 2020.
Official Journal of the Federation 'Acuerdo por el que se declara como emergencia sanitaria por causa de fuerza mayor, a la epidemia de enfermedad generada por el SARS-CoV2 (COVID-19)', <https://www.dof.gob.mx/nota_detalle.php?codigo=5590745&fecha=30/03/2020> accessed 16 April 2020.
Official Journal of The Federation, 'Acuerdo por el que se adicionan los transitorios de las Reglas de Operación del Programa de Microcréditos para el Bienestar 2020', <https://www.dof.gob.mx/nota_detalle.php?codigo=5591656&fecha=15/04/2020> accessed 18 April 2020.
Official Journal of The Federation, 'Acuerdo por el que se establecen acciones extraordinarias para atender la emergencia sanitaria generada por el virus SARS-CoV2' <https://www.dof.gob.mx/nota_detalle.php?codigo=5590914&fecha=31/03/2020&print=true.> accessed 17 April 2020.
Official Journal of The Federation, 'Acuerdo por el que se establecen las medidas preventivas que se deberán implementar para la mitigación y control de los riesgos para la salud que implica la enfermedad por el virus SARS-CoV2 (COVID-19)', <https://www.dof.gob.mx/nota_detalle.php?codigo=5590339&fecha=24/03/2020> accessed 16 April 2020.
Official Journal of The Federation, 'Decreto por el que se declaran acciones extraordinarias en las regiones afectadas de todo el territorio nacional en materia de salubridad general para combatir la enfermedad grave de atención prioritaria generada por el virus SARS-CoV2', <https://www.dof.gob.mx/nota_detalle.php?codigo=5590673&fecha=27/03/2020> accessed 18 April 2020.
Official Journal of The Federation, 'Decreto por el que se sanciona el Acuerdo por el que se establecen las medidas preventivas que se deberán implementar para la mitigación y control de riesgos para la salud que implica la enfermedad por el virus SARS-CoV2 (COVID-19)', <https://www.dof.gob.mx/nota_detalle.php?codigo=5590340&fecha=24/03/2020> accessed 18 April 2020.
Official Journal of The Federation, 'Reglas de Operación del Programa de Vivienda Social 2020' <https://www.dof.gob.mx/nota_detalle.php?codigo=5585435&fecha=04/02/2020> accessed 18 April 2020; CONEVAL highlights that approximately 73.6 million Mexicans are practically excluded from the formal housing market by not receiving household income equivalent to more than five minimum wages.
Ostendorf, P., 'International Sales Terms' [München: Hart Publishing, 2014].
Puentes-Rosas, E., Sesma, S., Gómez-Dantés, O. 'Estimación de la población con seguro de salud en México mediante una encuesta nacional', Salud Pública de México, <http://saludpublica.mx/index.php/spm/article/view/4685/5157> accessed 14 July 2020.
Rico Álvarez, F., Garza Bandala, P., 'Teoría de la Imprevisión' [2010] Revista Mexicana de Derecho <https://revistas-colaboracion.juridicas.unam.mx/index.php/rev-mexicana-derecho/article/view/14083/12572> accessed 18 April 2020.
Schwenzer, I., 'Article 79', *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)*, 4th ed., Oxford University Press [2016].

Schwenzer, I., Hachem, P., and Kee, C., *Global Sales and Contract Law*, Oxford University Press [2012].
Semanario Judicial de la Federación, 'Arrendamiento Inmobiliario. La acción de rescición procede sin responsabilidad para ninguna de las partes cuando la cosa arrendada se ve afectada por un hecho fortuito o causa de fuerza mayor', Tribunales Colegiados de Circuito, Tesis Aislada 2020827, Libro 71, October 2019, Tomo IV. <https://sjf.scjn.gob.mx/sjfsist/paginas/DetalleGeneralV2.aspx?Epoca=1e3e10000000000&Apendice=1000000000000&Expresion=arrendamiento%2520inmobiliario.%2520Caso%2520fortuito&Dominio=Rubro,Texto&TA_TJ=2&Orden=1&Clase=DetalleTesisBL&NumTE=1&Epp=20&Desde=-100&Hasta=-100&Index=0&InstanciasSeleccionadas=6,1,2,50,7&ID=2020827&Hit=1&IDs=2020827&tipoTesis=&Semanario=0&tabla=&Referencia=&Tema=> accessed18 April 2020.
Tallon, Denis, in Bianca-Bonell, M. *Commentary on the International Sales Law*, [Giuffrè: Milan, 1987], para. 3.1.2., <http://www.cisg.law.pace.edu/cisg/biblio/tallon-bb79.html> accessed 14 July 2020.

Section 2
Environment

Edited by

Domenico Amirante, Barbara Pozzo

Covid-19 and the environment: worries for today, lessons for the future

Domenico Amirante*

Abstract

The essay highlights the multi- and inter-disciplinary approaches to COVID-19 pandemic through the lens of the environmental law debate. Firstly, the study addresses environmental and human interconnections, recalling the most advanced and authoritative scientific assessments. In the following parts the environmental law principles are discussed, focusing on prevention and precaution, with the aim of proposing some key-questions related to several critical areas: 1) impact of lockdowns on GhG emissions, 2) extraordinary measures on future environmental legislations, 3) constitutional values/fundamental rights, 4) common shared environmental principles and 5) new forms of bottom-up participation (e.g. digital activism).

Keywords

Covid-19 Pandemic – Environmental Law – Precautionary Principle – Principle of Preventive Action

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* Full Professor of Comparative Public Law, University of Campania *Luigi Vanvitelli* (Italy). E-mail: do.amirante@gmail.com.

1. The first impact of COVID-19: experiencing (again) human fragility

The global crisis induced by the spreading of the COVID-19 virus all over the world represents not only a threat for the survival of millions of people, but also a cultural and moral shock for the whole mankind. We have suddenly discovered that our intrinsic fragility (inscribed in every human DNA) cannot be completely protected by technology, a flourishing economy, or any 'securitarian' approach (coming from international organisations, the State or corporate powers).

The close relation between the COVID-19 Pandemic and environmental degradation also appears evident, for several reasons. Within the international debate several voices have underlined the link between the economic crisis brought by the Pandemic and environmental degradation. Adam Tooze, an historian from Columbia University, has recently suggested that we are living through the first economic crisis of the Anthropocene. Lawyers are not very familiar with this word: Anthropocene designates the contemporary geological era where humanity's ecological impact is determining a change in the atmosphere and, more generally, a degradation of the natural basis of life on Earth. But nature has started blowing back on us in random and calamitous ways. According to Tooze, 'the great acceleration that defined the Anthropocene may have begun in 1945, but in 2020 we are facing the first crisis in which the blowback destabilises our entire economy'.[1] Moreover, if the 'climate change crisis' requires to the common man an effort to watch at the over-

[1] A. Tooze, 'We are living through the first economic crisis of the Anthropocene' *The Guardian* (London, 7 May 2020) <https://www.theguardian.com/books/2020/may/07/we-are-living-through-the-first-economic-crisis-of-the-anthropocene/> accessed 4 September 2020.

all picture (because the causal link between climate change and natural disasters we are suffering today is less evident) 'the remarkable thing about Covid-19 is that it brings the risks of the Anthropocene home to each and every one of us individually', so that people themselves 'have *en masse* decided on their own response to the threat, often ahead of their governments' and 'that was most dramatically reflected in the financial markets, which began a global run to safety'.[2]

2. Environmental degradation both causes and reinforces the diffusion of COVID-19

As legal scholars, we will not touch the medical debate about the scientific proof of a causal link between the pandemic and environmental degradation.
Here we can just report that, at the international level, there is a plethora of official documents, produced by United Nations related organizations, wich are strongly underlining this connection. Back in 2016 the UNEP's Frontiers Report, while recalling that 'around 60 per cent of all infectious diseases in humans are zoonotic', was warning that 'never before have so many opportunities existed for pathogens to pass from wild and domestic animals through the biophysical environment to affect people causing zoonotic diseases or zoonoses. The result has been a worldwide increase in emerging zoonotic diseases and outbreaks of epidemic zoonoses'.[3]
This gloomy realization led to UNEP's 2017 Resolution on Environment and Health, affirming 'the strong interlinkages between environment and health, including health inequalities', and the importance of 'addressing them jointly by implementing the 2030 Agenda for Sustainable Development'.[4] More recently, in the UNEP Statement on COVID-19, the executive director, while warning that 'as we continue to relentlessly encroach on nature and degrade ecosystems, we endanger human health' has officially stated that '75 percent of all emerging infectious diseases are zoonotic, i.e. viruses originating from the transfer from animals, whether domesticated or wild, to humans'.[5]

[2] Ibid.

[3] UNEP, *UNEP Frontiers 2016 Report: Emerging Issues of Environmental Concern* (United Nations Environment Programme 2016) 18.

[4] United Nations Environment Assembly of the United Nations, Environment Programme, Third session, Nairobi, 4-6 December 2017 UNEP/EA.3/Res 4, 2017; in the resolution it also explained 'that human, animal, plant and ecosystem health are interdependent; emphasizes in this regard the value of the "One Health" approach, an integrated approach which fosters cooperation between environmental conservation and the human health, animal health, and plant health sectors' (ibid. para 24).

[5] F. Coimbra, *The Executive Director's Statement to the 150th Meeting of the Committee of Permanent Representatives*, 30 April 2020 <https://www.unenvironment.org/news-and-stories/speech/executive-directors-statement-150th-meeting-committee-permanent/> accessed 4 September 2020.

From a different perspective, decades-long scientific assessments about environment and climate change, mainly conducted under the IPCC (the Intergovernmental Panel on Climate Change, another UN organization), have highlighted their interrelation. The current emergency introduced new elements of analysis, and several studies about the exposure to air pollution and COVID-19 mortality have been conducted, enhancing the concerns on the nexus between pollution and the diffusion of viruses. In Europe, and notably in Italy, the gravity of the pandemic in highly polluted and industrialized areas (i.e. Milan industrial district) confirms the evidences of these studies.

3. The effects of COVID-19 on the environment: the two sides of the same coin

The COVID-19 crisis has forced a sudden and general slowdown of many activities all over the world. Lockdowns have determined the closing of schools, universities and of a large number of productions and commerces considered as non-essential. Industrial production has been reduced and the impact of transportation has substantially dropped, from the international flights to the everyday routine of commuters and housekeepers. This has resulted in a considerable reduction both of carbon emissions and of global warming. In fact, according to the International Energy Agency, world's CO2 emissions are expected to fall by 8% this year because of the global economic downturn. But there is another important effect. If, for centuries, humans have pushed wildlife into smaller and smaller corners of the planet, nature is pushing back. Wild boars have descended onto the streets of several cities like Barcelona and Haifa, mountain goats have invaded a town in Wales. Whales were freely moving into the Mediterranean seas, while dolphins could be found in the once overcrowded Bosphorus, near Istanbul. In sum, 'nature is taking back her rights'. But how long will this positive effect of COVID-19 on the environmental state of the planet last? What will happen when the pandemic eventually and hopefully subsides? It is most likely that carbon and pollutant emissions come back quickly, and in a certain way, they are already coming back. In many countries, the urge for economic recovery induced governments (following the example of United States) to announce plans to lower environmental standards or other related measures. This attitude has been harshly censured by the UN Special Rapporteur on human rights and the environment, David Boyd, stating that 'these actions are irrational, irresponsible, and jeopardize the rights of vulnerable people'. According to Boyd, 'such policy decisions are likely to result in accelerated deterioration of the environment and have negative impacts on a wide range of human rights including the rights to life, health, water, culture, and food, as well as the right to live in a healthy

environment'.[6] So we are bound to face a serious 'environmental crisis' following the COVID-19 crisis.

A crucial arena to understand the direction of the economic recovery during and after COVID-19 is climate change action, the core of the environmental policies for today and for the years to come. The pandemic has delayed the UN Climate Change Conference COP26, set to take place in Glasgow in November, which has been be rescheduled for 2021. But here the good news is coming from the European Union that appears to be firm in its commitment to keeping up the pressure on an important reduction of carbon emission, with ambitious targets set for 2030 (and a promised carbon neutrality for 2050). In fact, EU has recently announced a € 750 billion recovery plan to pull EU economies out of the deep economic downturn caused by coronavirus. At the heart of the plan, the EU proposes to more than quadruple to € 40 billion the 'just transition fund', a specific monetary tool for climate transition, aimed at moving coal-dependent regions away from fossil fuels.

4. The use of environmental principles in the COVID-19 crisis: prevention or precaution?

The debates on the emergency measures and on the restrictions to individual rights and liberties normally fail to take into account a basic element: we are not facing an 'ordinary' emergency, like earthquakes, floods, fires or other natural disasters, against which we have 'disaster management' protocols and rules. The situation we are experiencing is not even comparable to the 'political' emergencies often referred to in many constitutional texts, arising from wars, invasions, armed uprisings, terrorist attacks. All these contexts require, in fact, the application of preventive measures (thus the application of the preventive principle) against an already experienced and known 'evil'. On the contrary, COVID-19 puts us in a different scenario, confronting an 'enemy' that we don't see and don't know. For environmental lawyers and managers this is a typical 'precautionary principle scenario'. In environmental matters (but this applies, of course, also to health problems), when we have enough scientific knowledge about a danger (e.g. air pollution), the preventive action principle leads legislators and administrators to prevent or limit the damages to the environment. In such cases, scientific evidence facilitates the adoption of preventive measures. When we run into a context of scientific uncertainty, as in the case of COVID-19, we need to apply the precautionary principle. This principle does not refer to a generic 'family man' precaution, but it is inspired by an anticipatory approach synthetized in the 1992 Rio Declaration on Environment and Development (Principle 15): 'Where there are threats of

[6] Cf. <https://news.un.org/en/story/2020/04/1061772/> accessed 4 September 2020.

serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'.

To frame properly the present situation, it is necessary to take a step back and recall some of the environmental law principles, and in particular the so called 'triad' of the environmental management principles traceable in European Union law: the 'polluter pays' principle, the principle of prevention and the precautionary principle. In their historical development (in EU law, but also in domestic environmental law all around Europe), these principles articulate the stages of the evolution of the relationships between law and science in environmental matters.

The 'polluter pays' principle calls upon lawyers and scientists to intervene when the environment has been damaged, by means of a cure aimed at restoration of the equilibrium, on the basis of a 'curative model'.[7] Normally it cannot restore the environment damaged or destroyed, but just offers a compensation (in most of the cases a pecuniary one). The principle of prevention, on the other hand, represents a step forward since it identifies the impact of human activities on the environment not as episodic and resolvable *a posteriori* (according to the curative model), but as a constant condition of individual and societal action. Environmental problems should thus be dealt with in advance, by prevention, with specific procedures such as for example the environmental impact assessment (EIA). This preventive approach is still based on a complete confidence in technical-scientific evidence as an instrument for the resolution of all environmental problems.

On the contrary, the precautionary principle intervenes at a different stage and is essentially based on the impossibility for legal or political actors to rely, in certain circumstances, on objective scientific data. In this sense, it is a typical post-modern legal principle. When confronted to unknown risks one becomes aware of the incapacity of science to apply solutions to environmental (and health) problems always and in every case. This demonstrates the insufficiency of the curative and preventive models illustrated above. Here the precautionary principle plays an emergency role, requiring the public actor called upon to tackle a situation of necessity to make choices in any event, even if not supported by scientific certainty. In such cases, one of the main elements of the precautionary principle arises: the re-expansion of political and administrative discretion regarding choices having an uncertain technical and scientific content. The precautionary principle brings out the changed legitimization between science and politics, placing the responsible political and administrative parties at the forefront of difficult decisions.[8]

[7] For a complete assessment on the genesis of this principles see N. De Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules*, Oxford University Press 2002).

[8] On this important function of the precautionary principle *see* D. Amirante, *Codification and Technical Rules in Environmental Law: Reflections on the French Experience* in A. Biondi, M. Cecchetti, S. Grassi, M. Lee (eds), *Scientific Evidence in European Environmental Rule-Making. The Case of the Landfill and End-of-Life Vehicles Directives* (Kluwer Law International 2003).

Thus, what are the exact contours of the precautionary principle? Although there is an endless bibliography on the subject, I shall just make reference here to one of its best descriptions, contained in the Communication by the EU Commission on the precautionary principle.[9]

According to the EU Commission, 'the precautionary principle should be considered within a structured approach to the analysis of risk which comprises three elements: risk assessment, risk management, risk communication'.[10] The Commission warns out that 'the precautionary principle, which is essentially used by decision-makers in the management of risk, should not be confused with the element of caution that scientists apply in their assessment of scientific data', to conclude that the 'implementation of an approach based on the precautionary principle should start with a scientific evaluation, as complete as possible'.[11] With regard to the measures to be taken, the EU also indicates an accurate shortlist. Thus, the measures based on the precautionary principle should be: '1) proportional to the chosen level of protection; 2) non-discriminatory in their application; 3) consistent with similar measures already taken; 4) based on an examination of the potential benefits and costs of action or lack of action (including, where appropriate and feasible, an economic cost/benefit analysis); 5) subject to review, in the light of new scientific data; 6) capable of assigning responsibility for producing the scientific evidence necessary for a more comprehensive risk assessment'.[12]

Are national states adopting the mainstream protocol of the precautionary principle, evaluating the gravity of the potential risk, declaring the social acceptability/non-acceptability of the risk, embracing proportional measures with respect to the risk, in a context of scientific uncertainty?

Within Europe not all the States have developed such strategies, but we can mention the example of Italy, one of the worst affected countries by COVID-19 in the old continent and the first Western country to enforce strict lockdown measures. The Constitution of the Italian Republic (1947) does not devise any rule for the declaration of the state of emergency (except for art. 78 on the declaration of the *state of war*). The state of emergency was then declared on January 31st in pursuance of a statutory provision: the *Civil Protection Code* of 2018,[13] which allows the government to take 'any necessary measure' within the limits of the 'general principles of the legal system'.

[9] Cf. European Union, *Communication from the Commission on the precautionary principle*, COM/2000/0001 (02/02/2000), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52000DC0001/> accessed 4 September 2020.

[10] Ibid. 2.

[11] Ibid. 3.

[12] Ibid. 4.

[13] Cf. Legislative-decree no. 1, 2 January 2018: the *Civil Protection Code* identifies the national civil protection authority in the President of the Council of Ministers, assigning him (art. 5) powers to adopt ordinances; the same *Code* then devises (art. 7) different levels of emergency: among them the most severe are the emergencies of national importance that must be addressed with extraordinary means and powers during defined periods of time. To deal with the national state

On February 23rd, the first of many such measures was approved: the *decreto-legge* 6/2020, which has empowered the competent authorities (indicated in art. 1, para. 1) to adopt 'every containment and management measure adequate and proportionate to the evolution of the epidemiological situation', leaving ample room for discretion; art. 2 provides that further containment and emergency management measures can be approved, in order to prevent the spread of the epidemic, even outside these cases. The latter are indeed taken through the legal instrument devised by art. 3, para. 1: the Prime Ministerial Decree (*D.P.C.M.*), i.e. decrees issued by the Prime Minister, which are administrative in nature and that set out in detail the rules on prohibited activities. Several more administrative acts have been established by individual ministries, like the Ministry of Health.[14]
Therefore, in the absence of specific constitutional provisions, all emergency measures have implemented in Italy in accordance with the law-decree 6/2020 (*decreto-legge*, a sort of ordinance enacted by the government in case of 'necessity and urgency'[15]), followed mostly by administrative acts. In a speech to the Chamber of Deputies (*Camera dei deputati*) on April 30th 2020, the head of government Giuseppe Conte has justified such measures with an explicit reference to the precautionary principle, applied on the basis of the risk-analysis conducted by a Technical Committee appointed on purpose. In this case the experts were not 'dictating' measures to the government but drawing the scenario of possible risks. After some initial criticism coming from the opposition parties, this precautionary attitude of the Italian government has been largely accepted by the public opinion.

5. Guidelines for an investigation

In the light of the aforementioned issues, several aspects concerning the link between COVID-19 and environmental emergencies may stimulate the current legal debate, highlighting a variety of critical concerns, with some special focuses.

of emergency, the President of the Council of Ministers can adopt ordinances (art. 25), in derogation from any current provision, as long as they comply with the general principles of law and with the European Union law.

[14] In fact, Law 883/1978 – the law that established the Italian National Health System – is still a fundamental legal basis for these administrative acts, as art. 32 states: 'the Minister of Health can issue *ordinances of contingent and urgent nature*, regarding hygiene and public health and veterinary police, with efficacy extended to the whole national territory or to part of it comprising several regions'.

[15] Cf. Art. 77, Constitution of Italy: 'When in extraordinary cases of necessity and urgency the Government adopts provisional measures having the force of law, it must on the same day present said measures for confirmation to the Houses which, even if dissolved, shall be summoned especially for this purpose and shall convene within five days. The decrees lose effect from their inception if they are not confirmed within sixty days from their publication'. Law-decree 6/2020 has thus been confirmed, modified and converted into Law 13/2020.

5.1. Specific Environmental laws, regulations, measures and protocols during the COVID-19 emergency

The unexpected spread of the COVID-19 resulted in the adoption of extraordinary rules with different legal strengths and aims. For instance, in South-East Asia (e.g. South Korea, Hong Kong, Singapore) protocols have been adopted since the SARS and the MERS epidemics in the Early 2000; in other cases, to the complete absence of a legal regime, legal systems replied with the application of already existing environmental legislations, considering the pandemic as a form of 'natural disaster' (e.g. India). In either case, we are observing diverse kinds of 'legal efforts': national, regional, and international. This scenario raises three main interrogatives: how are single states or regional institutions/organisations (like EU, ASEAN, SAARC, etc.) taking into account environmental concerns during the emergency? Are they consciously referring to the precautionary principles applying its codified rules, i.e., 'uncertain risk' evaluation and proportionality of measures? Is there any different or analogical application of environmental legislation to cope with the emergency?

5.2. Impact of the lockdown on GHG emissions and administrative assessments/regulations

As previously underlined, science is emphasising the nexus between the environment and the actual emergency, especially referring to the rate of mortality cases in high-polluted areas. This is one aspect of the issues that merges COVID-19 and the environment. The forced lockdowns and the complete stop of production activities allowed scientists to get data on the quality of air after the reduction of the GhG emissions. This could accelerate the efforts for energy transition, while for others this is a chance to reasonably increase pollution according to the pre-emergency standards. This raises two main questions: is there any specific legal assessment to deal with the pollutant activities during or after the COVID-19 emergency? Is there any change in state or regional policies especially referred to GhG emissions?

5.3. Impact of extraordinary measures on future environmental legislation and climate change policies

The global pandemic, the states of emergency, and the national responses have repeatedly originated, 'rollbacks', in environmental laws and regulations. In some cases, such legal downgrade affected environmental policies; in others, the current situation accelerated the ongoing and silent reversion to the previous regimes. In other words, we are witnessing to some attempts in using the COVID-19 as a pretext for environmental law downgrades. Nevertheless, this trend is just the negative side of a more complex phenomenon.

Despite of serious risks of an environmental/climate change regulation collapse, the impact of the lockdowns on GhGs emissions produced an expansion in protection measures, extending them to previously neglected law areas. In these cases, legal systems must deal with environmental issues in a more pertinent way, stimulating future legislative actions and not mere policies or soft-law arrangements. At the same time, we have to note that, globally, renewable energies have been more 'resilient' than fossil fuels during this crisis.

This may encourage more investments in this sector, considering it a priority in the future (public and private) expenditure to redress the economic system.

5.4. Impact on the constitutional values/fundamental rights

In many established democracies COVID-19 crisis encouraged a blatant authoritarianism, favouring the tilt of the state power towards executive branches. In some cases, especially in South America, this strong change in democracy's dynamics created human rights and humanitarian issues (e.g. Brazil, Ecuador).

The new emergency approach also led to a different understanding or interpretation of constitutional rights. In fact, many rights and duties could possibly be remodelled or implemented, considering the environmental issues and discussing the role of the humankind and the outcomes of its activities. Furthermore, the emergency set another variable in the twofold link between rights and health, going further the single understanding of the environment in a 'right-or-duty-key', but also as part of the triad health/environment/rights. The adoption of this perspective will produce a new legal ratio: every time there is a right or a duty related to health, it will encompass the environment. From this – probably brave – assumption, it would be interesting to investigate the new role of the environment according to the previous constitutional schemes, also in the light of public and individual health.

5.5. Impact on common and shared environmental principles

In the last fifty years, international community's efforts produced a body of shared principles regarding many aspects related to the environment. These instruments, whether they are implemented or neglected, have been able at least to demonstrate the seriousness of specific issues (i.e. Ozone Layer Depletion, Protection of Flora and Fauna, Climate Change, etc.), reinforcing state and supranational efforts. From these aspects, some questions arise: is the already existing body of environmental principles able to cope with the Covid-19 pandemic? Are new forms of principles unavoidably or expected? There will be effects on the implementation of environmental law principles in state legal systems through explicit legislations or innovative systems of litigation?

5.6. Proliferation of Digital Activism (talks and digital climate strikes)

The unpredicted crisis also made unusual responses, such as new forms of top-down concerns and bottom-up participation. According to this last assumption, in recent times environmental activism promoted the development of the 'environmental democracy' concept, an intersection of recognised principles (access to justice, information, participation) and the civil society's demands. The worldwide imposed lockdowns strengthened distances and barriers among countries and people, also influencing climate strikes. This phenomenon led the shift to different forms of participation, from the 'real' and 'individual' to the digital ones. From this trend three fundamental questions arise: does digital activism set the decline of environmental movements or a new step forward? How is civil society reshaping its own participatory interests? Is this a form of 'environmental democracy'?

Such ideas have a significant impact in opening a legal debate, concerning three main areas: national, international, and comparative law. According to the aforementioned–and still recent and open–issues, the debate may evolve on the evaluation of the legal measures adopted within single state jurisdiction or more of them, with the aim of setting a comparative inquiry, highlighting nexuses, analogies, differences, approaches and new developments or declines.

Articles

Climate and environmental approaches in the United States and Canada at the outbreak of the 2020 pandemic

Pasquale Viola*

Abstract

The essay deals with the issues triggered by environmental policies and Covid-19 pandemic in the United States and Canada. The analysis starts with an outline of the environmental law systems and the main responses to the pandemic, then emphasizing the focal legal concerns about the emergency measures and environmental policies. The last section draws critical conclusions that show some current patterns and the way forward in the entanglement environmental law/pandemic.

Keywords

Covid-19 Pandemic – Climate Change – Environmental Law in the United States and Canada – Comparative Public Law

* Post-Doctoral Researcher, Charles University (Prague, Czech Republic).

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Introduction[1]

Environmental and Climate issues are currently sharing the arena of scholarly debate with a more unexpected-but not less dangerous-subject: the Covid-19 pandemic. The United States and Canada represent a huge section of pollutant states, and their political and legal choices produce an echo on a global scale. The key-role of these two countries questions the feasibility of a more adamant effort to adopt pervasive and effective legal instruments despite contingencies. However, states of emergency-in legal, as well as in a less technical understanding-lead to a shift towards executives, usually most prone and used to adopting pragmatic and quick legal responses according to their agenda. From these assumptions, two main questions arise: are the United States and Canada implementing the same legal and political strategy in facing the ongoing threat originating from climate and environmental issues? Has something changed in the shadow of the global pandemic? Despite truisms and the narrative of lack of environmental concern in the United States, Canada as well seems to be accustomed to light efforts in climate and environmental actions. With the aim of explaining the previous assumptions, this essay is divided into two parts. As first, it provides an outline of the US and Canadian environmental systems and the main responses to Covid-19 (§ 1 and § 2). In the second part (§ 3), the analysis focuses on the significant topics that emerge from the pandemic emergency inside the climate/environmental framework, such as specific measures, possible scenarios on greenhouse gasses

[1] The article has been submitted on May 2020.

emissions (hereinafter GHGs), effects on principles of constitutional and international law, the rise of a peculiar activism.

1. An outline of environmental federalism in the United States and Canada

The field of environmental law in the United States is based on a complex system in which many actors try to find a balance among the constitutional allotment of powers, individual rights and national/international demands. The federal system of government fosters uncertainties on four main grounds: 1) the federal legislative power, where the Congress plays a key role in the approval of statutes and appropriations; 2) the executive and its implementation of laws; 3) the regulatory framework under the delegation to administrative Agencies; 4) the states' legislative and executive.

The legal basis for the distribution of powers between the federal and the state level resides in the commerce clause under the US Constitution, which regulates inter-state trade. According to this scheme, the Congress left more "environmental space" for state legislation, giving the opportunity to adopt regulations exceeding the federal standard.[2] However, in spite of the initial wide use of the commerce clause by the Congress, the Supreme Court gave a narrow definition of this power,[3] opening debates on which subject is entitled to adopt legislative measures in environmental matters. If at first glance the allotment of environmental powers seems to be fairly distributed between federal and states legislatures, several Constitutional provisions, Acts and Statutes extend congressional powers (such as the property clause, the National Environmental Policy Act (NEPA, 1969), the Clean Air Act (CAA, 1970), the Clean Water Act (CWA, 1972) or the Resource Conservation and Recovery Act (RCRA, 1976).

Along with the federal legislative power, Agencies actions represent the most important ground of the US environmental legal system, due to the role that the Environmental Protection Agency (hereinafter EPA) plays in addressing health, air and water issues. EPA's powers are manifold, and span from supervisory to advisory ones, to the adoption of rules and the adjudication of disputes. From the 1970 establishment on a presidential proposal,[4] the Agency is currently in 'its fourth era, which is more complex and difficult, both scien-

[2] J. Salzman, 'United States of America', in E. Lees, J.E. Viñuales (eds), *The Oxford Handbook of Comparative Environmental Law* (OUP 2019).

[3] *United States v Lopez*, 514 US 549 (1995).

[4] X. Liu, 'The U.S. Environmental Protection Agency. A Historical Perspective on Its Role in Environmental Protection' (Inaugural-Dissertation zur Erlangung des Doktorgrades der Philosophie, Ludwig-Maximilians-Universität München 2010).

tifically and legally, than any of the earlier three eras'.[5] Presently, EPA is the main implementing agency for several federal laws related to the CAA, the CWA, the RCRA, as well as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, 1980) as amended by the Emergency Planning and Community Right-to-Know Act (1986). Despite the unquestionable importance of EPA in the US environmental legal system, other Agencies regulate different relevant areas, e.g. the Department of Agriculture in forest management. Independence and functional approach are the main features of specialized administrative bodies, however, as J. Salzman points out, the tensions between the federal legislative and executive in trying to influence Agencies affect their independence.[6]

The Canadian environmental legal system is facing a double-side context: on the one hand, federal environmental jurisdiction encompasses a wide range of powers; while on the other, allotment of legislative power is going towards a functional devolution to provinces and local bodies, also trying to decolonise the "green approach".[7] Despite some areas of exclusive federal jurisdiction (i.e. fisheries, criminal jurisdiction related to environmental matters), the division of powers may be outlined with respect to each single object, rather than on the constitutional or legislative division of powers. For instance, environmental impact assessments on chemicals or pesticides can be made on the ground of federal or provincial jurisdictions, with an overlap of standards and methodology. In cases of conflicts, federal law prevails, but the legal issue must fall under those cases where it is impossible to comply with both.[8] In other cases, such as marine pollution and ozone depletion, provincial jurisdictions adopted and enforced more effective legislations, although federal legal intervention seems to be the most suitable for these topics.[9]
Along with the federal and the provincial levels of government, despite the lack of a recognized constitutional status, municipalities play a crucial role in facing environmental issues within their jurisdiction (e.g. climate change adaptation, land use planning). Of course, they act within the legal framework traced by other levels of government. One of the most pervasive challenges for the Canadian legal system is actually the reshaping process after the acknowledgment of indigenous traditions' legitimacy worth to set a dialogue and

[5] P. Bohannon, 'U.S. Environmental Protection Agency Policy: from the Beginning to the Millennium' [2000] 19 Environmental Toxicology and Chemistry 781. *Cf* L. Anzenberger, 'The Environmental Protection Agency's Regulatory Practices: The Impact of a Holistic Approach' [1985] 4 Environmental Progress 155: 'Quality leadership, technically valid statistics and regulations, and research activities have been problematic areas which have plagued the agency for some time now.'

[6] Salzman (n. 2) 387. Cf P.R. Verkuil, 'The purposes and limits of independent agencies' [1988] Duke Law Journal 257; P.M. Corrigan, R.L. Revesz, 'The genesis of independent Agencies' [2017] 92 New York University Law Review 3.

[7] S. Wood, 'Canada', in Lees, Viñuales (n. 2).

[8] *Ibid*. *Bank of Montreal v Hall* 1 SCR 121 (1990); *Multiple Access Ltd v McCitcheon* 2 SCR 161 (1982).

[9] *See* J. Benidickson, *Environmental Law* (Irwin Law 2013).

a relationship nation-to-nation.[10] As pointed out by S. Wood, this reconciliation process intensely affects the environmental legal field, especially in determining 'settler and indigenous governments' environmental powers; […] identifying indigenous law-makers and laws; managing conflicts between indigenous and settler laws'.[11]

2. Main responses to the Covid-19 pandemic[12]

The Covid-19 emergency broke out in the United States at the beginning of 2020. In January, the President established the White House Coronavirus Task Force, in order to coordinate at the federal level the monitoring, prevention, containment and mitigation of the pandemic. On May 13, the executive declared the national emergency, while the legislative passed the Coronavirus Aid, Relief, and Economic Security Act. According to the constitutional framework, Governors and local mayors may declare the state of emergency within their own jurisdictions. Due to these autonomous powers, the response to Covid-19 has been jeopardized by the different approaches of state and local governments. Currently, all of the fifty states, as well as the federal district and some of the US Minor Outlying Islands have declared the state of emergency in a time-range that goes from January 29 (American Samoa) to March 15 (Maine). The measures undertaken by the states differ on the ground of the virus impact on the population, shifting from stay-at-home-orders and quarantine at the entry into the state, until the light measures adopted in Nebraska, where there is no stay-at-home-order, a limited quarantine, and no restriction to non-essential retail was implemented.

About the Canadian response to the pandemic, since January 15 the federal government activated the Emergency Operations Centre, and enacted measures invoking the Quarantine Act of 2005. Furthermore, considering the possibility to face the pandemic without forcing constitutional guarantees at the federal level of government, there had been no enactment of the Emergency Act of 1985. In a different way, Provinces and Territories followed the World Health Organization declaration of pandemic, adopting measures of

[10] Truth and Reconciliation Commission of Canada, *Calls to Action* (TRC 2015); Truth and Reconciliation Commission of Canada, *What We Have Learned* (TRC 2015); Truth and Reconciliation Commission of Canada, *The Survivors Speak* (TRC 2015); Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future* (TRC 2015). *Cf* E. Bozhkov *et al*., 'Are the natural sciences ready for truth, healing, and reconciliation with Indigenous peoples in Canada? Exploring 'settler readiness' at a world-class freshwater research station' [2000] Journal of Environmental Studies and Sciences; J. Ball, P. Janyst, 'Enacting research ethics in partnerships with indigenous communities in Canada: "do it in a good way"' [2008] 3 Journal of Empirical Research on Human Research Ethics 33; F. Berkes, 'Indigenous ways of knowing and the study of environmental change' [2009] 39 Journal of the Royal Society New Zealand 151; K. Watene, E. Palmer (eds), *Reconciliation, Transitional and Indigenous Justice*, Routledge, 2020.

[11] Wood (n. 7) 111.

[12] Considering the up-to-date and evolving situation, this paragraph is mainly based on Official Reports or information provided by the Governments, as well as on the most affordable news published by the main media.

health and/or state emergency, in a time frame from March 12 (Quebec) to March 22 (Nova Scotia). The actions are the ones adopted in other cases, similar to the US measures, but without issuing stay-at-home-orders.
The US and Canadian responses to Covid-19 emergency seem to be quite similar, with the federal executives and legislatives more focused on the financial and commercial aspects, while the state and provincial responses are more effective and impact the individual behaviours and needs. In both cases the first decision was the isolation of the country from outside, trying to reduce the spread of the contagion, leaving state and local levels wide margins of manoeuvre. At a first glance, the absence of a federal declaration of emergency in Canada could be interpreted as a different response to the pandemic, leading to a weak coordination among the levels of government; however, considering the legal nature and the frequent routine of national emergencies in the United States,[13] these data cannot determine a different approach.

3. Focal issues among climate, environmental and pandemic concerns

While ensuring aid and health protection as the main contemporary target, the efforts of the executives and the legislatives in the United States and Canada at the all levels of government seem to be more focused on individual health and economic demands, rather than on the development of appropriate measures with more long-term and wide views (especially with respect to a healthy environment). This short-term necessity also has repercussions on the interconnectedness between environmental law systems and Covid-19 measures, affecting the pre-emergency standard of environmental protection in a more or less blatant way. These approaches determine an extensively critical assessment on the recent developments in environmental legislation.

3.1. The specific environmental laws and regulations during the Covid-19 emergency and their impact on present and future climate/environmental legislation

The study conducted by the Environmental and Energy Law Program (Harvard Law School) shows several US "rollbacks" originated or finalised during the Trump administration and the Covid-19 emergency, adopting a 'one-two punch' approach: 'First a delay rule to buy some time, and then a final substantive rule'.[14] This trend affects a wide range of topics, i.e.

[13] Until today, 68 national emergencies have been declared since 1917 (T.W. Wilson, Emergency in Water Transportation of the United States); 34 of them are still pending. Cf Congressional Research Service, National Emergency Powers, Updated March 23, 2020, CRC, Washington, 2020.

[14] N. Popovich, L. Albeck-Ripka, K. Pierre-Louis, '95 Environmental Rules Being Rolled Back Under Trump' *New York Times* (New York 21 December 2019). The metaphor of the one-two punch and the further explanation have been proposed

natural resources (especially offshore activities related to oil and gasses), air, water, flora, fauna, etc. Although this approach is more a continuum with the pre-Covid-19 policy than a shift towards novel kinds of political agendas, recent developments suggest a subtle use of the globally-declared pandemic and health emergency to foster significant downgrades in the field of environmental law.

An evidence on the path undertaken during the Covid-19 emergency is the memorandum addressed by EPA (on March 26) to all governmental and private sector partners on the enforcement and compliance assurance program. Through this provision, EPA announced a temporary (time-undefined) discretion compliance policy on the ground of the current national emergency. In other words, this plan allows for a deficiency in enforcing environmental obligations. More specifically, through the memorandum the Agency justifies a non-complying strategy on the basis of a concern regarding the facility operations, the availability of staff and contractors, as well as on delays of laboratories in analysing samples and providing results. Furthermore, the Agency acknowledges effects which 'constrain the ability of regulated entities to perform routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification'.[15] The aforementioned concerns imply the difficulties in fulfilling federal environmental permits, regulations and statutes. However, the EPA is trying to guarantee 'the ability of an operation to meet enforceable limitations on air emissions and water discharges, requirements for the management of hazardous waste, or requirements to ensure and provide safe drinking water'.[16] This discretionary power does not apply to criminal violations and to policies adopted according to the CERCLA Act and the RCRA Act. In introducing such measures, EPA highlights that 'the general statements contained in this policy may not address every potential civil violation that may arise as a result of Covid-19. As such, EPA may provide additional enforcement guidance applicable to specific programs on an ongoing basis and EPA's self-disclosure'.[17]

Canadian efforts in mitigating and adapting to the pandemic show a similar climate/environmental trend, although environmental policies suffered a lack of coordination and implementation among jurisdictions, as the recent international outcomes have shown as well.[18] The Canadian regulatory system is mainly based on self-reporting data, determining a two-fold attitude in international and domestic trends addressing climate and environmental issues. As far this double attitude is concerned, the international agenda shows the

by C. McCoy.

[15] United States Environmental Protection Agency, Memorandum 'COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program' (Washington 26 March 2020).

[16] *Ibid.*

[17] *Ibid.*

[18] B. Meyer, *The International Law on Climate change* (CUP 2018).

political will to tackle climate and environmental issues in the phase of negotiation, while the internal implementation of such will lacks in terms of effectiveness. On these aspect, I may recall the Canadian decision to leave the Kyoto Protocol mechanisms to avoid a finding of non-compliance[19] or the uncertain political agenda, as J. Welsh Brown, P.S. Chasek and D.L. Downie emphasize: 'Canada shifted from a swing state in the climate negotiations under the liberal government of Paul Martin to a veto state under the conservative government of Stephen Harper to a likely swing state, but also a potential lead state, under Prime Minister Justin Trudeau'.[20]

At first glance, a general and strong downgrading of environmental legislation and regulation is not documented. However, federal measures of environmental restraint have been adopted, while other strategies to tackle the emergency, similar to those adopted by the EPA in the United States, have been introduced at the provincial level, notably in Alberta, Saskatchewan and Quebec.

Regarding the federal jurisdiction, the most pervasive emergency measure impacting environmental standards is the Fisheries Management Order of May 15 (revoking the previous order of April 2), which allows to carry out fishing activities without at-sea observers. The order provides some exceptions, such as for companies that developed safe working procedures related to Covid-19 and 'in case at-sea observer companies are satisfied that safe working procedures consistent with their own procedures are in place on vessels on which the observers they employ are to be deployed, and keep a record of these procedures for presentation to a fishery officer upon request'.[21]

About the provincial jurisdictions, similar measures have been issued by the Fisheries and Oceans Canada-Quebec Region, through the Fisheries Management Order of April 3 (which prevails over any regulations made under the Fisheries Act and any Order related to), which equally authorizes fishing activities without at-sea observers on board fishing vessels[22].

In a different way, also Alberta permitted environmental downgrades during the pandemic; for instance, the Ministry of Environment and Parks postponed the date of reporting on renewable fuels standards. Other measures regard the Environmental Protection and Enhancement Act, the Water Act and the Public Lands Act, providing for a temporary suspension of information reporting requirements (except in the case of drinking water facilities).[23]

[19] Meyer (n 17).

[20] J. Welsh Brown, P.S. Chasek, D.L. Downie, *Global environmental politics* (Routledge 2018) 52. For further information on the Canadian legal developments in environmental and climate matters *see* http://www.ICLG.com accessed 24 May 2020.

[21] Ministry of Fisheries, Oceans and the Canadian Coast Guard, 'Order related to Section 9.1 of the Fisheries Act' (15 May 2020).

[22] Fisheries and Oceans Canada – Quebec, 'Notice to Fish Harvesters – Fisheries management order' (3 April 2020).

[23] https://inter-l01-uat.dfo-mpo.gc.ca/infoceans/ accessed 24 May 2020.

The Saskatchewan province issued a Temporary Enforced Policy During the pandemic, stating that subjects must comply with environmental obligations, but if compliance is not reasonably practicable because of Covid-19 issues, 'proponents shall report the non-compliance to the ministry', […] 'act responsibly to minimize the effects and duration of any non-compliance caused by Covid-19 related issues', 'identify and document the specific nature and dates of the non-compliance', and 'identify and document how Covid-19 was the cause of the non-compliance, and actions taken in the response, including efforts to comply as soon as possible'.[24] These provisions of reporting emergency measures, however, do not apply to Waste Stewardship Regulations, Mining and Industrial Operations, Landfill Operations, Potable Water Facilities Regulated by the Ministry of Environment, Hazardous Waste Storage Facilities, Other Activities, Fish, Wildlife and Lands Branch, Climate Change Branch. In these matters, the non-compliance report to the Ministry is optional.[25]

3.2. Impact of the measures on GHG emissions and some remarks on constitutional and international principles

A recent study conducted by a team of experts on altered patterns of energy demand around the world, combining energy, activity and policy data during the Covid-19 emergency and the 2019 statistics, demonstrates a decreasing of CO2 emissions on a global scale.[26] Currently, the most affected sectors are aviation, transport, industry and the public. As the United States Energy Information Administration (EIA) pointed out, there should be a decrease in emissions of –7.5% in 2020,[27] while there is no forecast related to the impact of the pandemic measure on GHG emissions in Canada from official sources. The most up-to-date Canadian data repository on GHGs is Canada's official national greenhouse gas inventory, prepared and submitted annually to the United Nations Framework Convention on Climate Change (UNFCCC).

In the light of the current emergency measures, climate change issues, and international concerns/pressures, the US and Canadian approach to international venues is a symptom–or the effect–of their own involvement and strategic policy system, as per the recent withdrawal of the United States from the Paris Agreement and the aforementioned Canadian "two-fold attitude". If we adopt a wider perspective, a strict bond may be identified

[24] Saskatchewan Ministry of Environment, 'Temporary Enforcement Policy during the Covid-19 Pandemic', available at https://www.saskatchewan.ca/ accessed 24 May 2020.

[25] Ibid: 'This policy addresses violations related to: The Environmental Management and Protection Act, 2010 and Regulations; The Environmental Assessment Act; The Waste Stewardship Regulations; The Wildlife Act and Regulations; The Provincial Lands Act and Crown Resource Land Regulations; The Conservation Easement Act; The Management and Reduction of Greenhouse Gases Act and Regulations; and The Saskatchewan Environmental Code. https://www.saskatchewan.ca/ accessed 24 May 2020.

[26] C. Le Quéré *et al.*, 'Temporary reduction in daily global CO2 emissions during the Covid-19 forced confinement' [2020] *Nat. Clim. Chang.* 1.

[27] US Energy Information Administration, 'Short-Term Energy Outlook (STEO)' (May 2020).

between the international policy agenda and the federal management of such issues, more focused on leaving margins to agencies or sub-federal levels of government.
In spite of future uncertainties on the impact of Covid-19 on GHG emissions, currently there is a convincing connexion between air pollution and a higher death rate due to the novel coronavirus, as some studies revealed in the cases of China and Italy.[28] Regarding the United States, a nationwide cross-sectorial study is proposing that an increase of only 1 μg/m3 in PM2.5 is associated with an 8% increase in the Covid-19 death rate.[29] Despite the scientific results and some uncertainties, the aforementioned studies are influencing future legal measures, especially in the shift from a hypothetical application of the precautionary principle to the commitment for preventive action.
At this stage, a proper assessment on GHGs impact would lack of sufficient and long-term scientific bases. However, considering the emergency measures adopted and the time-limited positive outcomes of the worldwide lockdowns,[30] common sense suggests that an uncontrolled and almost-limitless pollutant activity will have an impact on future environmental and pandemic patterns, but to what extent is far from being detected.[31]
On the contrary, a tentative assessment can be made regarding constitutional and international principles, as demonstrated by environmental and climate challenges arising from measures adopted in both countries during Covid-19 emergency. In this scenario, the long-lasting question regarding the uncertain balance between restrictions and individual rights opens new grounds of investigation. According to the individual perspective, the rollbacks may favour property rights, but this interpretation collides with the fundamental right to life and, to some extent, the right to a healthy environment. This issue shows the need to find the proper ratio between economic activities and the protection of the environment, as well as solutions to the problems related to workplace's safety operating with a lack of personnel (e.g. oil and natural gas industry, the management of hazardous waste). Furthermore, Covid-19's measures are stressing the factual implementation of environ-

[28] Y. Zhu *et al.*, 'Association between short-term exposure to air pollution and Covid-19 infection: Evidence from China' [2020] Science of the Total Environment 727; Y. Han *et al.*, 'Outdoor Air Pollutant Concentration and Covid-19 Infection in Wuhan, China', 26 May 2020 (preprint). Similar studies have been already conducted also regarding the SARS: Y. Cui *et al.*, 'Air pollution and case fatality of SARS in the People's Republic of China: an ecologic study' [2003] 2 Environmental Health 15. About the Italian case: E. Conticini, B. Frediani, D. Caro, 'Can atmospheric pollution be considered a co-factor in extremely high level of SARS-CoV-2 lethality in Northern Italy?' [2020] Environmental Pollution 261.

[29] X. Wu *et al.*, 'Exposure to air pollution and Covid-19 mortality in the United States: A nationwide cross-sectional study', 24 April 2020 (preprint).

[30] See F. Dutheil, J.S. Baker, V. Navel, 'Covid-19 as a factor influencing air pollution?' [2020] Environmental pollution 263.

[31] As L.-A. Duvic-Paoli points out, the Covid-19 emergency is questioning the deep connections among humans, animals and the environment, stressing the international law regime. However, she finds hope and opportunities in the current emergency: 'The Covid-19 pandemic is a striking image of the Anthropocene era: human impacts on Earth have been so profound that they have constituted a new geological epoch. We have destabilised the fragile equilibrium of our planet's ecosystems and are now facing the direct consequences. The pandemic is nevertheless a chance to remedy this and build new foundations.' L.-A. Duvic-Paoli, 'Covid-19 Symposium: The Covid-19 Pandemic and the Limits of International Environmental Law' [2020] Opinio Juris 30 March, http://opiniojuris.org/ accessed 30 May 2020.

mental principles. For instance, the precautionary principle and the preventive action are fundamentally set aside from policies of "non-compliance to environmental standards", although these choices seem to be addressed to economic targets, more than human health concerns; moreover, an uncontrolled pollutant activity can voluntarily dismiss the duty to avoid transboundary environmental damages.

3.3. Digital Activism: how many steps forward, how many backwards?

Digital activism embraces various aspects and techniques to address climate and environmental issues. In a wide approach, they may be summarised in i) legal provisions for participation and information; and ii) civil society movements. Despite a top-down (from the legal field to the civil society) or bottom-up (from the civil society to the legal system) approach, the current pandemic is actually reshaping the ways to address global concerns. As per the concept of Environmental Democracy, 'land and natural resource decisions adequately and equitably address citizens' interests,' furthermore, 'rather than setting a standard for what determines a good outcome, environmental democracy sets a standard for how decisions should be made'.[32] Thus, the main feature of digital activism resides in its aptitude to "force" legal systems according to the demand of climate/environmental justice, establishing the momentum for effective legal actions.[33] In line with the main role of activism (both real and digital), in the last decades, movements have influenced different conceptions of distributive justice, implementing the ethical debate revolving around different responsibilities and capabilities, as well as accountability of past and present pollutants.[34]

Not only as a result of Friday for Future movement, in the United States climate and environmental activism is rising, as demonstrated by a wide set of strikes and protests in the past two years, especially among young people[35] and NGOs. Efforts have been made in many directions, such as the implementation of independent sources based on affordable data, as it is the case for Climatenexus.[36] Also Canadian forms of activism are increasing, even in official venues, as confirmed by the efforts of the Canadian Government in officially addressing these forms of participation related to action, climate future, partnerships, adaptation, health, science, and emissions reporting.[37] This form of activism deals

[32] Center for International Environmental Law, https://www.ciel.org. accessed 24 May 2020.

[33] Concerning environmental and climate movements as driving forces in the ethical and political debate: T. Jafry (ed.), *Routledge Handbook of Climate Justice* (Routledge 2019); D. Schlosberg. *Defining Environmental Justice: Theories, Movements, and Nature* (Oxford 2007); E.A. Page, *Climate change, justice and future generations* (Edward Elgar Publishing 2006).

[34] C. McKinnon, *Climate Change and Future Justic:. Precaution, Compensation and Triage* (Routledge 2012); J.C. Heyward, D. Roser, *Climate justice in a non-ideal world* (OUP 2016); T.M. Thorp, *Climate Justice: A Voice for the Future* (Palgrave Macmillan 2014); J. Ebbesson, P. Okowa, *Environmental Law and Justice in Context* (CUP 2009).

[35] J. Ramadan, 'The Rise of U.S. Youth Climate Activism' *Harvard Political Review* (Cambridge 4 October 2019).

[36] https://climatenexus.org accessed 24 May 2020.

[37] https://www.canada.ca/ accessed 24 May 2020.

with other practices of civil participation, as exemplified by the Climate Action Network Canada-Réseau Action Climat Canada (CAN-RAC Canada), that is a coalition of more than 100 Canadian organizations,[38] or the Climate Atlas of Canada, which 'combines climate science, mapping and storytelling to bring the global issue of climate change closer to home for Canadians. It is designed to inspire local, regional, and national action that will let us move from risk to resilience.'[39]

The current pandemic did not stop climate and environmental activism,[40] as well as movement, in gaining a significant role in four main areas: i) participation of the citizens in the decision-making processes; ii) access to information related to the environment; iii) surge trends in facilitating and encouraging public awareness; iv) renewal of doctrinal debates on judicial and administrative proceedings, including redress and remedy. Despite uncertainties and the fact that the top-down and the economic-oriented approaches seem to better suit the economic needs, a wide range of civil activism is still growing. The forced shift from "real" to digital definitely altered shapes and ways of protest and participation, making strikes easier to join, but less persuasive in terms of substantial and tangible impact. This change is producing new forms of activism, altering ways of participation that may be improved or distorted in the light of forthcoming developments. However, in spite of the ongoing proliferation of talks, conferences and online-strikes, we are still far from a truthful assessment of success, failure, or decline on these new approaches.

Conclusion

Climate and environmental law are dealing with Covid-19 emergency through patterns of adaptation, rather than mitigation[41]. US environmental policy, in spite of not being an example of best-practice even in the past, under the current presidency is increasingly considering environmental legislation a tight tie for economic needs. The common idea that identifies Canada as an uncontaminated country is far from reality, and the pragmatic political agenda which reflects on international negotiations demonstrates how the United States and Canada are sharing, in different manners, the same attitude towards the environment and climate change. From this assumption, and regarding the focal points previously introduced, the pandemic highlighted some critical–and still evolving–topics:

[38] https://climateactionnetwork.ca/ accessed 24 May 2020.

[39] https://climateatlas.ca/ accessed 24 May 2020.

[40] Conference organized by the School of Advanced International Studies, Johns Hopkins University, JHU SAIS: Covid-19, Climate Change and Environmental Advocacy, 27 April 2019.

[41] A statistical study about Covid-19 mitigation measures in the United States reveals that compliance is personal and context related, and 'perceptual deterrence was not associated with compliance, people actually comply less when they fear the authorities'. Cf B. van Rooij *et al.*, 'Compliance with Covid-19 Mitigation Measures in the United States' [2020] Amsterdam Law School Research Paper 21.

i) in situation of emergency, the legislative power is usually set aside in comparison to the executive; this trend points out that the lack of political will can be a bigger obstacle than the legislation;[42] ii) as a result of the previous assumption, the existence of a regulatory framework is not a guarantee of climate and environmental success; iii) climate and environmental policies are disposable if compared to other needs (individual, rather than communal; economic, rather than health); iv) the emergency legislation is going towards a lower protection within norms and policies for the environment, as well as towards less effective measures for adaptation and mitigation to climate change; v) civil society is somehow managing the lack of means for movement restrictions, with the aim of strengthening its action.

[42] The current pandemic extends the thesis proposed by Wood (n. 7) 110: 'A lack of political will can be a bigger obstacle to environmental leadership than constitutional limits are'.

Articles

The Covid-19 Outbreak in the UK.

Its Impact of Public Health Security on Environmental Protection

Carmine Petteruti*

Abstract

This paper outlines the impact of Covid-19 on environmental policies in the United Kingdom. The first part is a survey on the measures implemented to cope with the Covid-19 emergency, also highlighting some emergency measures enforced by the Italian government. Then, it focuses on the impact of the COVID-19 emergency legislation on environmental and climate change policies and legislations, dealing with Brexit's challenges for the UK environmental law. The conclusion highlights some of the main issues related to the emergency legislation and to the protection of fundamental human rights.

Keywords

Covid-19 Pandemic – The Coronavirus Act 2020 – Environmental Protection and climate change in the UK – Comparative Public Law

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* Researcher at Università della Campania "Luigi Vanvitelli".

Introduction

The Covid-19 pandemic exploded almost one year ago, soon becoming a global concern. First considered as a mere health emergency, it has soon become an economic and social emergency, due to the measures put in place to limit the spread of the coronavirus (e.g., halt to production, commercial activities, transport and travel restrictions, etc.). For such reasons, it is quite common in the public discourse to compare the pandemic outcomes to the tragic consequences of a war[1].

Like in every crisis, many questions – sometimes rhetorical – arise: when and how will we get out of the Covid-19 emergency? Will people be able to build resilience to reshape our societies, just as after the World Wars? We will certainly be able to get out of the emergency and resume our life, but only after acknowledging the weakness and vulnerabilities of Western society and economy, without examining the impacts of large-scale disasters on its well-being. An example is provided by the legal framework and by state intervention that appear to be uncertain and unsystematic, mainly based on recommendations rather than on specific Orders, and, in some cases, provoking disappointment among individuals (as in the cases of nationwide lockdowns). The most notable example is the contrast between the approaches taken in Italy and those adopted in the UK, at least in the pandemic's early stages. On the one hand, the Italian Government has been adopting a series of progressive restrictions since March, including limitation on individual mobility or temporary suspension of working activities, with the exception of essential services, due to the high number of people who had been infected and/or killed by the virus. On the other hand, the UK government put in place less strict containment measures, in the wake

[1] A. Torre, *Dal Coronavirus alla Corona. Emergenza pandemica ed evoluzione costituzionale del Regno Unito* [2020] 43 DPCE Online <http://www.dpceonline.it/index.php/dpceonline/article/view/981> accessed 11 November 2020. The author points out the warlike matrix of the "key" UK Emergency Legislation, invoking "emergency-conflict" as the basis of emergency legislation, to deal with adverse health, political, and economic conditions. See also F. Fracchia, *Coronavirus, senso del limite, deglobalizzazione e diritto amministrativo: nulla sarà più come prima?* [2020] 3 Il diritto dell'economia 575.

of British Prime Minister Boris Johnson's "Keep Calm and Carry On" slogan, requiring all citizens to adopt the recommended behaviors to prevent the spread of the virus.
Due to the aforementioned causes, evaluating the effectiveness of emergency measures can be challenging, especially without considering the social and legal context in which preventive and precautionary measures have been taken.
However, regardless of the emergency context under examination, it has become clear that there is a political difficulty in finding the right balance between health protection and economic interests, in outweighting fundamental human rights (e.g. the right to liberty of movement, as well as to leave any country, including one's own, the right to assemble, etc.)[2] rather than creating conditions facilitating public protests and demonstrations, as a result of the adoption of the restrictions. The Brexit process, which has increased economic, political and social uncertainty, played a significant role in the UK, despite the threat of Scotland and Northern Ireland's secession.
Furthermore, the aforementioned scenario and the attention towards pandemic-related topics could distract attention away from environmental and climate change issues. In fact, the UK government action on climate change has been adopted under the Climate Change Act 2008[3] and the Climate Agreement at the COP21 in Paris on 12 December 2015[4] to reduce greenhouse gas emissions. During the COVID-19 pandemic outbreak, this commitment was confirmed by the intention to implement green economy policy interventions, with the aim of compensating damages suffered due to coronavirus outbreak.
Moreover, Brexit raises questions about how the UK will continue to take strong climate action at home, whether in partnership with EU Members or not, and if the UK will be setting out its own Nationally Determined Contribution (NDC)[5]. In the UK's withdrawal from the EU, the UK government confirmed to fulfil its commitments to fight against climate change, claiming to have been the first major economy in the world to legislate for a net-zero greenhouse gas emissions target[6].

[2] China is becoming an extreme example. The lack of instruments for human rights protection allowed the adoption of more severe restrictions on individual rights, using the death penalty for those who do not comply with those restrictions. L. Cuocolo (Eds), *Diritti costituzionali di fronte all'emergenza Covid-19. Una prospettiva comparata* [2020] Federalismi.it <https //federalismi.it/13>.

[3] The Climate Change Act 2008 does not only provide for the reduction of targeted greenhouse gas emissions (a target for up to 95% reduction in greenhouse gas emissions by 2050, compared to 1990 levels), but also for policy interventions on waste management and the use of green fuels. Adopting the Paris Agreement in 2015, the UK – Climate Change Act 2008 – set a legal framework to meet the targets for global action on climate change.

[4] The agreement was ratified by the UK on 18th November 2016.

[5] C. Born, *Brexit And The Paris Agreement* [2016] E3G <www.e3g.org> 1: "Technically the EU could ratify whilst the UK contributes to the (then) joint NDC. To further safeguard the UK's continued involvement after it leaves, the EU's NDC could be achieved through a joint fulfilment arrangement or other technical arrangement. This was the approach taken by Iceland when it ratified the second commitment period of the Kyoto Protocol".

[6] <https://www.gov.uk/government/publications/meeting-climate-change-requirements-if-theres-no-brexit-deal/meeting-climate-change-requirements-if-theres-no-brexit-deal>.

1. Main responses to the Coronavirus outbreak

The surge in infections and deaths in Italy, especially in the north of the country, led the government to enforce a lockdown on the whole national territory since March 2020, while the UK Government's adopted a step-by-step approach to respond to the COVID-19 pandemic. In the early phase of the crisis, in the wake of the "Keep Calm and Carry On" slogan, the UK government responded with specific advices instead of national restrictions, urging people to use common sense, to help prevent the spread of the virus. Indeed, the UK Government's action appeared to be inconsistent with its expert medical and scientific advisors (more worried about the spread of Coronavirus)[7]. Probably, due to the increasing awareness regarding the inadequacy of healthcare services – ascribed to the decentralization of the National Health Service (NHS)[8] – the UK Prime Minister initially advocated for herd immunity as the U.K.'s strategy to contain the coronavirus outbreak, saying that many families would have lost loved ones. Although the Health Secretary Mr. Matt Hancock denied that this was ever the government's official strategy, preventive measures (closure of all non-essential business activities and school closures) were very limited and the main concern was to keep citizens well informed, asking them to reduce activities deemed unnecessary and to maintain social distancing[9].

Just like in Italy, where the regulatory measures taken by the local Government in response to the coronavirus were sometimes in contrast with regional regulations, the health emergency in the UK highlighted the peculiarities of the British devolution settlements applied in accordance with the Sewel Convention 1999[10]. It was precisely within the scope of decentralization to delegate issues in healthcare systems and various civil service issues, for example to Local resilience forums (LRFs) which ensure the devolution settlement. They are multi-agency partnerships made up of representatives from local public services and other agencies, they are made up of Category 1 and 2 responders under the Civil Contingencies Act 2004, and they contribute to central government civil contingency planning[11].

[7] D.J. Hunter, *Covid-19 and the Stiff Upper, 19 Lip – The Pandemic Response in the United Kingdom*, [2020] The New England Journal of Medicine 1.

[8] Wales, Scotland and Ireland have relatively autonomous healthcare systems.

[9] The UK population surpassed the 60 million mark, UK Covid-19 cases increased to 942,275 people and the rate of reported deaths was 45,955 in October 2020. Italy's population is about 60 million, the total number of coronavirus (COVID-19) cases is 617,000 cases and 38,122 deaths. Recently, due to a significant rise in the number of COVID-19 infections, the Government has reinstating lockdown measures, as in other European countries such as Spain and France.

[10] For a commentary on the evolution of intergovernmental relations in the UK, see J. Gallagher, 'Intergovernmental Relations in the UK: Co-operation, Competition and Constitutional Change' [2012] 14 BJPIR 198; I. Mc Lean, *Understanding the Union*, in M. Keating (eds), *The Oxford Handbook of Scottish Politics* (OUP 2020).

[11] The main civil protection duties fall on the Category 1 responders as follows: risk assessment; business continuity management (BCM); emergency planning; and maintaining public awareness and arrangements to warn, inform and advise the public.

The Civil Contingencies Act 2004, Part 1, establishes a consistent level of civil protection across the UK. Consistency and co-operation at the local level is performed between Local Respondents of Category 1 and 2[12]. Section 1 of The Civil Contingencies Act 2004 defines an 'emergency': (a) an event or situation that threatens serious damage to human welfare in a place in the United Kingdom; (b) an event or situation which threatens serious damage to the environment of a place in the UK; (c) war, or terrorism, which threatens serious damage to the security of the UK. The Act gives a comprehensive list of what is classified as an event or situation threating damage to human welfare, including: loss of human life, human illness or injury, homelessness, damage to property, disruption of a supply of money, food, water, energy or fuel, disruption of a system of communication, disruption of facilities for transport, or disruption of services relating to health. Damage to the environment involves causes or may cause: contamination of land, water or air with biological, chemical or radio-active matter; disruption or destruction of plant life or animal life. A "senior Minister of the Crown" can issue 'emergency regulations' if an emergency is about to occur.

Part 2 of the Act establishes government's emergency powers, defines their limits, objectives and duration. The use of emergency powers is a last resort option in the most serious of emergencies, where existing legislation is insufficient to ensure a properly effective response. The Civil Contingencies Act provides for ministers to take emergency powers to deal with crises. Emergency regulations must be proportionate to the aspect or effect of the emergency they are directed at. What emergency regulations contain will depend on the specific requirement arising out of the potential or actual circumstances of the emergency. Thus, Emergency Measures (adopted by the Council of Ministers)[13] overlap with statutory laws, restricting personal freedom, although they may be consistent with the human rights guaranteed under the Human Rights Act 1995[14].

1.1. The Coronavirus Act 2020

The Coronavirus Act 2020 was adopted to respond to the COVID-19 pandemic. It contains 102 sections and 29 schedules; the Act provides that the majority of the provisions will

[12] Category 1 responders are listed in Schedule 1 to the Act. They are the main organisations involved in most emergencies at the local level: for example, the emergency services. Category 2 responders are also listed in Schedule 1. They are likely to be heavily involved in some emergencies: for example, utilities and transport companies.
The Act brings both groups within its framework to ensure greater consistency and co-operation at the local level. *Cabinet Office, Revision to Emergency Preparedness*, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/61024/Chapter-1-Introduction_amends_16042012.pdf> 11 November 2020. On Civil Contingecies Act, see C. Walker, J. Broderick, *The Civil Contingencies Act 2004* (OUP 2006).

[13] A. Torre (n. 2).

[14] About Brexit and repealing of Human Rights Act 1995, see C. Mc Corkindale, *Brexit and Human Rights* [2018] 22 Edinburgh Law Review 126; A. Smith, M. McWilliams and P. Yarnell, *Does Every Cloud Have A Silver Lining: Brexit, Repeal of the Human Rights Act and the Northern Ireland Bill of Rights* [2016] 40 Fordham Int'l L.J. 79.

expire after two years (Sunset Clause)[15], then for another six months after the end of the two-year period, unless the provision expires instead at such earlier time as is specified in the regulations (section 90). Under section 98, "So far as practicable, a Minister of the Crown must make arrangements for the motion mentioned in subsection (1) to be debated and voted on by the House of Commons within a period of 7 sitting days beginning immediately after each 6 months review period. The Government set out the five main purposes of the Act: (i) Increasing the available health and social care workforce; (ii) Easing and reacting to the burden on frontline staff; (iii) Containing and slowing the virus; (iv) Managing the deceased with respect and dignity; and (vi) Supporting people. The Act provides for parliamentary monitoring of the provisions with the possibility of assessing the persistence of the emergency every six months[16]. Other extraordinary measures were added to implement various levels of lockdown (lockdown regulations). These measures are introduced through secondary legislation, especially Regulations and Orders, based on laws on health matters (e.g. National Health Service Act 2006, Public Health (Control of Disease) Service Act 1984) or security (e.g. Social Security Act 1998, Housing Act 1996)[17]. Although the Civil Contingencies Act 2004 allows the government to introduce measures to limit the spread of Covid-19, it has been necessary to introduce an emergency legislation due to a long-term crisis management. The Act has been subject to criticism, since it allows the government to make regulations without an act of parliament, so undermining core democratic principles. The Civil Contingencies Act 2004 gives further emergency powers to the government and, unlike the Coronavirus Act, the parliament has the power to annul or amend regulations by resolution; regulations are limited in duration to 30 days, unless Parliament votes to extend this period before it expires.

In this regard it should be noted that the Constitution Committee of the House of Lords in an inquiry into fast-track legislation in the 2008-09 Session, recommended that there

[15] The Act will expire after two years of the Act's passing (Section 89). This does not prevent Ministers from using powers granted under section 90 of the Act to cause provisions to expire earlier than the two year sunset. Provisions can also be extended for a maximum of an additional six months.

[16] S. Molloy *Covid-19, Emergency Legislation and Sunset Clauses* [2020] UK Constitutional Law, https://ukconstitutionallaw.org/2020/04/08/sean-molloy-covid-19-emergency-legislation-and-sunset-clauses/ accessed 11 November 2020. The Author highlights that the temporary emergency measures may not be sufficient: "Such is the nature of the pandemic and such is the extent and wide-ranging nature of powers afforded under the Coronavirus Act (and similar pieces of legislation adopted globally), that more review processes might be required". On the debate, V. Fredianelli, *L'emergenza Covid-19 in Francia e nel Regno Unito. Un bilancio comparato*, in R. Tarchi (eds), *L'emergenza sanitaria da COVID-19: una prospettiva di diritto comparato* [2020] 1 Rivista Gruppo di Pisa Special Issue 71.

[17] Many statutory instruments (SIs) used for emergency measures, have been subject to negative procedure (the SI is laid before Parliament after it has been made into law by the minister, but may be annulled if a motion to do so – known as a 'prayer' – is passed by either House within 40 days of it being laid before Parliament. Parliamentary recesses of over four days do not count towards the 40 days) or to affirmative procedure (the SI is laid before Parliament after it has been made – signed – into law by the minister, but cannot remain law unless it is approved by the House of Commons and in most cases also the House of Lords within a statutory period – usually 28 or 40 days). An extensive analysis on SI and Covid-19 is on Hansard Society, *Coronavirus Statutory Instruments Dashboard*, 2020, <https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard 11 November 2020>.

should be a presumption in favor of sunset clauses appearing in fast-tracked legislation to ensure that it is subject to parliamentary review; and that there should be a presumption in favor of early post-legislative review of fast-tracked legislation[18]. As underlined in the Public Administration and Constitutional Affairs Committee Fourth Report of Session 2019-21[19], as a result of the timescales involved and the political situation, detailed scrutiny of the Coronavirus Bill was not practical. It is therefore very important that Government is held to account for how it uses and justifies the continued application of the Act. Therefore, it's particularly important that the Government provides information to help facilitate effective Parliamentary scrutiny: the original rationale for the temporary provisions in the Coronavirus Act, because those provisions are still justified and the evidence base for demonstrating those provisions are still effective[20].

1.2. A brief comparison between Italy and the UK on COVID-19 emergency legislation

Examining the Italian legislation on civil protection (Legislative Decree No. 1 of January 2, 2018) and the Civil Contingencies Act 2004, it emerges that both in Italy and the UK emergency management falls under the sphere of civil protection. In this framework, many similarities emerge regarding devolved competences, which in Italy are provided by Article 117 of the Constitution. In both legal systems, the proximity of each of the aspects of civil protection are evident and the central government plays a pivotal role. In Italy this department has shown limits due to regulatory overlap between the national government and the Regional Governments and because of the lack of coordination, particularly during the summer, in the second phase of the epidemic. The UK emergency management has been much more centralized, despite it has given various competences to local and regional authorities in the field of civil protection. However, both governments have decided to face the emergency using secondary legislation, referred to as urgent or as necessary, which then becomes law. In the UK, the Coronavirus Act 2020 grants the government emergency powers, while the Italian government has adopted a series of Decrees, then converted into law. Although both in Italy and in the UK the Parliament plays a central role, the two systems tend to strengthen the executive power during an emergency.

[18] R. Kelly, *Fast-track legislation*, House of Commons Library, Briefingpaper, Number 05256, 25 March 2020. The Committee identified five constitutional principles that it believed should underpin the consideration of fast-track legislation: i) he need to ensure that effective parliamentary scrutiny is maintained in all situations; ii) The need that the technical quality of all legislation is maintained and improved; iii) The importance of providing interested bodies and affected organisations with the opportunity to influence the legislative process; iv) The need to ensure that legislation is a proportionate, justified and appropriate response to the matter in hand and that fundamental constitutional rights and principles are not jeopardised; v) The need to maintain transparency.

[19] Public Administration and Constitutional Affairs Committee, Fourth Report of Session 2019–21, Parliamentary Scrutiny of the Government's handling of Covid-19, 8 September 2020.

[20] R. Cormacain, *Keeping Covid-19 emergency legislation socially distant from ordinary legislation: principles for thestructure of emergency legislation* [2020] The Theory and Practice of Legislation 1; R. Hogarth, *Parliament's role in the coronavirus crisis*, Institute for Government, 2020.

The Coronavirus Act 2020 sets out measures to respond to the COVID-19 pandemic, while Orders and Regulations related to unresolved issues or to get them resolved quickly become less important.

In Italy, the adoption of secondary legislation has become the rule rather than the exception. The first Decree-Law with restrictive measures to face the health emergency by Covid-19 (Decree-Law No. 6 of 23 February, 2020), granted the "competent authorities" with the power to adopt measures in response to coronavirus outbreak. Many other Decrees of the President of the Council of Ministers (DPCM)[21] have been issued, which have progressively limited fundamental human rights granted by the Constitution. The DPCMs are regulatory acts which have the force of law[22]; they are not converted into law by Parliament but they recall Articles 16, 17 and 32 of the Constitution, which legitimate the government's containment measures to protect public health as a fundamental human right indispensable for the exercise of other human rights.

Therefore, in Italy, much more than in the UK, the epidemic crisis has been de-parliamentarized, due to the limitation upon the power of Parliament[23], while the government is entrusted with special powers to manage the emergency situation and it is referred to as the sources of law[24].

2. UK Environmental Law, Brexit and Covid-19

Although the United Kingdom withdrew from the European Union on 31 January 2020, it is clear that the UK environmental legislation still has a significant European footprint[25]. However, soon it will be possible to understand how the UK's environmental legislation will evolve and if it will continue to comply with the EU environmental legislation. One

[21] Unlike Decree Law or the ordinary law, the DPCM do not require parliamentary approval.

[22] E.C. Raffiotta, *Sulla legittimità dei provvedimenti del Governo a contrasto dell'emergenza virale da Coronavirus* [2020] Biodiritto <www.biodiritto.org> accessed 11 November 2020.

[23] F. Clementi, *Quando l'emergenza restringe le libertà meglio un decreto-legge che un Dpcm*, Il Sole 24 Ore, 13 March 2020 <https://24plus.ilsole24ore.com/art/coronavirus-quando-l-emergenza-restringe-liberta-meglio-decreto-legge-che-dpcm-ADfpIxC>

[24] S. Cassese, *La pandemia non è una guerra. I pieni poteri al governo non sono legittimi*, Il dubbio, 14.04.2020 < https://www.ildubbio.news/2020/04/14/cassese-la-pandemia-non-e-una-guerra-pieni-poteri-al-governo-sono-illegittimi/>

[25] Article 2 of the European Union (Withdrawal) Act 2018 (it is an Act of the UK Parliament that provides for repeal of the European Communities Act 1972, related to the accession of the United Kingdom to the European Community) provides that EU-derived domestic legislation continues to have effect on and after exit. B. Guastaferro, *Parlamenti, Corti e struttura territoriale dello Stato: il Regno Unito tra Brexit e devolution* [2020] 41 DPCE Online <www.dpceonline.it> accessed 11 November 2020; G. Caravale, *L'approvazione dell'European Union (Withdrawal) Act 2018 e le incertezze dell'accordo di recesso* [2018] 2 Nomos <www.nomos-leattualitaneldiritto.it> accessed 11 November 2020; P. Craig, *Constitutional Principle, the Rule of Law and Political Reality: The European Union (Withdrawal) Act 2018* [2019] 82 MLR 319; M. Elliott, S. Tierney, *Political Pragmatism and Constitutional Principle: The European Union (Withdrawal) Act 2018* [2019] 1 PL 1.

of the major factors that led to the results of Brexit referendum in 2016 was the prospect of a stronger economic growth resulting from the removal of the UK from the European restrictions[26]. In addition, there is the prospect to reduce administrative burdens, authorisations, reports and data sharing related to environmental legislation. Moreover, the UK will need to decide if to implement its commitment agreed at COP21 in Paris in 2015. The Agreement on Climate Change contains non-regression clauses[27], it brings all nations into a common cause to undertake ambitious efforts to fight climate change. Countries submit their plans for climate action known as "nationally determined contributions" in a framework of differentiated responsibilities and respective capabilities. As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts, which will represent a progression over time. Therefore, it is an improvement or, at the most, the maintenance of an unchanging situation, but with the objective to achieve higher levels of climate protection. It is not only a EU's strategy but it has become an international climate action[28]. The outcome document of the United Nations Conference – or Rio+20 – states the need that all Parties do not backtrack from their commitment to the outcome of the United Nations Conference on Environment and Development, albeit it does not explicitly refer to the principle of non-regression. The 2016 World Declaration on the Environmental Rule of Law, drafted by a team of members at the 1st IUCN World Environmental Law Congress in April 2016 in Rio de Janeiro, Brazil, attempts at codifying the non-regression principle and imposes a duty on States to take appropriate steps to promote and achieve ecological justice through the environmental rule of law.

With regard to the so-called 'resistance test' of British environmental legislation, it should be noted that the EU environmental law was transposed into the national system of environmental legislation. This has included the establishment of a UK-wide environmental governance body, as the consequence of an active and propulsive involvement of the United Kingdom in the in the field of the EU environmental policy[29]. This is the case of the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora – which aims to promote the maintenance of biodiversity – translated into specific legal obligations by the Conservation (Natural Habitats, &c.) Regulations

[26] A plausible scenario that could affect the UK might be the risk of a regression, together with a reduction of environmental standards to better compete in international markets. Therefore it will be necessary to see the impact of environmental regulation on the Uk domestic and international market. M. Gehring, F. Phillips, *Brexit and Environmental Law. The Rocky Road Ahead*, CIGI, Waterloo, 2018, 6 ss. The Authors examin the legal and policy considerations underpinning Brexit in light of international environmental commitments, in particular relating to climate change, arguing that deregulatory pressures could evaporate the dream of a greener post-Brexit Britain.

[27] Environmental protection is enforced by the implementation the principle of non-regression through regulatory, sanctioning and jurisprudential measures. C. Petteruti, *Le sanzioni ambientali come strumento di prevenzione del danno ambientale. Profili di comparazione* [2019] 4 DPCE 1113.

[28] C.T. Reid, *Brexit and the future of UK environmental law* [2016] 4 Journal of Energy&Natural Resources Law 407.

[29] Ibid.

1994[30], or of climate change regulations, the Greenhouse Gas Emissions Trading Scheme Regulations 2012 and the system of Integrated Pollution Prevention and Control (IPPC). The UK-wide policies on waste are built on the EU waste laws: the definition of hazardous waste in the Environmental Protection Act 1990 originates from the Directive 2008/98/EC – also known as the Waste Framework Directive – and the EU Directive 91/689/EEC – the Hazardous Waste Directive. Clearly, just as the UK environmental law will be less influenced by the EU law, the EU environmental law may be seen differently in legal systems such as the common law[31]. As matter of fact, the UK's withdrawal from the EU could then have less significant consequences than we might think, due to the United Kingdom's post-Brexit relationship with the remaining European Union members. Indeed, the relevant EU environmental legislation will continue to apply in the UK, due to the UK's ambition to maintain "the freest possible trade"; therefore, the UK will remain largely aligned to the EU businesses trading standards[32].

3. Impact of COVID-19 outbreak on GHG policy

A new report published on the UN-established Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) warned that preventing future pandemics depends on tackling biodiversity loss and climate change[33]. This perspective is confirmed in the address of the UK Committee on Climate Change, which is responsible for monitoring progress towards the targets in addition to providing independent advice on carbon budgets. According to the Committee addressing this, these priorities can lead to multiple benefits through improving the condition of the natural environment and air quality, benefiting biodiversity and public health, as well as improving well-being, and reducing society's exposure to external shocks[34].

Although it's too early to make an assessment of the impact of COVID-19 on the environment, the available data have shown a strong correlation between emission reduction and energy consumption. Therefore, in Europe, there is a correlation between GHG emissions and GDP, highlighting that the emission reduction targets can be only achieved through a

[30] See the Conservation of Habitats and Species Regulations 2010 entered into force on 1st April 2010.

[31] Decisions of the European Court of Justice (ECJ) are bound to a significant redrafting due to the new directions of the UK Supreme Court that in the judgment *R (on the Application of Miller and another) (Respondents, 1) v Secretary, 19 of State for Exiting the European people Union (Appellant, 19)* has ruled "Upon, 19 United, United Kingdom's, 1999 withdrawal from the European people Union, EU law Will Cease to be a source of Domestic law for the future (...), decisions property of the Court of Justice Will (…) be of no more than persuasive authority, and there Will well no further References It is not just a that court from UK courts".

[32] About the Britain's future economic relationship with the EU, see V. Bogdanor, *Brexit, the Constitution and the Alternatives* [2016] 27 King's Law Journal 314.

[33] IPBES, *Workshop on Biodiversity and Pandemics* (2020).

[34] CCC Reducing UK emissions Progress Report to Parliament (2020).

sustainable development policy[35]. As it has been already pointed out, environmental policy often sets short-term goals, renouncing long term goals and so making it even harder for States to develop national long-term strategies on climate change[36].

The UK's commitment to fight against climate change has been pursued under international agreements with European Member States. The Climate Change Act 2008 aims to enable the United Kingdom to cut greenhouse gas emissions by 80% below 1990 levels[37]. It is the first global legally binding climate change mitigation target set by a country[38]. Although no specific sanctions or penalties are stated to apply for failing to meet targets, it is clear that the Government's violation of the Climate Change Act 2008 would expose it to a political censure, if not to a judicial one. Indeed, it has been pointed out that the key strength of the Climate Change Act is its long-term objectives[39]. This is because the action to combat climate change requires structural changes that cause political debate about the different options available, due to their impact on households and businesses. Surely regulatory framework may help manage and deal with potential socio-political conflicts and structure a constructive decision-making process[40], particularly in view of the seriousness of a pandemic scenario such as Covid-19.

The Climate Change Act has already been subject to several changes since it came into force, in fact, since 2008 Conservative and Labour parties have alternated in government.

[35] D. Helm, *The Environmental Impacts of the Coronavirus* [2020] 76 Environ Resouree Eeon 21: "Put simply, the evidence from the correlation between the falls in emissions and GDP during the pandemie lockdowns indicates that achieving the Paris Agreement of a 1.5 °C limit to global warming is going to be very difficult if GDP and population continue to rise. This observation should further ignite the debate about whether growth in consumption is compatible with limiting global warming and protecting the environment more generally, and whether technological progress can be fast enough to reduce the environmental impacts of that greater consumption". I. Schumaker, *Perspectives on the Economics of the Environment in the Shadow of Coronavirus* [2020] 76 Environmental and Resource Economics 447.

[36] A. Averchenkova, S. Fankhauser and J.J. Finnegan, *The impact of strategic climate legislation: evidence from expert interviews on the UK Climate Change Act* [2020] Climate Policy 1: "Policy certainty can be enhanced through several channels. First, putting policy into law, with due parliamentary oversight, is expected to reduce the scope for backsliding from earlier commitments and to ensure continuity in climate change objectives, targets and policies (…) it is more difficult to ignore, weaken or abolish a parliamentary act than government strategies or white papers, as it requires active legislative processes to amend or remove them". The Authors highlights that it is useful to delegate the implementation of climate interventions to independent bodies charged with evaluating or implementing policies.

[37] So far, the United Kingdom has been implementing a plan to bring all greenhouse gas emissions (GHG) to net zero by 2050. Specific interventions have been identified to achieve this target such as: energy efficiency, sustainable consumption, renewable energy, intensification of the use of hydrogen as renewable energy source. To reach the new goal of the Net Zero, it reduced GHG emissions by at least 44% compared to 1990 (2018 data). However, even before the pandemic, the UK was lagging behind in achieving its 2022, 2027 and 2032 targets. S. Bell, *United Kindom*, in E. Lees, J.E. Viñuales (eds), *The Oxford Handbook of Comparative Environmental Law*, (OUP 2019): "It has been argued that the Climate Change Act 2008 sets sufficiently clear targets for greenhouse gas (GHG) reduction to create a form of substantive rights in the UK's political constitution".

[38] Loi n° 2019-1147 of 8 November 2019 on Énergie et Au Climat in France; the Klimaschutzgesetz 2019 in Germany; the Swedish Climate Act 2018.

[39] K. Hill, *The UK Climate Change Act 2008. Lessons for National Climate Laws* (ClientEarth 2009); H. Townsend, *Climate Change Act 2008: Will It Do the Trick?* [2009] 11 Environmental Law Review 116.

[40] A. Averchenkova, S. Fankhauser and J.J. Finnegan (n. 36).

The pandemic is the latest event that, together with the economic crisis and the Brexit referendum, has affected the UK. Nevertheless, the Act has not suffered setbacks, except some delays, and it has never been repealed[41]; on the contrary, it has been amended with the aim to achieve more ambitious targets than those of 2008[42]. In short, everything suggests that it can also withstand the impact of COVID-19, perhaps contributing to the development of Green-Economy as an opportunity to promote employment and business growth.

So much emerges from the Committee on Climate Change that in April 2020, six initiatives were indicated to the Prime Minister for a resilient recovery from COVID-19: use climate investments to support the economic recovery and jobs; lead a shift towards positive long-term behaviours; tackle the wider resilience deficit on climate change; embed fairness as a core principle; ensure the recovery does not lock-in greenhouse gas emissions or increased climate risk; strengthen incentives to reduce emissions when considering fiscal changes[43].

The Committee on Climate Change Reducing UK emissions' Progress Report to Parliament shows that the long-term climate targets will remain unchanged: the need to prepare for climate change and to transition to a Net-Zero economy remains a scientific and economic imperative and provides a positive vision for society[44]. There is no doubt that the net zero target by 2050, following the pandemic, is set in a new context. However, commitment to reduce climate-changing gas emissions is currently highlighted, stressing the UK's action in the fight against climate change at international level also with regard to the 26th session of the Conference of the Parties (COP26) of the UN Framework Convention on Climate Change (UNFCCC) hosted in Glasgow by the UK in partnership with Italy. Postponed to November 2021, the Conference will be a key moment to check the Nationally determined Contributions (NDCs) by the Parties for intended emissions reductions to 2030.

[41] The Committee on Climate Change (CCC) is one of the main features and strengths of the Act 2008, an independent advisory body. See the Recent Committee's 2020 report to Parliament (2020) <https://www.theccc.org.uk/publication/reducing-uk-emissions-2020-progress-report-to-parliament/>.

[42] The Climate Change (Emissions Reduction Targets) (Scotland) Act 2019, which amends the Climate Change (Scotland) Act 2009, sets targets to reduce Scotland's emissions of all greenhouse gases to net-zero by 2045.

[43] CCC (2020) Letter to Prime Minister Boris Johnson on Building a resilient recovery from the COVID-19 crisis: "The economic recovery from [COVID-19] gives the UK a chance to grow back in a way that is fit for the low-carbon future to which it aspires, and that can benefit from the industrial and economic developments that this future offers".

[44] Ibid.

4. Environmental impacts of the COVID-19 pandemic

The EU environmental law rests on the Environmental Law principles. The key principles of the Environmental Law are the precautionary principle (or precautionary approach) and the prevention principle.

This requires environmental standards to prevent environmental damage. The violation of these principles involves the application of the 'polluter pays' principle; this principle means that the polluter should bear the "costs of pollution prevention and control measures". The precautionary principle and the prevention principle are central principles of the UK Environmental Law[45]. The current UK environmental legislation is the result of the the implementation and the adherence to the international and EU's norms[46]. The result is a complex – and uncertain – post-Brexit legal system, mainly due to the process of the UK transposition of EU legislation, ensuring that directives are transposed into domestic legislation. The implementation of the latter is conferred by the central government to its departments, which will then report on areas of competence: Department for Environment, Food and Rural Affairs (Defra) and divided among a range of other departments including the Ministry of Housing, Communities & Local Government; the Department of Business, Energy and Industrial Strategy; the Department of Transport; the Treasury; and the Ministry of Justice[47].

Currently, the European Union (Withdrawal) Act 2018 requires the Secretary of State to publish a draft Bill consisting of a set of environmental principles, to be kept in the body of the UK law. The aim is to prevent that, in the UK after Brexit, these principles may not be applied, even in the courts, through transposition and implementation of the EU legislation into the domestic legal order. On the other hand, leaving the European Union would give the UK the opportunity to optimise environmental policy. In this regard, George Eustice, appointed Secretary of State for Environment, Food and Rural Affairs, said the Environment Bill 2019 is a keystone in the government's vision to deliver the most ambitious environmental programme. The Bill sets out policies, strategies and specific objectives in environmental protection[48]. In the face of Covid-19 emergency, it's more important than

[45] However, it should not be ignored that jurisprudence gives environmental principles political rather than legal importance.

[46] With respect to the original role of environmental issues in private law, which is mainly involved in protecting property and in neighbourhood disputes, environmental law has been progressively increasing its public dimension since the period of industrialization and urbanization, together with the growing demand for the environmental and human health protection. S. Bell, (n. 37).

[47] Ibid.

[48] According to E. Fisher, *Executive Environmental Law* [2020] 83 The Modern Law Review 163, the Draft Bill is inadequate in its engagement with the nature of environmental problems, the benefits of legislation, and the importance of constitutionalism: "In this 'unfrozen moment' thus lies a risky post-Brexit future – a future that not only environmental lawyers, but also public lawyers should be alert to".

ever not only to protect and manage environment but also to foster investment in green economy.

Beyond what could be the innovation effects of the British environmental law, it seems difficult that it won't apply the principles of both domestic and international environmental law, with the risk of a regression of the Environmental protection and management[49]. This would be in contrast with the principle of non-regression of International Environmental Law related to the environmental protection. On the other hand, these set of environmental principles, including the precautionary principle has been recognised by British case law with regard to environmental impact assessments and authorisations[50].

The precautionary principle plays an important role related to the Covid-19 pandemic, because, in line with the implementation of environmental law, it guides many of the measures to contain the contagion in cases where there is a lack of clear and unambiguous scientific indication[51]. Indeed, both in Italy and in the UK the application of the precautionary principle has taken on an even stronger connotation, since the measures to contain the spread of virus COVID-19 have been adopted in the absence of definite scientific data, in order to prevent the critical issues in the healthcare sector – particularly in hospitals – rather than to contain the negative impact on people's health. Therefore, the governments restrictions on non-essential businesses, unnecessary administrative burdens and people's

[49] The *Fishermen and Friends of the Sea (Appellant) v The Minister of Planning, Housing and the Environment (Respondent) (Trinidad and Tobago) [2017] UKPC* offers some instructive examples of how the UK courts deal with environmental principles. The case is noteworthy because it provides a relatively rare judicial consideration of one of the core environmental principles – the polluter pays principle — by the UK Privy Council. Lord Carnwath began the judgment with a general summary of what the polluter pays principle is about, "The Polluter Pays Principle ('PPP' or 'the Principle') is now firmly established as a basic principle of international and domestic environmental laws. It is designed to achieve the 'internalization of environmental costs', by ensuring that the costs of pollution control and remediation are borne by those who cause the pollution, and thus reflected in the costs of their goods and services, rather than borne by the community at large". Therefore, the principles of environmental law, being rooted in international customary law, can only be acknowledged and implemented by the national jurisprudence of the United Kingdom. If the UK government keeps its promises about transposing environmental principles and responsibility into post-Brexit legislation, there will likely be no particular action by the UK courts. Otherwise, if a framework emerges in which environmental principles is a downsizing in practice, it is possible that the UK Supreme Court adopts a more interventionist and controlling attitude. C. Hilson, *The Polluter Pays Principle in the Privy Council: Fishermen and Friends of the Sea (Appellant) v The Minister of Planning, Housing and the Environment (Respondent) (Trinidad and Tobago) [2017] UKPC 37* [2018] 30 Journal of Environmental Law 507.

[50] The British courts have been fostering the need to comply with the EU Environmental Legislation. The violation is sanctioned as environmental offences and the consequent civil and criminal liability. *R v Milford Haven Port* Authority [2000] 2 Cr App R (S) 423, *R v Anglian Water Services Ltd* [2003] EWCA Crim 2243, *R v Thames Water Utilities Ltd* [2015] EWCA Crim 960; [2016] 3 All E.R. 919, all cited in P. Stookes, *Brexit and Implications for Environmental Law* [2018] 6 Environmental Law and Practice Review 103.

[51] The precautionary principle was enshrined in the Maastricht Treaty of 1992 and has been applied by the European Court of Justice as a *general principle of law*, acquiring the definition of principle that "enables decision- makers to adopt precautionary measures when property scientific evidence about an environmental or human health hazard is uncertain and stakes are high". The precautionary principle used in the emergency legislation may lead to the implementation of measures based on based on purely hypothetical scientific evidence, where uncertainty, such as lack of information, acquires a positive charge. In fact, the precautionary principle has become a guiding principle adopted by governments to respond to the challenges of the pandemic and adopt containment measures. D. Bourguignon, *The precationary principle. Definitions, applications and governance, European Parliamentary Research Service*, December 2015, PE 573.876.

daily activity movements were aimed at reducing the spread of the virus and preventing hospital collapse. Therefore, this approach changes the policy for determining the criteria for risk acceptability. The risk should not be assessed by comparing it to the consequences of an adverse event but considering the ability of the management system to react and contain the consequences of an adverse event, implementing strict safety measures.
In the event of unidentified risks and waiting for scientific data, the government is responsible for establishing the criteria for risk acceptability, according to threats and vulnerabilities parameters, and considering all the population's concerns. It is therefore up to political bodies to decide the measures to be implemented, involving the political parties concerned and taking temporary, proportionate and non-discriminatory actions, without neglecting the burdens and benefits associated with the decisions[52].

5. Necessity and proportionality as tools for protecting human rights and environment in times of emergency

The Covid-19 emergency is exacerbating existing human rights violations. The measures to prevent the spread of the virus have had an impact on constitutional human rights, and have been hardly accepted by people. This is due to different levels of risk perception between citizens – partially related to scientific uncertainties inherent to the symptoms and the model the virus can spread, partially because of unclear messages to explain the measures taken. Freedom of movement, freedom of thought and worship, freedom of assembly and association are just some of the issues contained in the emergency measures set out in the Public Health (Control of Disease) Act 1984, The Health Protection (Coronavirus) Regulations 2020 and the Coronavirus Act 2020, which arise compatibility problems with the provisions of the Human Rights Act 1998 and the Equality Act 2020. Therefore, in the absence of a written constitution, the Human Rights Act 1998 is the 'shield' of human rights principles, constitutionally guaranteed. The Act provides that it is unlawful for a public authority to act in a way that is incompatible with a Convention right (Article 6), guaranteed under the European Convention on Human Rights (ECHR). However, the protection of human health, of public safety, or the protection of public order and the rights of others are fundamental rights set out in the Convention which can both restrain the fundamental freedoms. In this difficult balance between the right of protection and other rights, the main concern is not only linked to the proportionality and necessity of the measures taken

[52] Communication from the Commission on the precautionary principle, COM (2000) 1 final. According to the Communication, decision-makers need to be aware of the degree of uncertainty attached to the results of the evaluation of the available scientific information. Judging what is an "acceptable" level of risk for society is a political responsibility. A wide range of initiatives is available in the case of action, going from a legally binding measure to a research project or a recommendation. The decision-making procedure should be transparent and should involve as early as possible and to the extent reasonably possible all interested parties (Refs. 5).

in achieving the objectives of protection. The fear is that the emergency may consolidate a different approach for the protection of all the rights and freedoms, leading to a regression of their protection[53]. Therefore, the adoption of appropriate measures under the rule of law is a basic prerequisite to legitimate restrictions of these rights only if such restrictions are "necessary in a democratic society like the one of the UK. At the same time, since environmental factors may affect individuals' rights (for example, by affecting their health), the call to good regulation is a step to protect natural environment as announced by Boris Johnson in the UK New Deal, to respond to the economic collapse caused by Covid-19. Indeed, the Prime Minister's "build, build, build" slogan has been interpreted by many as an alarm to weaken environmental protection. Therefore, it is clear that the requirements of necessity and proportionality, referred to in the Coronavirus Act 2020 to legitimate the emergency measures adopted, should also be properly considered as options to relaunch social and economic activities, to achieve a correct environmental protection and to improve environmental objectives.

The UK net zero targets are based on a veryambitious pathway that involves:

- energy efficiency in buildings;
- modification and or carbon transport;
- implement renewable energy to contribute to a resilient and sustainable energy system;
- embedding low-carbon investments into trends in world energy markets by sector and technology.
- Strengthening Agricultural Support Services, promoting land use conversion and biodiversity protection;
- Resilience to Climate Change.

As highlighted by the Committee on Climate Change[54], climate investment will help create jobs and a new economic recovery, while changing the UK's gas emissions and building climate resilience. To achieve these goals, a more broadly cooperation is required by the territorial authorities, which must make full use of the policy levers available to them and work closely with the UK Government to ensure delivery in those areas that are not devolved.

[53] J. Pugh, *The United Kingdom's Coronavirus Act, deprivations of liberty, and the right to liberty and security of the person* [2020] 7 Journal of Law and Biosciences 1.

[54] Committee on Climate Change, *Reducing UK emissions. Progress Report to Parliament*, June 2020, presented to Parliament pursuant to Section 36(1) of the Climate Change Act 2008.

6. UK Environmental Digital Activism in the time of Covid-19

The Covid-19 pandemic has certainly highlighted the importance of communication about the current emergency, contributing to guide communities and individual behavior. The communication channels involved are not only the traditional media, but above all the Internet and social medias. The capillary action of this kind of communication highlights the problem of the right "not to be informed", more than of the right "to be informed". In short, there is a problem related to the selection of information that requires a critical approach that Internet and social networks users do not always have, being exposed to the threat of fake news. Moreover, school closures and restrictions on gatherings may have a negative impact on public participation. Environmental activists mainly show this discomfort. Just think about the protests around the world aimed at preventing further global warming and climate change which shacked up public opinion, promoting the international debate on climate change.

The Internet has been used as the key instrument by Environmental activists (particularly those committed to the fight against global warming), since it is a mechanism for worldwide information dissemination, it is a useful tool to make people – including bloggers – voice their opinion and organize themselves in an environmental movement. The advantage of the so-called 'social media activism'[55] is to involve individuals with different backgrounds around common causes[56]. The use of social media and the Internet has thus created new forms of environmental activism, strengthening the concept of environmental democracy[57] and its principles[58].

[55] S. Wilson, *Representing Climate Activism through Digital Media before and during COVID-19 lockdowns* [2020] 4 International Journal of Contemporary Humanities 2; L.E. Hstress, J. Hopke, *Internet-Enabled Activism and Climate Change*, in M.C. Nisbet, S.S. Ho, E. Markowitz, S. O'Neill, M.S. Schäfer, and J. Thaker (Eds), *The Oxford Encyclopedia of Climate Change Communication* (OUP2018).

[56] N. Basserabie, *How activism is evolving to hold government and business accountable* [2019] Australian Human Rights Institute <www.humanrights.unsw.edu.au> 11 November 2020.

[57] In the European legal system, environmental democracy can be developed through participatory and ecologically politics, according to which, authorities are required to involve citizens in the decision-making processes. At international level, the Aarhus Convention grants the public rights regarding access to information, public participation and access to justice. See G. Cordini, *Ambiente e democrazia. Profili introduttivi di diritto pubblico comparato* [2001] Diritto e gestione dell'ambiente 11; on the Aaarhus Convention see C. Petteruti, *Le limitazioni indirette al diritto di accesso del pubblico alle informazioni ambientali: ammissibilità di una tassa per l'accesso alle informazioni ambientali nei limiti della ragionevolezza* [2017] 1 DPCE Online http://www.dpceonline.it/index.php/dpceonline/article/view/102 accessed 11 November 2020.

[58] Principle 10 of the 1992 Rio Conference on Environment and Development provides three Environmental Democracy rights: 1) the right to participate in environmental decision making, 2) the right for citizens affected by environmental decisions to receive pertinent information, and 3) the right to access judicial and administrative proceedings, including redress and remedy, to effectuate these rights. D. Takacs, *Environmental Democracy and Forest Carbon (REDD+)* [2014] 44 Environmental Law 71: "In addition, indigenous peoples, other forest dependent peoples, and possibly all local citizens should give free, prior, and informed consent (FPIC) when decisions about environmental resources vital to their lives are made".

In the UK, Environmental Movement Organizations –environmental non-governmental organizations (ENGOs) and environmental charities – have been joined by non-formal Environmental Movement Organizations, which include environmental networks59. As noted[60], there are different community-based (local, regional, national and global) Environmental Movement Organizations in UK that operate more as non-formal networks. At the same time there are environmental networks like the Campaign against Climate Change (CCC), a UK-based pressure group founded in 2001. These movements made extensive use of the internet and of social media as tools for advocacy campaigns, to mobilize collective participation and action. However, democratization of environmental digital activism may contradict itself. Indeed, it cannot be ignored that digital activism requires hardware and software to access the Internet, thus creating inequalities[61]. Moreover, the widespread diffusion of environmental technologies and the development of green computing will be needed as well – including hardware and software; this might be more expensive than the use of a laptop or a smartphone. All these issues must be taken into consideration. These problems have emerged even after Covid-19 emergency in different countries – like Italy – that have implemented school closures and strategies to support remote learning. This choice raised heated debates about the violation of the right to education for persons without financial resources having to buy education-related ICT equipment and lacking broadband connectivity[62].

Albeit environmental digital activism (often called 'clicktivism') might increase minorities' involvement in British environmental movements, it should not be ignored that actually there may be limitations due to problems with access to the web, generating inequalities in digital activism.

[59] S. Pickard, *The Nature of Environmental Activism Among Young Peoplein Britain in the Early 21st Century*, in B. Prendiville, D. Haigron (Eds), *Political Ecology and Environmentalism in Britain* (Cambridge Scholars Publishing, 2020). According to the authors: "Non-formal Environmental Movement Organisations tend to have a different organisational structure to political parties and other formal organisational structures. Indeed, they are usually leaderless and (officially) tend to have no hierarchy, thus operating within a decentralised, horizontal and egalitarian grouping, or informal 'fluid networks'".

[60] Ibid.

[61] J. Pickeril, *Environmental Internet Activism in Britain* [2001] 13 Peace Review 365.

[62] Article 26 of the Universal Declaration of Human Rights provides the right to education. Education shall be free, at least in the elementary and fundamental stages. Higher education shall be equally accessible to all on the basis of merit. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. Article 2, Protocol 1, of the European Convention on Human Rights provides that No person shall be denied the right to education.

Conclusion

UK is currentlyfacing two wicked public policy issues – Covid-19 and Brexit, having a deep impact on its economic, political and environmental activity.
The British people's reaction to the referendum result was not unanimous; separatist national identities were fueled in Scotland and Northern Ireland – which voted to remain.
Thus, many uncertainties rose, particularly at international level, since there is no precedent of a Member State withdrawing from the Union. It is extremely difficult to predict the future of the UK. Similarly, it will be hard to forecast the impact of the COVID-19 pandemic. Therefore, it is arduous to define the negative effects of both Covid-19 and Brexit in the UK or whether they could provide new opportunities.
Environmental issues are rooted in this uncertain scenario. The UK's withdrawal from the EU may involve a review of environmental legislation and there might be a return to the former regulatory framework as an immediate impact of Brexit (The European Communities Act 1972), as stated in UK Supreme Court Miller Judgment on 27 January 2020[63].
A Review of the Regulatory Framework could be even more necessary in response to Covid-19 and it's the environmental impacts – for example, its implications on climate change – which will affect the future economic policy choices. Actually, the European Union (Withdrawal) Act 2018 contains provisions to make regulations to prevent a regression on the UK environmental law and regulation; UK will continue to apply the EU law under the 2018 Act.
It is no coincidence that specific maximum precautionary measures are helping to control and reduce the spread of the virus. Both in the UK and in other countries – like Italy – precautionary measures and prevention measures have been adopted so far; therefore, it is difficult to determine which ones prevails. While restrictions on the use of public transport are based on disease prevention aimed at reducing the risk of infection in confined spaces, precautionary measures require limitations on all non-essential business activities, because they may facilitate the spread of the virus.
Therefore, Britain is experimenting a new precautionary approach, managing the critical issues of the system to prevent the risk of infection rather than managing the risks itself.
Comparing the Italian and the British interventions to deal with the COVID-19 pandemic, it is evident that the executive plays a key role, as shown by the UK Coronavirus Act 2020 and the Italian Civil Protection Code.
The use of secondary legislation to deal with the pandemic reduced'the influence of the legislatures. Both in the UK (the Coronavirus Act 2020) and in Italy (Decree-Laws No. 6

[63] R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant), [2017] UKSC 5.

of 23 February 2020 and No. 19 of 25 March 2020), Parliaments allowed governments to rapidly introduce emergency measures that have affected constitutional rights.
To this extent, the recurrent "limitative pattern" measures through the use of secondary legislation may foster the risk of by-passing the temporary requirements, which is essential in states of emergency, thus leading to a limitation of human rights, due to deviations from the legislative power. The last assumption suggests that, both in the UK and Italy, in dealing with the emergency, the Parliament was called to ratify the measures taken by the government or to take the institutional steps deemed necessary to legitimate the measures adopted in time of emergency, without playing an active role in checking the limiting of fundamental rights on the grounds of the requirement of proportionality and necessity of the emergency measures adopted[64].
The Italian Government often used secondary legislation issuing Ministerial Decrees (DPCM) and Ordinances, which, being administrative acts, are subject to preventive control[65]. For instance, there is little doubt that some measures (e.g. restrictions on individual mobility, privacy, and even the right to health) are contained in the Decree-Laws No. 6 and no. 19/2020[66].
Similarly, the use of Ordinances has been wide, causing regulatory overlaps among executive bodies (e.g. Ordinances of the Ministry of Health and Ordinances of the Head of the Department of Civil Protection), the national government and the Regional Governments (which, in the exercise of their power to adopt restrictive measures, have frequently applied more stringent measures confined to a specific territory). In UK, the Coronavirus Act 2020 has substantially transposed the strategic plan of the Government issuing Policy Statement, Policy Papers and Reports, conferring wide powers to the government (expanding the plethora of Orders and Regulations issued) and approving government's Coronavirus action plan[67]. In this regard, concerns have been raised about how the Coronavirus Act 2020 has been fast-tracked through Parliament, without a proper and thorough analysis of the broad powers ascribed to the Government[68]. Furthermore, the total volume of

[64] The question arises as to whether the effect of this situation is the result only of the impact of the virus emergency or whether it is the result of a new balance of power which is emerging in parliamentary systems. S. Baldini, *Il Parlamento*, in L. Pegoraro, A. Rinella (eds), *Sistemi costituzionali*, Torino, 2001. In British politics, Parliament usually has a dominant role, although the most recent events triggered a process of rebalancing between the parliamentary support to the Government (the majority) and its role to examine and challenge the work of the government.

[65] This situation is further aggravated by the fact that the adoption of the measures is influenced by medical-scientific indications coming from external entities.

[66] A. Cardone, *La "gestione alternativa" dell'emergenza nella recente prassi normativa del governo: le fonti del diritto alla prova del Covid-19* [2020] <www.lalegislazionepenale.eu> 11 November 2020.

[67] The Coronavirus (Scotland) Act and the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act of Ireland have been in compliance with the Coronavirus Act 2020.

[68] In this regard, no clause has been included in the Coronavirus Act regarding questions about the necessity and proportionality of the measures taken, although requests were made before the approval of the Act. It must be said that the Government has ensured that the powers will be exercised in accordance with the principles of necessity, proportionality and not-discrimination and will be consistent with international human rights law.

delegated legislation, such as the Health Protection (Coronavirus) Regulations 2020, the Statutory Sick Pay (General) (Coronavirus Amendment) (No. 2) Regulations 2020, and the Employment and Support Allowance and Universal Credit (Coronavirus Disease) Regulations 2020 have not been adopted through Parliament, but laid under the negative or affirmative procedures, albeit they have provided significant provisions related to criminal liability and suspension of certain business activities.

Therefore, the temporary requirement must always be guaranteed and respected, so that a state of emergency does not turn in what Carl Schmitt described a 'State of Exception'. It is no coincidence that the provisions of both the Coronavirus Act 2020 and Decree Law no. 1 of 2nd January, 2018 are time-limited and provide temporary restrictions of fundamental rights.

Another issue could arise in the case of a long duration of COVID-19 pandemic, with the risks of normalizing the Coronavirus emergency. In this case, better planned and designed regulatory interventions will be needed in order to respond to the inevitable social and economic changes that cannot be managed through an extension of existing emergency measures and without ensuring respect for fundamental rights in the exercise of their powers.

The proportional and necessary character of the measures adopted must be consistent with an economic, social and political reset, and must consider some important issues such as environmental protection and mitigations against climate change, which are major factors in facing the virus also. While the UK Prime Minister declares new strategic investment plans in infrastructure, in Italy many measures are announced to simplify administrative procedures. For example, the lockdown period has seen a slew of new renewable energy plants, also due to the suspension of exports of critical minerals from China and to the delays concerning permits issued by the competent authorities[69]. In the current situation, proportional and necessary measures for a "recovery" legislation should simplify administrative procedures, at least to allow the Italian renewable energy sector to reach the emissions reduction targets required by the European Union[70].

[69] L.M. Pepe, *The Scenario of Renewable Energy Sources in Italy and the Effects of COVID-19* [2020] Global Energy Law and Sustainability 200.

[70] Under the 'Clean Energy For All Europeans' Package (Regulations and Directives), the European Commission required all Member States to meet international emissions targets by increasing the share of energy produced from renewable sources (+32% by 2030) and improve energy efficiency (+32.5% by 2030).

Articles

La pandémie de Covid-19, la crise écologique et la "transition verte" : les expériences de la France et de la Belgique

Luigi Colella*

Abstract

En 2020, la France et la Belgique, comme une large partie du monde, ont été touchés par la pandémie du Covid-19. Face à cette pandémie les mesures législatives d'urgence ont conduit à la contraction des droits et des libertés fondamentaux ainsi qui à des dérogations des politiques environnementales. La crise sanitaire a été l'occasion d'interrogations sur l'équilibre entre État et marché qui a significativement évolué ces dernières décennies. Les verrouillages pendant la pandémie de Covid-19 peuvent avoir des impacts positifs directs, à court terme et sur notre environnement, en particulier en termes d'émissions et de qualité de l'air, bien que ceux-ci soient probablement temporaires. La pandémie et la crise écologique ont une racine humaine qui doit être recherchée dans la rupture de l'équilibre entre l'homme et la nature, qui affecte, par exemple, le rapport entre

* Université de la Campania, Luigi Vanvitelli, Italie.

la science et la vie, entre la technologie et le bien-être, entre l'environnement et la santé, entre l'éthique et l'économie.

Keywords

Etat d'urgence sanitaire – Pandémie de Covid19 – Droit de l'environnement – France et Belgique – Crise systémique globale

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Introduction

La France et la Belgique, comme une large partie du monde, ont été touchées aujourd'hui par la pandémie connue comme Covid-19. Le virus, identifié en Chine en décembre 2019, s'est répandu dans le monde entier en poursuivant son expansion, notamment en Europe où la France et la Belgique ont été particulièrement touchées.
L'Organisation mondiale de la santé (OMS) a déclaré que le Covid-19 constituait une urgence sanitaire de portée internationale en mars 2020.
Au niveau international la crise sanitaire du Covid-19 est vue comme une « crise systémique globale », c'est-à-dire comme une crise source de chocs secondaires multiples et aussi comme une menace pour la population globale, qui est à l'origine d' une crise sanitaire, environnementale, sociale, économique et financière.

La pandémie du Covid-19 peut être analysée à la lumière du concept de l'*Anthropocène*[1], une période caractérisée par l'augmentation exponentielle de la population, combinée à la rapidité du progrès technologique et du renforcement de la capacité humaine de transformer l'environnement. L'avènement de l'*Anthropocène* est marqué per des phénomènes tels que la déforestation, l'expansion des terres cultivées, la perte de la biodiversité, l'augmentation de la pollution, la surexploitation des ressources ainsi que l'exploitation minière, le changement climatique et la perte d'intégrité des écosystèmes et territoires, une perspective dans laquelle le droit de l'environnement peut jouer un rôle central pour la santé de la planète terre.

Dans ce cadre, l'article ci-présent concerne la législation sur l'état d'urgence qui a été mis en place, en France et en Belgique, et également la relation entre crise sanitaire et droit de l'environnement. Nous proposons aussi certaines actions pour dépasser la crise écologique mondiale et relancer la « transition verte », comme solution durable et résiliente. Comme le souligne Amirante[2], au temps de l'Anthropocène et de la mondialisation, nous devons regarder de près les rapports entre l'environnement et la santé, l'environnement et l'économie. Dans ce cadre, il est nécessaire de repenser en termes globaux le rapport entre économie et environnement.

1. La pandémie de Covid-19 et la loi d'urgence sanitaire en France

L'expérience juridique française s'est notamment distinguée dans la période de l'urgence sanitaire. La loi d'urgence n° 2020-290[3] du 23 mars 2020 pour faire face à l'épidémie de Covid-19 a institué l'état d'urgence sanitaire en France. Cet état d'exception a notamment permis d'avoir recours à un confinement strict à l'échelle du territoire national, ainsi qui à des restrictions de déplacement et à la fermeture de lieux publics.

[1] N. Castree, *The Anthropocene and Geography I: The back story* (2014), *Geography Compass* 8, 7, 436; P. Crutzen, *Benvenuti nell'Antropocene. L'uomo ha cambiato il clima, la Terra entra in una nuova era* (Mondadori 2005).

[2] D. Amirante, 'Il Covid-19 fra sicurezza sanitaria e sicurezza ambientale' (2020), 2.

[3] La loi d'urgence pour faire face à l'épidémie de Covid-19 contient des règles de natures diverses, rassemblées en 22 articles et réparties en quatre titres : le premier titre est consacré aux mesures sanitaires; le second aux règles de l'urgence économique.

La loi sur l'Etat d'urgence sanitaire[4] a été la réponse française à la crise[5]: cette loi a prévu la concession de nouveaux pouvoirs au Gouvernement pour légiférer de manière extraordinaire et d'urgence avec des « ordonnances » spéciales pour répondre à la crise épidémiologique et soutenir l'économie nationale.

Avant l'urgence Covid-19, dans le système législatif français, il y avait deux bases juridiques pour l'adoption de mesures en matière de santé : tout d'abord il faut rappeler le pouvoir de « portée générale » du Premier ministre, et, d'autre part, la disposition contenue dans l'article L. 3131-1 du Code de la santé publique, qui permet au Ministre des Solidarités et de la Santé d'adopter, en cas de « menace ou épidémie », les mesures nécessaires à la protection de la santé de la population.

Dans ce contexte, l'urgence Covid-19 a été l'occasion d'introduire la définition d'une menace sanitaire grave ou d'une urgence au niveau réglementaire.

La Loi n° 290 de 2020 a introduit « l'état d'urgence sanitaire » qui a lancé « l'état d'urgence » dit état d'exception (classique), déjà prévu par la loi historique du 3 avril 1955.

Avec la loi n° 55-385 du 3 avril 1955, antérieure à la Constitution de 1958, l'état d'urgence, ou soi-disant état d'exception, est régi comme une mesure exceptionnelle, qui peut être décidée par le Conseil des ministres, en cas de danger imminent résultant d'atteintes graves à l'ordre public et également en cas de catastrophe publique, comme une catastrophe naturelle d'une ampleur exceptionnelle. Cet instrument renforce les pouvoirs des autorités civiles et restreint certaines des libertés publiques et droits individuels, notamment pour les personnes soupçonnées de constituer une menace pour la sécurité publique.

L'état d'urgence doit être approuvé par le Parlement par une loi spéciale qui déclare l'urgence limitée à une partie ou à la totalité du territoire national[6].

L'article 5 de la loi du 3 avril 1955 prévoyait que la déclaration de l'état d'urgence conférait certains pouvoirs aux Préfets des départements dans lesquels l'état d'urgence était appliqué. Selon le paragraphe 3 de l'article 5 précité, le Préfet avait le pouvoir « d'interdire le

[4] Le projet de loi a été présenté au Conseil des ministres le 18 mars 2020 par le Premier ministre Édouard Philippe. Le texte final de la loi a été adopté le 22 mars 2020 et publié au Journal officiel le 24 mars 2020. Les quatre étapes du processus législatif peuvent être résumées comme suit : 1) Adoption par le Conseil des ministres le 18 mars 2020 ; 2) Dépôt au parlement à la même date du 18 mars 2020 ; 3) Examen et adoption (Examen et adoption définitif) le 22 mars 2020 ; 4) Promulgation le 23 mars 2020. Voir L. Colella, 'L'emergenza Covid-19 e "L'ètat d'urgence sanitarie" in Francia. Prime note sulla loi d'urgence n. 290/20' (2020) 2 *Quaderni amministrativi 90*.

[5] P. Costanzo, 'Brevi note sulle soluzioni apprestate in Francia per contrastare la pandemia nei giudizi di costituzionalità' (2020) *Consulta online* 242; C. Sartoretti, 'La risposta francese all'emergenza sanitaria da Covid-19: Stato di diritto e Costituzione alla prova della pandemia' (2020) 2 *Dpce online* 1637; D. Pamelin, 'La Francia e il Covid-19:la creazione del nuovo stato d'urgenza sanitaria', (2020), 3, *AIC*, 308.

[6] Selon la législation générale sur « l'état d'urgence » conformément à la loi n. 385 de 1955, il est possible de décréter une situation d'urgence qui autorise le Préfet ou le ministre de l'Intérieur pour adopter certaines mesures restrictives de la liberté personnelle, y compris des limitations de la liberté de mouvement et de circulation sur le territoire national. En particulier, les pouvoirs publics sont habilités à : 1. restreindre ou interdire la circulation à certains endroits ; 2. interdire certaines réunions publiques ou fermer temporairement certains lieux publics et lieux de culte ; réquisitionner des personnes ou des véhicules privés ; 4. autoriser les recherches administratives ; 5. interdire à certaines personnes d'être ou de s'arrêter sur un site spécifique ; 6. émettre des ordonnances d'assignation à résidence.

séjour en tout ou en partie du département à quiconque tenterait d'entraver, de quelque manière que ce soit, l'action des pouvoirs publics ».

A cet égard, il convient de noter que la décision du Conseil constitutionnel français du 9 juin 2017 a déclaré contraire à la Constitution le paragraphe 3 de l'art. 5 de la loi 385 de 1955 car le législateur n'avait pas garanti dans cette circonstance un équilibre entre les différentes valeurs en conflit. Par conséquent, la loi du 11 juillet 2017 a prévu que le Préfet peut interdire le séjour d'une personne sur le parcours d'une manifestation s'il existe des raisons sérieuses de croire que son comportement constitue une menace pour la sécurité et l'ordre publique. L'ordonnance du Préfet doit indiquer la durée, limitée dans le temps, de l'acte et les circonstances factuelles et locales précises qui le justifient, ainsi que le territoire auquel il s'applique, dans la limite qu'il ne peut inclure le domicile de l'intéressé.

Aujourd'hui l'article 16 de la Constitution française de 1958 permet l'adoption d'une législation de l'état d'urgence, « lorsque les institutions de la République, l'indépendance de la Nation, l'intégrité de son territoire ou l'exécution de ses engagements internationaux sont menacés d'une manière grave et immédiate et que le fonctionnement régulier des pouvoirs publics constitutionnels est interrompu, le Président de la République prend les mesures exigées par ces circonstances, après consultation officielle du Premier ministre, des Présidents des Assemblées ainsi que du Conseil constitutionnel »[7].

Dans ce cadre constitutionnel, la loi n. 290 de 2020 sur « l'état d'urgence sanitaire » représente une nouveauté inédite dans le domaine du *droit d'urgence français*. La loi d'urgence a limité les droits fondamentaux et elle a soulevé de nombreux doutes quant à sa constitutionnalité[8].

Le titre I de la loi, institué "L'état d'urgence sanitaire", contient des règles qui ont, en substance, modifié le titre III du livre I de la troisième partie du "Code de la santé publique" dans lequel a été insérée la référence précise aux cas de « Menaces et crises sanitaires graves » pour indiquer les graves menaces et crises de santé publique telles que celle en cours en raison de l'urgence épidémiologique du Covid-19[9].

[7] Selon l'article 16 de la Constitution de 1958 « Il en informe la Nation par un message. Ces mesures doivent être inspirées par la volonté d'assurer aux pouvoirs publics constitutionnels, dans les moindres délais, les moyens d'accomplir leur mission. Le Conseil constitutionnel est consulté à leur sujet. Le Parlement se réunit de plein droit. L'Assemblée nationale ne peut être dissoute pendant l'exercice des pouvoirs exceptionnels ; Après trente jours d'exercice des pouvoirs exceptionnels, le Conseil constitutionnel peut être saisi par le Président de l'Assemblée nationale, le Président du Sénat, soixante députés ou soixante sénateurs, aux fins d'examiner si les conditions énoncées au premier alinéa demeurent réunies. Il se prononce dans les délais les plus brefs par un avis public. Il procède de plein droit à cet examen et se prononce dans les mêmes conditions au terme de soixante jours d'exercice des pouvoirs exceptionnels et à tout moment au-delà de cette durée ».

[8] R. Fitoussi, *Coronavirus: «C'est en temps de crise que le respect des droits fondamentaux est encore plus important» selon Dominique Rousseau* (2020) 21.03.2020 Publicsenat.org; F. Gallarati, 'Le libertà fondamentali alla prova del coronavirus. La gestione dell'emergenza sanitaria in Francia e Spagna' L. Cuocolo (cur.) *Dossier I diritti costituzionali di fronte all'emergenza Covid-19. Una prospettiva comparata* (www.federalismi.it, 31 mars, 2020, 42).

[9] Déjà conformément à l'art. L. 3131-12 du Code de la santé publique « l'urgence sanitaire peut être déclarée sur tout ou partie du territoire national, ainsi que sur le territoire des collectivités territoriales régies par les articles 73 et 74 de la

Selon la loi n. 290 de 2020, « l'état d'urgence sanitaire », justifié par de graves menaces pour la santé publique, est déclaré par décret du Conseil des ministres et adopté sur la base du rapport du Ministre des Solidarités et de la Santé; mesures économiques extraordinaires liées à l'état d'urgence sanitaires, des mesures administratives *ad hoc* qui autorisent des limitations particulières de la liberté individuelle, visant en substance à surmonter et contenir la situation d'urgence nationale.

En France, la situation épidémiologique actuelle est préoccupante dans certaines grandes villes comme Paris. La crise sanitaire par Covid-19 est déjà considérée – par le droit français – comme une force *majeure*[10] qui a justifié des comportements distinctifs en raison de l'urgence imprévisible.

Le dernier 28 octobre 2020, le Président de la République a décidé de prendre des mesures pour réduire à leur plus strict minimum les contacts et les déplacements sur l'ensemble du territoire en établissant un confinement du 30 octobre au 1er décembre 2020.

Selon le Premier ministre, Jean Castex, la France était exposée à une deuxième vague épidémique extrêmement forte, touchant tout aussi durement l'ensemble de voisins pays européens[11]. Au regard de l'évolution actuelle et prévisible de l'épidémie au cours des prochains mois d'une part, et au regard du caractère provisoire de ces dispositions, d'autre part, le Conseil scientifique a considéré nécessaire proroger le régime transitoire institué à la sortie de l'état d'urgence sanitaire jusqu'au 1er avril 2021, telle que proposée par le projet de loi.

Les préoccupations liées à la crise sanitaire ont poussé, à la demande du Président du Sénat, Gérard Larcher, à la mise en place par le Sénat d'une *Commission d'enquête* pour l'évaluation des politiques publiques face aux grandes pandémies et leur gestion[12].

Constitution et de la Nouvelle-Calédonie en cas de catastrophe sanitaire » (catastrophe ou urgence sanitaire) qui, par sa nature et sa gravité, met en danger la santé de la population.

[10] Selon un arrêt de la Cour d'appel de Colmar rendu le 12 mars 2020 a déjà retenu la qualification du COVID-19 comme cas de force majeure dans la matière : on peut considérer que cette jurisprudence est la première *à* avoir *été rendue en France en la matière. En effet, la Cour d'appel de Colmar a estimé en matière de droit des étrangers que l'absence du demandeur d'asile à l'audience était justifiée « en raison des circonstances exceptionnelles et insurmontables, revêtant le caractère de la force majeure, liées à l'épidémie en cours de Covid-19 » puisqu'il était établi que le demandeur d'asile en question avait été en contact avec une personne infectée par ce virus (CA Colmar, 12 mars 2020, RG* 20/01098).

[11] L'impact sanitaire de l'épidémie reste très lourd et le nombre de décès continue d'augmenter. Au cours des deux derniers mois, la France a connu plus de 10 000 décès supplémentaires dus à la Covid-19, portant le nombre total de personnes décédées à 42.500 depuis le début de la pandémie.

[12] Voir *Commission d'enquête pour l'*évaluation des politiques publiques face aux grandes pandémies à la lumière de la crise sanitaire de la covid-19 et de sa gestion, <https://www.senat.fr/commission/enquete/gestion_de_la_crise_sanitaire.html>.

3. L'urgence sanitaire et la « déconstruction » du droit de l'Environnement : le principe de non-régression

Pendant le période de crise sanitaire les mesures de confinement liées à la pandémie du Covid-19 ont interrompu une grande partie de l'activité économique et industrielle.
Les limitations des activités humaines on pense à la réduction des activités industrielles, économiques et de transport, ont favorisé une amélioration de la qualité de l'air dans des villes comme Paris et dans toutes les grandes villes européennes. En même temps, les mesures d'urgence ont conduit à une récupération de la biodiversité et à un retour de certaines espèces de la faune[13].
En France, la crise sanitaire a justifié l'application de certaines dispositions à caractère économique, qui déroge à la législation environnementale ordinaire : avec la crise sanitaire, ces dispositions économiques se sont pérennisées.
Dans ce cadre, le décret du 8 avril 2020[14] a autorisé les Préfets[15] à déroger à toute une série de normes principalement environnementales – article 1 :

– *Aménagement du territoire et politique de la ville* ;
– *Environnement de l'agriculture et des forêts* ;
– *La construction des logement* ;
– *Urbanisme* ;
– *Protection et mise en valeur du patrimoine culturel.*

Ce décret dans son article 2 prévoit *quatre conditions* à la dérogation :

1) Être justifié par un motif d'intérêt général et l'existence de circonstances locales. En période d'urgence toute raison économique est désormais considérée comme une « raison d'intérêt général »; cette situation déroge à la législation environnementale nationale ;
2) Avoir pour effet d'alléger les démarches administratives et de réduire les délais de procédure. Cet objectif permet de supprimer les procédures de concertation, de consultation et même des enquêtes publiques remplacées désormais par de simples consultations par Internet, là aussi une conséquence du Covid-19 ;
3) Être compatible avec les engagements européens et internationaux de la France ;
4) Ne pas porter atteinte aux intérêts de la défense de la sécurité des personnes et des biens ni une atteinte disproportionnée aux objectifs poursuivis par les dispositions

[13] E. Dantan, V. Louis, A. Pawlotsky, 'Les conséquences de l'état d'urgence sanitaire en matière de droit de l'environnement', (2020) *La Revue des droits de l'homme* <http://journals.openedition.org/revdh/10021>.

[14] Par un décret n° 2020-412 du 8 avril 2020 publié au JO du 9 avril 2020, le Gouvernement a pérennisé le droit pour les préfets de déroger, à certaines conditions, à des normes nationales, dans un souci de simplification du droit. Décret n° 2020-412 du 8 avril 2020 relatif au droit de dérogation reconnu au préfet, *Journal officiel électronique authentifié n° 0087 du 09/04/2020*. Les dispositions du présent décret s'appliquent à l'ensemble du territoire de la République.

[15] Le décret n° 2020-412 du 8 avril 2020 intervient à la suite d'une expérimentation engagée après la publication du décret n° 2017-1845 du 29 décembre 2017 relatif à l'expérimentation territoriale d'un droit de dérogation reconnu au Préfet.

auxquelles il est dérogé. Il s'agit de la disposition la plus négative car, par définition, les dispositions à caractère environnemental et sanitaire, puisque souvent l'une accompagne l'autre, ont pour but de garantir la sécurité des personnes et des biens.

Selon les commentateurs les plus critiques, les exceptions au droit de l'environnement inscrites dans la législation sur l'état d'urgence liée à la pandémie ont été l'occasion d'introduire des exceptions aux principes de participation et d'information qui constituent des principes environnementaux constitutionnels.

Selon la doctrine française[16] , la réduction des installations des antennes-relais constitue un premier exemple des dispositifs dérogatoires, dans le contexte sanitaire actuel, aux principes du droit de l'environnement. L'ordonnance du 25 mars 2020 prise dans le cadre de la loi d'état d'urgence sanitaire autorise en effet les opérateurs téléphoniques non seulement à ne pas informer les maires de l'installation d'antennes-relais, et donc leurs administrés, mais aussi à se passer de l'accord de l'Agence Nationale des Fréquences. Une deuxième dérogation au droit de l'environnement concerne le secteur agricole ; en ce cadre « pour tenir compte des difficultés à mener la concertation publique dans le contexte du Covid-19 », le Ministère de l'Agriculture et de l'Alimentation a décidé que jusqu'au 30 juin 2020 les distances d'épandage de pesticides pourront être réduites.

Plusieurs textes adoptés dans la période de l'épidémie de Covid-19 ont eu des impacts sur le droit de l'environnement, en particulier sur le droit des installations classées. Les exceptions à la législation environnementale, selon certains, présentent le risque de conduire à une « déconstruction » du droit environnemental français, en instaurant des lois environnementales à géométrie variable et optionnelle.

La législation sur l'état d'urgence pourrait entraîner une régression de la protection de l'environnement et une violation des principes constitutionnels garantis par la *Charte de l'Environnement* de 2005 et en particulier la violation des principes de la prévention, de la participation et de la non-régression.

Dans ce cadre, le «principe de non-régression» a été envisagé en France par la loi n. 1087 du 8 août 2016 sur la reconquête de la biodiversité, de la nature et des paysages et a ensuite été inscrite à l'article L. 110-1 du *Code de l'Environnement*[17].

[16] P. Billet, 'Droits de l'environnement et de l'urbanisme au temps du Covid-19', (2020) 17 *La semaine juridique*, édition administrations et collectivités territoriales. Ainsi la loi n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de Covid-19 (JO 24 mars 2020) a habilité le Gouvernement à prendre par ordonnances des mesures provisoires afin de répondre à la situation de ralentissement ou de suspension des activités qui viennent affecter plus encore certaines dispositions en matière d'urbanisme ou d'environnement dans le but de gérer les délais pendants ou les délais à venir, mais pas seulement.

[17] La loi n° 2016-1087 du 8 août 2016 a inscrit le principe de non-régression en tête du code de l'environnement, plus précisément à l'article L. 110-1 du code de l'environnement, aux côtés des principes de prévention ou de précaution. Il est ainsi défini : « 9° Le principe de non-régression, selon lequel la protection de l'environnement, assurée par les dispositions législatives et réglementaires relatives à l'environnement, ne peut faire l'objet que d'une amélioration constante, compte tenu des connaissances scientifiques et techniques du moment ».

Selon certains observateurs l'article 2 de la Charte de l'environnement indique que « toute personne a le devoir de prendre part à la préservation et à l'amélioration de l'environnement ». Cela signifie explicitement que l'État en tant que personne morale a un devoir d'action en faveur de la préservation de l'environnement. Le terme d'« amélioration » peut par ailleurs être interprété comme contenant l'idée de non-régression. Les requérants appellent ainsi le Conseil constitutionnel à considérer que le principe de non-régression est déjà inscrit dans la Constitution, plus précisément à l'article 2 de la Charte de l'environnement[18].

Dans la « société du risque »[19], la législation d'urgence peut produire des exceptions, qui peuvent entraîner une *régression*[20] de la législation environnementale.

En France, pendant la crise sanitaire pour éviter un abus de la législation dérogatoire par les Préfets, une *Circulaire* du Premier Ministre a été publiée à ce sujet (6201/5G en date du 6 août 2020[21]) en précisant l'application du cadre dans lequel il est donné au Préfet le droit de déroger à des normes réglementaires prévues par le décret n° 2020-412 du 8 avril 2020 relatif au droit de dérogation reconnu au préfet.

Selon la *Circulaire*[22] du 6 août 2020 « Le recours au droit de dérogation, fondé sur les motifs d'intérêt général et d'existence de circonstances locales, ne saurait, par ailleurs, se traduire par une atteinte disproportionnée aux objectifs poursuivis par les dispositions auxquelles il est dérogé, ni contrevenir à des normes de niveau législatif ou constitutionnel, à des engagements européens et internationaux de la France ou à des principes généraux du droit ».

[18] M. Zinzi, *La Charte de l'Environnement francese tra princìpi e valori costituzionali* (ESI 2011).

[19] Les risques environnementaux qui peuvent affecter la qualité de vie sont considérables: on a par exemple le risque nucléaire. En matière nucléaire la législation française sur la gestion des déchets nucléaires constitue une législationmodèle pour les Etats européens, cfr. L. Colella, 'La localizzazione del Deposito nazionale delle scorie radioattive in Italia tra «principio di non regressione ambientale», democrazia e partecipazione: quale contributo dal «modello» francese' (2015) 1, *Diritto e giurisprudenza agraria, alimentare e dell'ambiente*, 36.

[20] En matière environnementale, la reconnaissance jurisprudentielle du principe de non-régression commence à faire son chemin au début des années '90 en matière d'aires protégées (voir phrase n.° 28 de 1994 de la Cour Constitutionnelle hongroise) et commence à apparaître timidement dans les différentes expériences européennes d'Etats individuels aux terminologies les plus disparates. Dans certains pays, en fait, on parle de « principe de statu quo » (c'est le cas en Belgique), alors qu'en France, cependant, le concept d « effet cliquet » a également été utilisé, tandis que dans d'autres expériences on parle du « principe d'intangibilité » de certains droits fondamentaux garantis au niveau constitutionnel. Cfr. M. Prieur, G. Garver, 'Non-regression in environmental protection : a new tool for implementing the Rio principles' (2012) *Future Perfect*, Rio+20 Tudor Rose/UN; I. Hachez, *Le Principe de Standstill dans le droit des droits fondamentaux: une irréversibilité relative* (Bruylant 2008); O. De Frouville, *L'intangibilité des droits de l'homme en droit international* (Pedone 2004); M. Prieur, 'Non-regression in environmental law', (2012) S.A.P.I.EN.S 5.2. <*http://journals.openedition.org/sapiens/1405*>.

[21] Voir la Circulaire relative à la dévolution au préfet d'un droit de dérogation aux normes réglementaires, <http ://circulaires.legifrance.gouv.fr/pdf/2020/08/cir_45029.pdf>.

[22] *Circulaire relative à la dévolution au préfet d'un droit de dérogation aux normes réglementaires*, voir <https ://www.legifrance.gouv.fr/download/pdf/circ ?id=45029>.

En effet la *Circulaire* conseille d'établir un bilan « coûts/avantages » de la mesure de dérogation, de réaliser une estimation des risques juridiques – risque contentieux, risque financier, etc. – et d'évaluer ses conséquences en termes de cohérence de l'action publique locale.
Le *principe de non-régression* ne peut pas accepter la non-application de normes environnementales laquelle par définition constitue une régression[23]. Pour ces raisons, une intervention dérogatoire du Préfet pendant la crise sanitaire, qui produit une réelle diminution de la protection de l'environnement n'est pas respectueuse de la *Charte de l'Environnement* et de la législation environnementale de l'Etat. Ainsi l'intervention dérogatoire par ordonnances sera censurable devant le juge administratif.
Pendant la crise sanitaire afin de garantir les niveaux les plus élevés de protection de l'environnement, d'une part, et, d'autre part, la santé publique, certaines conditions devront être assurées comme le respect du *principe de prévention*.
En même temps, il sera nécessaire de veiller au respect du *principe de précaution*, qui veut que face à la menace d'une dégradation irréversible de l'environnement, on ne saurait s'autoriser de l'absence d'une connaissance scientifique absolue pour remettre à plus tard des mesures qui sont justifiées en elles-mêmes. Le principe de précaution peut donc servir de base à des politiques touchant des systèmes complexes qui ne sont pas encore bien compris et dont on ne peut encore prévoir quelles conséquences auront leurs perturbations.

4. Pandémie sanitaire et changement climatique en France

L'adoption de la *loi sur l'énergie et le climat* (loi 2019-1147) montre que la France vise à répondre aux exigences de la "transition énergétique verte" et à la "lutte contre le changement climatique" ; cette loi fixe des points cardinaux de la politique énergétique française :
– la neutralité carbone d'ici à 2050 ;
– la réduction de 40% de la consommation de combustibles fossiles par rapport à 2012 d'ici à 2030, par rapport au 30% auparavant ;
– la déplacement à 2035 au lieu de 2025, de la réduction de 50% de la part de l'énergie nucléaire dans la production d'électricité avec la fermeture de 14 réacteurs.

[23] Selon un précédent juridique important le droit de dérogation préfectoral ne méconnaît pas le principe de non-régression. Par une décision du 17 juin 2019 (n. 421871), le Conseil d'Etat a rejeté le recours en annulation du décret n. 2017-1845 du 29 décembre 2017 relatif à l'expérimentation territoriale d'un droit de dérogation reconnu au préfet. Le Conseil d'Etat a jugé que ce décret ne méconnaît pas le principe de non-régression tel qu'inscrit à l'article L. 110-1 du code de l'environnement : « *Si l'association requérante soutient que les dispositions du décret attaqué méconnaissent ce principe, il résulte des termes mêmes et notamment de son article 1er qu'il ne permet pas de déroger à des normes réglementaires ayant pour objet de garantir le respect de principes consacrés par la loi tel que le principe de non-régression. Par suite, le moyen tiré de la méconnaissance de ce principe doit être écarté* ».

En France, la loi sur l'énergie et le climat a réaliser une mise en œuvre concrète au *Haut Conseil pour le climat* (Art. L. 132-4), créé le 27 novembre 2018, en tant qu'organe indépendant de régulation en matière de climat[24].
Selon le dernier « Rapport spécial »[25] du *Haut conseil pour le climat*[26], la plupart des causes structurelles de la pandémie Covid-19 sont aussi à l'origine du changement climatique.
Déjà en 2007, l'Organisation Mondiale de la Santé déclarait que l'une des plus grandes conséquences du changement climatique serait l'altération des processus de transmission des maladies infectieuses.
Dans sa résolution du 14 mars 2019 sur le changement climatique, le Parlement européen a exigé des objectifs plus ambitieux en matière de réduction des émissions pour 2030, afin d'atteindre l'objectif d'émission zéro d'ici 2050. Dans ce cadre, le 11 décembre 2019la Commission européenne a présenté le Green New Deal européen, c'est-à-dire une nouvelle stratégie, qui voit l'Europe jouer le rôle de Global Leader stimulant un chemin pour rendre l'économie durable et transformer les enjeux climatiques et les défis l'environnement dans toutes les politiques et en rendant la transition équitable et inclusive.
Dans ce cadre global, la *crise Covid-19* et le *changement climatique* présentent des similarités, donc il est possible de tirer des leçons de l'une pour augmenter nos capacités de résilience à l'autre. La pandémie et le changement climatique sont des « menaces majeures » pour l'ensemble de l'humanité.
Selon les études scientifiques les émissions de gaz à affect de serre , sont réduites de 30 % environ durant le confinement et la pandémie. La réduction des émissions du transport de surface compte pour 60 % de la réduction totale. L'aviation est le secteur qui a réduit le plus ses émissions, -75% durant le confinement, mais il n'est que responsable du 10 % environ de la baisse totale, en incluant l'aviation internationale.
La sortie de crise et « la relance » ne devront pas donc négliger l'urgence climatique, qui elle aussi est cause de décès, dégâts matériels et pressions inédites sur le bien-être des personnes.
La crise du Covid-19 rappelle l'importance de mettre en œuvre les actions fondamentales listées par le cadre de Sendai pour la réduction des risques de catastrophe (2015-2030), encadré par ses quatre priorités: comprendre les risques de catastrophes; renforcer leur gouvernance pour les gérer; investir dans leur réduction aux fins de résilience; renforcer l'état de préparation aux risques de catastrophes pour intervenir de manière efficace et pour mieux reconstruire.

[24] La structure organisationnelle interne comprend, outre le président, pas plus de douze membres choisis pour leurs compétences scientifiques, techniques et économiques dans les domaines des sciences du climat et des écosystèmes, de la réduction des émissions de gaz à effet de serre et de l'adaptation et de la résilience au changement climatique.

[25] Haut Conseil pour le climat, *Climat, santé : Mieux prévenir, mieux guérir* (rapport spécial, avril 2020).

[26] Le Haut conseil pour le climat est un organisme indépendant chargé d'émettre des avis et recommandations sur la mise en œuvre des politiques et mesures publiques pour réduire les émissions de gaz à effet de serre de la France. Il a vocation à apporter un éclairage indépendant sur la politique du gouvernement en matière de climat. Le Haut conseil pour le climat a été créé par le décret du 14 mai 2019, après avoir été installé le 27 novembre 2018 par le Président de la République.

Après la crise sanitaire, la probabilité d'un effet de rebondissement est majeure. Après la crise financière de 2008, les émissions mondiales de CO2 liées à l'énergie et au ciment avaient baissé de 1,4 % en 2009, pour augmenter de 5,9 % en 2010. Il faut éviter que la sortie de la crise s'accompagne d'une augmentation accélérée de l'exploitation des ressources naturelles et d'une production économique irrationnelle ainsi d'un développement industriel non durable.
La baisse radicale des émissions de gaz à effet serre liée à la crise reste marginale. Elle n'est ni durable, ni désirable, sans un changement structurel organisé mettant les enjeux climatiques au cœur des décisions post-crise sanitaire.
Le *Haut conseil pour le climat* dans le Rapport spécial « Climat, santé : mieux prévenir, mieux guérir » invite à accélérer la transition juste pour renforcer la résilience aux risques sanitaires et climatiques consacré aux enseignements à tirer de la crise sanitaire du Covid-19 et aux suites à donner pour atteindre nos objectifs vers la neutralité carbone.
La COP26 d'après crise, à Glasgow ne doit pas être la copie de la COP15 à Copenhague en 2009. Le report de la COP26 en raison de la crise sanitaire, l'année où les mécanismes de l'accord de Paris entrent en vigueur, doit pleinement contribuer à l'objectif de relever l'ambition collective des États parties à l'accord de Paris.
Tant en France que dans le monde les réflexions sur l'après-crise sanitaire portent sur le besoin de mener une relance « verte, pas grise », qui n'enferme pas l'économie dans des trajectoires carbonées incompatibles avec la stratégie nationale bas-carbone. Les « jours d'après » doivent aussi être ceux de l'après-carbone.

5. Le Plan national de la santé-environnement en France

La crise sanitaire de la Covid-19 a fait émerger le lien étroit entre santé humaine, santé animale et santé de l'environnement.
Selon la définition proposée par le bureau européen de l'Organisation mondiale de la Santé (OMS) en 1994 lors de la conférence d'Helsinki, « la santé environnementale comprend les aspects de la santé humaine, y compris la qualité de la vie, qui sont déterminés par les facteurs physiques, chimiques, biologiques, sociaux, psychosociaux et esthétiques de notre environnement.
Les comportements humains, par leur impact sur la biodiversité ou le changement climatique, par exemple, pèsent lourdement dans l'origine des infections virales zoonotiques émergentes, qui est multifactorielle. Selon l'Organisation mondiale de la santé (OMS), 23% des décès et 25% des pathologies chroniques dans le monde peuvent être attribués à des

facteurs environnementaux et comportementaux (qualité de l'air, de l'eau, de l'alimentation, modes de vie, etc.)[27].

Dans ce cadre, en France, les causes des pathologies liées à l'impact environnemental sont différentes : la pollution de l'air extérieur et de l'air intérieur, l'exposition au tabac et aux champs électromagnétiques, mais aussi l'exposition aux produits chimiques.

La destruction des écosystèmes due aux pressions humaines multiplie les contacts entre espèces réservoir et espèce humaine et tend ainsi à augmenter le risque de transmission de pathogènes à l'homme et l'émergence de nouvelles maladies.

Pour répondre à ces problèmes la France, qui fait partie des États de l'Europe les plus engagés en matière de santé environnement, est intervenue avec les *Plans nationaux santé environnement* (PNSE) qui se sont succédé depuis la conférence de Budapest de 2004.

Ces *Plans nationaux*[28], inscrits dans le *Code de la santé publique* (article L. 1311-6), ont permis :

- des avancées notables pour réduire l'impact des effets négatifs de l'environnement sur la santé ;
- une meilleure prise en compte de la santé environnement à toutes les échelles du territoire ;
- le développement de programmes de recherche structurés sur cette thématique. À titre d'exemples, depuis 2004 : la réduction de 50 à 80 % des émissions atmosphériques de substances dangereuses de la part des industriels ;
- la participation des équipes de recherche françaises à des projets d'ampleur européenne ;
- la mise en place d'un dispositif de surveillance renforcée des pollens ;
- l'interdiction d'utilisation du perchloroéthylène dans les pressings ;
- plus de 300 projets de recherche en santé environnementale.

Face à une exposition croissante aux maladie infectieuses des animaux vertébrés transmissibles à l'être humain, zoonoses, la France avec le *quatrième Plan national* santé-environnement (*PNSE4*), s'est engagée dans une approche intégrée et unifiée de la santé publique, animale et environnementale autour du concept « un monde, une santé » ou « *One Health* ».

[27] En France, la pollution de l'air extérieur est considérée comme la première source de mortalité environnementale: 48000 à 67000 décès prématurés annuels en France et 400 000 décès prématurés annuels en Europe. Encore l'exposition au gaz radon émis naturellement par les sols et 3 000 décès par an en France dont une part importante serait liée à une Co exposition au tabac. L'exposition aux champs électromagnétiques (lignes haute tension, téléphones portables, wifi, fours micro-ondes, usage médical, etc.) même si les liens avec les effets sur la santé font l'objet d'incertitudes.

[28] Le deuxième *Plan national santé environnement* a été adopté en conseil des Ministres le 24 juin 2009 pour la période 2009-2013. Sa mise en œuvre a été placée sous le copilotage des ministères en charge de la santé et de l'écologie, il a fait l'objet d'une déclinaison en plans régionaux santé environnement (PRSE). Le troisième *Plan national santé environnement*. En novembre 2014, le *troisième Plan* (PNSE3) a été présenté en Conseil des Ministres à l'issue d'un travail d'évaluation du PNSE2, de mobilisation des différentes parties prenantes pour son élaboration, et de consultations. Le PNSE3 a ansi été adopté pour la période 2015-2019.

Ce *Plan national (PNSE4)* est un moyen concret pour réaliser la *Stratégie nationale de santé 2018- 2022* (SNS) adopté en France a décembre 2017 et qui a suivi le Plan national de santé publique (PNSP) ou « Priorité Prévention ».

Le *PNSE4*, intitulé « Mon environnement, ma santé », a l'ambition de permettre à chacun de nos concitoyens d'être acteur de son environnement et de sa santé et il constitue actuellement la base de l'écologie de la santé en France. Il est construit autour de *quatre axes* :

1. s'informer sur l'état de son environnement et les bons gestes à adopter ;
2. réduire les expositions environnementales affectant la santé ;
3. démultiplier les actions concrètes menées dans les territoires ;
4. mieux connaître les expositions et les effets de l'environnement sur la santé des populations.

Selon le *premier axe,* la formation, l'information et la prévention en matière de santé environnement sont des objectifs fondamentaux. La crise de la Covid-19 et les règles de confinement ont conduit, par exemple, les citoyens à des pratiques comme l'utilisation des produits désinfection des mains qui font partie de la catégorie des biocides. Selon le *PNSE4* « le recours aux désinfectants ne doit pas devenir automatique » et réduire le recours aux désinfectants « est essentiel pour limiter la dispersion dans l'environnement de ces produits qui peuvent entraîner des déséquilibres des écosystèmes ainsi que l'apparition de phénomènes de résistance ».

En ce qui concerne le *deuxième axe, il* faut réduire l'exposition aux ondes électromagnétiques (dont 5G) et améliorer la connaissance des impacts sanitaire des nouvelles technologies. Le *PNSE4* a pour objectif de réduire l'impact environnemental qui en résulte par les ondes électromagnétiques attribuées à la téléphonie mobile augmentent, et le déploiement prévu fin 2020 de la technologie 5G suscite de nombreuses interrogations.

Dans le *troisième axe* du *PNSE4* il est prévu la création « d'une plateforme collaborative pour les collectivités » sur les actions en santé environnement et renforcer les moyens des territoires pour réduire les inégalités territoriales en santé environnement. Il faut sensibiliser les urbanistes et aménageurs des territoires pour mieux prendre en compte les problématiques de santé et d'environnement dans les documents de planification territoriale et les opérations d'aménagement[29].

Selon le *quatrième axe* il faut connaître les effets des activités humaines sur la santé et l'environnement, par exemple l'incidence du changement climatique sur la santé et les facteurs favorisant l'émergence ou la diffusion de bactéries antibiorésistants dans l'environnement qui jouent également un rôle non négligeable sur la santé. Face à ces risques, selon le PNSE4, il faut faciliter l'accès aux données environnementales pour répondre à la

[29] Il s'agit de mettre en œuvre en pratique, le concept *d'urbanisme favorable à la santé* (UFS) initié en 1987 par le réseau des Villes-Santé de l'OMS Europe et réinvesti en France depuis le début des années 2010.

demande d'accès du public à une information exhaustive, neutre et transparente en matière d'environnement et créer un *Green Data Hub*.
Le nouveau *Plan national santé environnement* (PNSE4) est le résultat d'une vision écologique intégrale qui envisage non seulement les aspects strictement environnementaux, mais aussi ceux concernant la santé, les animaux, le territoire urbain, etc..
Cette politique écologique intégrale s'inspire également du « Pacte vert » (*green deal*) pour l'Europe lancé le 11 décembre 2019 par la nouvelle Commission européenne qui porte un objectif de « pollution zéro ».
Selon le Président de la République *Macron*, avec la pandémie de la Covid-19, la France, comme tous les pays du monde, a traversé, et traverse encore, une épreuve sanitaire jamais vue. Dans ce cadre, la France de 2030 devra être plus verte, plus respectueuse du climat. C'est pourquoi *France Relance*[30] vise à accélérer la conversion écologique de l'économie et du tissu productif.

6. La pandémie et l'éducation à l'environnement et au développement durable

La pandémie a relancé en France un intérêt extrême pour l'éducation environnementale, à tel point, que le Gouvernement a présenté à l'Assemblée Nationale la *proposition de loi n° 3317*[31] relative à l'éducation à l'environnement et au développement durable.
Selon la *proposition de loi n. 3317* le choc de la pandémie a montré que nous ne pouvons ignorer la qualité de l'environnement : « pendant le confinement, les émissions de CO2 et les pollutions ont chuté ». La faune a repris ses droits parfois jusque dans nos villes. La reprise économique sur les mêmes bases qu'avant n'est pas un remède durable au changement climatique ni à l'effondrement de la biodiversité. Une relance aveugle pour revenir à la « normalité » rattrapera rapidement les tonnes d'émissions polluantes évitées et nous replongera encore dans nos travers ». Le but de la loi est de changer le code de l'éducation car il est évident que c'est à l'école que commencent la formation des citoyens et l'impulsion des changements.
La finalité de l'éducation à l'environnement et au développement durable est de donner aux futurs citoyens les moyens de faire des choix qui, intégrant les questions complexes

[30] Pour faire face à l'épidémie du Coronavirus Covid-19, le Gouvernement a mis en place dès le début de la crise, des mesures inédites de soutien aux entreprises et aux salariés, qui continuent aujourd'hui d'être mobilisables. Afin de redresser rapidement et durablement l'économie française, un Plan de relance exceptionnel de 100 milliards d'euros est déployé par le Gouvernement autour de 3 volets principaux: l'écologie, la compétitivité et la cohésion. Voir le Rapport *France Relance* (3 septembre 2020), https://www.economie.gouv.fr/files/files/directions_services/plan-de-relance/annexe-fiche-mesures.pdf.

[31] Proposition présentée par Mme Jennifer De Temmerman, députée.

du développement durable, leur permettront de prendre des décisions responsables tant dans la sphère publique qu'au plan personnel.
L'article 1 vise à entériner la présence de l'éducation à l'environnement et au développement durable dans le code de l'éducation, introduit pour la première fois par la loi n° 2013-595 du 8 juillet 2013 d'orientation et de programmation pour la refondation de l'école de la République. Il met l'éducation à l'environnement et au développement durable sur le même plan que l'enseignement technologique, les enseignements artistiques et l'éducation physique et sportive en le faisant apparaître dans les objectifs et missions du service public de l'enseignement. En outre, pour être en adéquation avec l'instruction obligatoire à 3 ans, il fait débuter l'éducation à l'environnement et au développement durable dès l'école maternelle.
L'article 2 vise à intégrer la notion d'activités environnementales dans le code de l'éducation afin de compléter le chapitre sur les activités périscolaires.
L'article 3 vise à afficher les objectifs de développement durable dans les établissements scolaires afin de sensibiliser les élèves, sur le même modèle que celui de la déclaration universelle des droits de l'homme.
L'éducation environnementale constitue aujourd'hui une priorité pour les systèmes éducatifs des pays européens. Dans le système scolaire italien, par exemple, la loi 20 août 2019, n. 9237 a introduit le caractère obligatoire de l'enseignement des valeurs environnementales par le biais de l'éducation civique[32].
En Italie, à partir de l'année scolaire 2020/2021, dans les écoles de tout ordre et niveau du système national d'enseignement italien, l'enseignement sera inséré "transversalement" à l'éducation civique, y compris l'éducation environnementale.
Selon nous, l'éducation aux valeurs environnementales est à la base du changement culturel plus que jamais nécessaire après la pandémie pour protéger la biodiversité environnementale et culturel, relever le défi du changement climatique et réaliser les objectifs d'économie circulaire.
Ces objectifs écologiques exigent comme base constitutionnelle la valeur de la durabilité environnementale entendue comme manifestation de la solidarité intergénérationnelle.

[32] L. Colella, 'Educazione ambientale e valori costituzionali in Portogallo e in Italia. La legge n. 92 del 2019 tra educazione civica e cittadinanza ecologica' (2020) 1 XX *AmbienteDiritto.it* 1.

7. La crise sanitaire de Covid-19 en Belgique

La Belgique, comme la France, a été sérieusement affectée par la pandémie[33]. Ici la crise sanitaire est intervenue en pleine crise politique[34], qui semblait d'une gravité sans précédent, depuis la fin de la Seconde Guerre mondiale[35]. Face à cette urgence sanitaire, l'État belge a rassemblé les forces et il a pris des mesures fortes[36], qui ont répondu à son obligation juridique de réagir face à un risque pour la vie, pour la santé et pour la qualité de l'environnement.
Le droit constitutionnel belge ne prévoit pas de système explicite d'état d'urgence, contrairement à ce qui existe ailleurs et en France. Pendant la pandémie, le droit constitutionnel belge a été affecté par certains problèmes, que peuvent se résumer a deux thématiques :
1) la centralisation des compétences vers l'autorité fédérale ;
2) la limitation des libertés fondamentales pour des raisons de protection de la santé.
Un premier aspect du droit de la crise sanitaire concerne le partage de compétences entre l'Etat fédérale et les entités communautaires.
Selon une étude récente[37], la Belgique, dans la première phase de la crise sanitaire, a dû donner une réponse centralisée à la crise Covid-19 ; en ce cadre « *La question s'est compliquée par le partage de compétences en vigueur entre les différents niveaux de pouvoir. La Belgique est un État fédéral au sein duquel les compétences sont en principe réparties de manière exclusive entre l'Autorité fédérale, les Régions et les Communautés. Des compétences importantes en matière de politique de la santé sont accordées aux Communautés par l'article 5, § 1er, I, de la loi spéciale de réformes institutionnelles du 8 août 1980* ».
Dans ce cadre de nombreuses législations pertinentes pour lutter contre les épidémies et pandémies ont été adoptées par les entités fédérées, dès avant la crise de 2020. L'Autorité fédérale dispose aussi de compétences dans le domaine de la santé, soit sous la forme d'exceptions explicites aux compétences des Communautés comme sa compétence relative aux mesures prophylactiques nationales, ou ses compétences financières – soit dans le cadre de ses compétences résiduelles. Cependant, des solutions originales ont été mises en œuvre pour associer l'Autorité fédérale et les entités fédérées à une prise de décision concertée[38]. Il ne fait toutefois aucun doute que cette réponse a été définie et mise en

[33] Voir A. Rovan, *Covid-19: en Belgique, le reconfinement de « la dernière chance » – Le pays est le plus touché d'Europe. L'objectif du tour de vis est d'éviter que « les soins de santé craquent »* Le figaro (30 October).

[34] J. Faniel, C. Sägesser, 'La Belgique entre crise politique et crise sanitaire (mars-mai 2020)', (2020) 2 2447 *CRISP* 5 ; S. Ganty, *Belgium and Covid-19: When a Health Crisis Replaces a Political Crisis* (2020) www.verfassungsblog.de.

[35] Pendant plus d'un an, le pays a été dirigé par des gouvernements fédéraux en affaires courantes et minoritaires et, pendant près de dix mois, le monde politique a cherché en vain à mettre en place un gouvernement fédéral de plein exercice et disposant d'une majorité au sein de la Chambre des représentants issue des élections du 26 mai 2019.

[36] V. Laborderie, *La Belgique è l'épreuve de la pandémie*, *Gérer le Covid-19, un tout d'Europe*, (Fondation Robert Schuman, Printemps 2020), 11.

[37] F. Bouhon, A. Jousten, X. Miny, E. Slautsky, 'L'État belge face à la pandémie de Covid-19 : Esquisse d'un régime d'exception', *CRISP*, 1, (2020), 5.

[38] G. Milani, 'L'emergenza sanitaria nel diritto pubblico comparato: la risposta del Belgio al Covid-19', 2 (2020), 1671.

œuvre principalement au niveau fédéral, à partir de la déclaration de lancement de la "phase fédérale de coordination et de gestion de crise".
La réaction à la crise a été aussi caractérisée par un transfert important de pouvoirs de Parlements au profit des Gouvernements, à presque tous les niveaux de pouvoir[39]. La diffusion de l'épidémie Covid-19 a conduit, en Belgique comme en France et en Italie, à un renforcement de l'Exécutif, en vue de l'adoption de mesures urgentes destinées à gérer la crise. La loi habilitant le Roi à prendre des mesures de lutte contre la propagation du Covid-19 (I) et la loi habilitant le Roi à prendre des mesures de lutte contre la propagation du Covid-19 (II) ont notamment autorisé le gouvernement à intervenir, pendant une période maximale de trois mois, par des arrêtés visant à prendre rapidement des mesures de lutte contre la pandémie et de gestion des conséquences de la crise sanitaire.
Un deuxième aspect, qui a caractérisé le droit constitutionnel belge à l'époque de la pandémie concerne les limitations des libertés individuelles. En ce cadre pour limiter la propagation du Coronavirus, le gouvernement belge a pris, au début de la crise sanitaire, une série de mesures contenues dans l'arrêté ministériel du 23 mars 2020[40] visant à réduire les contacts entre personnes et imposant un confinement généralisé.
La crise sanitaire du Covid-19 a amené les pouvoirs publics belges – comme on l'a dit pour la France – à limiter les droits et libertés des citoyens d'une manière inédite en temps de paix.

8. Environnement, pandémie et transition durable en Belgique.

L'article 23 de la Constitution belge consacre « le droit à la protection d'un environnement sain »[41], un droit fondamental également confirmé par la doctrine juridique et la jurisprudence constitutionnelle[42]. Le même article 23, alinéa 3, reconnait « le droit à la sécurité

[39] J. Clarenn, C. Romainville *Le droit constitutionnel Belge à l'épreuve du Covid-19* (2020) JP Blog <http://blog.juspoliticum.com/2020/04/23/le-droit-constitutionnel-belge-a-lepreuve-du-covid-19-1-2-par-julian-clarenne-et-celine-romainville/>.

[40] Texte disponible au <https://bit.ly/3mzaGFw>. Voir aussi Décret du 20 mars 2020 contenant des mesures en cas d'urgence civile en matière de santé publique.

[41] Le 31 janvier 1994, un article 23 a été inséré dans le Titre II de la Constitution sur les droits et libertés. F. Haumont, *Le droit constitutionnel belge à la protection d'un environnement sain. Etat de la jurisprudence* (2005) Revue Juridique de l'Environnement, numéro spécial. La charte constitutionnelle de l'environnement. pp. 41-52. Sur le droit constitutionnel belge à l'environnement, B. Jadot, *Le droit à l'environnement*, in R. Ergec *Les droits économiques, sociaux et culturels dans la Constitution* (Bruylant 1995), 257; B. Jadot, *Le droit à la conservation de l'environnement*, Aménagement-Environnement, n° spécial 1996,229, F. Ost, *Un environnement de qualité: droit individuel ou responsabilité collective?*, L'actualité du droit de l'environnement , Bruylant, Bruxelles, 1995, 23 ; J. Theunis, B. Hubeau, *Het grondwettelijk recht op de bescherming van een gezond leefmilieu*, (1997) TROS, 329. Voir aussi D. Amirante, *L'ambiente preso sul serio. Il percorso accidentato del costituzionalismo ambientale* (2019) *DPCE* 19.

[42] H. Born, F. Haumont, 'Le droit à la protection d'un environnement sain', M. Verdussen et N. Bonbled (dir.), *Les droits constitutionnels en Belgique – Les enseignements jurisprudentiels de la Cour constitutionnelle, du Conseil d'Etat et de la Cour de cassation* (Bruylant 2011) 1416.

sociale, à la protection de la santé et à la protection sociale, sanitaire et juridique », confirmant le lien étroit entre l'environnement et la santé.

La localisation du Droit à la protection de l'environnement sain dans le Titre II de la Constitution a pour conséquence qu'il entre dans le bloc de constitutionnalité, entendu comme l'ensemble des normes de référence utilisées par la Cour constitutionnelle comme instruments du contrôle de constitutionnalité des normes législatives.

Le texte constitutionnel fait, par lui-même, obstacle à l'édiction de normes qui feraient régresser le droit reconnu par rapport à ce qui était acquis au moment de l'entrée en vigueur du texte, obligation de *standstill*[43]. Le juge constitutionnel belge considère que le « *droit à la protection d'un environnement sain* » garanti par l'article 23 de la Constitution belge « implique, en ce qui concerne la protection de l'environnement, une obligation de *standstill*, qui s'oppose à ce que le législateur compétent réduise sensiblement le niveau de protection offert par la législation applicable, sans qu'existent pour ce faire des motifs liés à l'intérêt général » (*C. arb., 14 sept. 2006, n° 135/2006, 137/2006*). Par son rang constitutionnel, le droit à la protection d'un environnement sain produit aussi une directive d'interprétation : quand un texte – dans quelque domaine que ce soit – se prête à plusieurs interprétations, il s'impose de privilégier celle qui se concilie le mieux avec le droit protégé selon la prospective « *in dubio pro natura* »[44].

Dans le cadre constitutionnel au cours des dernières années, la législation belge a mis en œuvre des politiques européennes en répondant aux objectifs de qualité de l'air, du sol et de l'eau garantissant la durabilité environnementale[45]. Face à la pandémie les mesures mises en place pour lutter le Covid-19 ont eu un impact considérable sur l'économie et la société, mais également sur l'environnement.

Comme cela s'est produit en France, en Belgique également, les mesures exceptionnelles adoptées pendant les périodes d'urgence sanitaire ont conduit à certaines dérogations à la législation environnementale et d'aménagement du territoire. Il s'agit toutefois de dérogations de nature procédurale et non de fond. Par exemple dans son arrêté de pouvoirs spéciaux n° 2020/001, la Région de Bruxelles-Capitale avait suspendu du 16 mars au 15 juin tous les délais de rigueur et les délais de recours prévus dans la législation bruxelloise. À partir du 16 juin, tous ces délais recommenceront donc à courir. Cependant pour donner au citoyen – et surtout à l'administration – une marge de manœuvre supplémentaire, l'arrêté de pouvoirs spéciaux n° 2020/038[46] prolonge les principaux délais en matière d'amé-

[43] V. Hachez, *Le principe de standstill dans le droit des droits fondamentaux: une orréversibilité relative* (Bruylant 2008).

[44] F. Ost, *La nature hors la loi* (La Découverte 1995) 100.

[45] *L'examen de la mise en œuvre de la politique environnementale 2019, Rapport par pays – Belgique*, 2019.

[46] Voir l'Arrêté n° 2020/038 du Gouvernement de la Région de Bruxelles-Capitale de pouvoirs spéciaux du 10 juin 2020 prolongeant certains délais relevant du Code bruxellois de l'Aménagement du Territoire et de l'ordonnance du 5 juin 1997 relative aux permis d'environnement, M.B. 16 juin 2020.

nagement du territoire et d'environnement[47]. L'arrêté de pouvoirs spéciaux n° 2020/038 est entrée en vigueur le 16 juin et restera d'application jusqu'au 31 décembre 2020. Dans même temps dans les périodes d'urgence sanitaire et avec le confinement les citoyens belges ont pu respirer un air d'une meilleure qualité et profiter d'un cadre plus silencieux, grâce à une nette réduction des concentrations de dioxyde d'azote (NO2) et des particules fines, causées notamment par le trafic routier.

En ce cadre l'*Agence européenne pour l'environnement* a établi que cette diminution était de l'ordre de 35% en Belgique, contre 61% en Espagne et 52% en France, au mois d'avril 2020. Selon cet dernier *Rapport*[48] la pandémie Covid-19 met en évidence les interrelations entre nos systèmes naturel et sociétal et que « la résilience sociétale dépend d'un système de soutien environnemental résilient ». Dans le même temps, le Rapport a mis en évidence que la perte de biodiversité et les systèmes alimentaires intensifs rendent les maladies zoonotiques plus probables. La dépendance accrue aux plastiques à usage unique et les bas prix du pétrole résultant des verrouillages ont des conséquences négatives.

En Belgique la pandémie Covid-19 a provoqué des changements importants dans la production et la consommation de plastiques et de déchets plastiques. La pandémie a entraîné une augmentation soudaine de la demande mondiale d'équipements de protection individuelle (EPI), tels que masques, gants, blouses, désinfectant pour les mains en bouteille, etc. Au cours des premiers efforts visant à arrêter la propagation du virus, l'Organisation mondiale de la santé (OMS) a estimé que, chaque mois, 89 millions de masques médicaux étaient nécessaires dans le monde, ainsi que 76 millions de gants d'examen et 1,6 million de jeux de lunettes. Les verrouillages pendant la pandémie de Covid-19 peuvent avoir des impacts positifs directs, à court terme et sur notre environnement, en particulier en termes d'émissions et de qualité de l'air, bien que ceux-ci soient probablement temporaires. Les mesures temporaires prises pour faire face à cette pandémie ne sont pas construites comme une réponse durable au défi du changement climatique. La pandémie Covid-19 met en évidence, une fois de plus, la nature interconnectée de nos systèmes planétaires, depuis les origines zoonotiques de la maladie et leur relation avec notre environnement naturel et nos systèmes alimentaires, jusqu'à la plus grande vulnérabilité aux maladies résultant des inégalités sociales[49], de la mauvaise qualité de l'air, de la pollution et d'autres facteurs environnementaux comme le changement climatique.

En mai 2020, les experts du *SPF Santé*[50] de la Belgique ont rédigé une première note de vision, qui a donné quelques idées sur la manière dont une telle politique de relance post-Covid-19 et la transition vers une économie régénératrice pourraient être menée au

[47] Voir le site <http://urbanisme.irisnet.be/actualites-accueil/arrete-de-pouvoirs-speciaux-ndeg-2020-038-prolongeant- certains-delais-relevant-du-cobat-et-de-l2019ope>.

[48] European Environment Agency, *Covid-19 and Europe's environment: impacts of a global pandemic* (05 Nov. 2020).

[49] J.A. Patel et autres, 'Poverty, inequality and COVID-19: the forgotten vulnerable' (2020) *Public Health* 183 110.

[50] *Le Service public fédéral (SPF) Santé, Sécurité de la Chaine alimentaire et Environnementa été créé en 2001.*

bénéfice de l'économie, de l'environnement et de la santé de citoyens belges. Dans ce cadre le SPF Santé de la Belgique a présenté le 15 octobre 2020, une nouvelle note opérationnalisant concrètement ces principes de transition et de relance en matière d'environnement et de santé publique. Selon le *SPF Santé* pour parvenir à une croissance plus durable et conforme aux objectifs du Pacte Vert européen et aux Objectifs de Développement Durable des Nations Unies, la stratégie de relance doit répondre aux enjeux de la neutralité climatique, de la préservation et de la restauration durable de la biodiversité, de l'amélioration de la qualité de l'air, de l'eau et du sol, d'une utilisation durable et efficace de l'énergie et des ressources, de développement d'une économie circulaire et de cycles de matériaux non toxiques et d'une consommation et production saines et durables et ce, tout en accordant une attention particulière aux personnes les plus vulnérables et en intégrant les différents piliers de la santé.

Conclusion

La France et la Belgique ont fait face à la pandémie par des mesures législatives d'urgence qui ont conduit à la contraction des droits et libertés fondamentaux. L'étude et la comparaison entre ces expériences a mis en évidence trois points communs.

En premier lieu, les gouvernements de France et de la Belgique ont tenté d'équilibrer le droit à la santé avec d'autres droits fondamentaux, tels que la liberté de mouvement, la liberté d'entreprise et de travail. En deuxième lieu, la législation d'urgence a conduit à une contraction des politiques environnementales au profit de la reprise économique et du marché. En troisième lieu, la propagation du virus a été à l'origine d'un crise systémique globale. Dans ce cadre, la pandémie mondiale de Covid-19 (selon certaines études) est étroitement attachée aux problèmes de l'environnement et elle est liées au changement climatique et conduira à la prise de conscience collective de l'accélération vers des investissements durables.

La crise sanitaire est l'occasion d'interrogations sur l'équilibre entre État et marchés, qui a significativement évolué ces dernières décennies. La relance économique pourrait oblitérer la transition écologique. La pandémie et la crise écologique ont une racine humaine qui doit être recherchée dans la rupture de l'équilibre entre l'homme et la nature, qui affecte, par exemple, le rapport entre la science et la vie, entre la technologie et le bien-être, entre l'environnement et la santé, entre l'éthique et l'économie. Nous devons réaliser une nouvelle union entre l'économie et l'écologie. Il est nécessaire de poursuivre une écologie intégrale pour renouveler la relation entre la personne et l'environnement. Après la pandémie un changement révolutionnaire est nécessaire pour assurer une protection intégrale de l'environnement à travers l'utilisation d'une économie circulaire comme un mode de vie qui dépasse le modèle d'une « économie malade », fruit de la croissance économique inéquitable qui ne tient pas compte des valeurs humaines fondamentales (selon l'enseignement du *Pape François*).

Pour assurer « les droits et les devoir écologiques » face à la pandémie les politiques globales de l'environnement doivent être fondées sur deux axes principales : 1) le principe de non-régression environnementale ; 2) le principe de l'éducation environnementale.
En ce qui concerne le principe de la non-régression, les expériences de la France et de la Belgique sont très importantes pour les autres pays. Comme nous avons dit le principe de non-régression, en France et en Belgique, est un principe majeur du droit de l'environnement. Aujourd'hui, le débat français sur le principe de non-régression est très important pour la protection équilibrée de l'environnement et la protection de la santé humaine. Certains députés – en application du second alinéa de l'article 61 de la Constitution – ont introduit un recours devant le Conseil Constitutionnel sur le projet de loi "relatif aux conditions de mise sur le marché de certains produits phytopharmaceutiques en cas de danger sanitaire pour les betteraves sucrières" tel qu'adopté le 30 octobre 2020 par l'Assemblée nationale en lecture définitive. Selon ces députés, cette loi est manifestement contraire à plusieurs principes à valeur constitutionnelle et elle porte atteinte au principe de prévention En premier lieu, l'objet du projet de loi est d'autoriser les personnes à porter une atteinte volontaire à l'environnement, et non de la prévenir. Au regard de la législation en vigueur qui interdit totalement l'usage des néonicotinoïdes, « les dispositions de l'article 1er ont pour effet, d'une part, de donner la faculté juridique à l'exécutif d'autoriser l'utilisation en France de certaines substances néonicotinoïdes (alinéa 3), privant ainsi de garantie légale l'interdiction de toute cette famille de substances en France, et, d'autre part, de recourir au mécanisme des dérogations (alinéa 4) pour autoriser par arrêté jusqu'au 1er juillet 2023 l'emploi de semences traitées avec des substances néonicotinoïdes dont l'utilisation est interdite en Europe »[51]. Les requérants considèrent que le projet de loi porte l'atteinte au principe de non-régression et prive par là même de garanties légales « le droit de vivre dans un environnement équilibré et respectueux de la santé » consacré par l'article 1er de la *Charte de l'environnement*.
Pour éviter une nouvelle crise environnementale, il faudra investir dans l'éducation environnementale des enfants et des générations futures afin de construire une nouvelle citoyenneté écologique fondée sur des droits et des devoirs environnementaux. La nécessité d'insister sur l'éducation environnementale comme renfort pour édifier des sociétés durables et respectueuses de l'environnement particulier, est consacrée dans certains documents internationaux tels que les documents internationaux tels que l'Accord de Paris sur le climat de 2015 et, en particulier, par le projet de *Pacte Global de l'Environnement*[52]

[51] Voir *Recours devant le Conseil Constitutionnel sur le projet de loi "relatif aux conditions de mise sur le marché de certains produits phytopharmaceutiques en cas de danger sanitaire pour les betteraves sucrières*", dans <https://www.ecologie-democratie-solidarite.fr/wp-content/uploads/2020/11/201110_Recours-CC_PJL-ne%CC%81onicotinoi%CC%88des_VDEF.pdf?fbclid=IwAR3VxmZTyoFWw_LLEpOkeiBRN7-Gr7zx0uJKH3QdKIlakt2idaksYmLutNk>.

[52] P. Thieffry, 'Vers l'ouverture des négociations sur un Pacte mondial pour l'environnement' (2018) *Revue trimestrielle de droit européen*; D. Amirante 'Un Patto mondiale per l'ambiente, A Global Pact for the Environment' (Napoli 2018); L.

qui est défini comme la « boussole » du nouveau droit mondial de l'environnement. Le *Pacte Global de l'Environnement* est un traité regroupant l'ensemble des principes fondateurs de l'environnement[53] et qui consacre certaines dispositions référées à l'éducation à l'environnement[54]. Pour donner un sens de l'importance de chacun à être protagoniste de cette green mission le Président de la « Commission Environnement du Club des Juristes », Y. Aguila (à Naples, à l'occasion de la Présentation du projet de *Pacte Global* le 29 octobre 2018) a rappelé l'histoire connue de l'incendie et de l'oiseau de Paulo Coelho. « *On raconte que " un jour, la forêt prenait feu et les animaux fuyaient à la recherche d'un lieu sûr. Alors qu'il s'enfuit, le singe remarque un petit oiseau volant en direction des flammes. 'Qu'est- ce que tu fais ?' demande le singe. 'Ne vois-tu pas que la forêt a pris feu ?' 'Oui', répond l'oiseau 'Mais j'apporte quelques gouttes d'eau dans mon bec pour éteindre le feu'. Le singe s'exclamait : 'Comment peux-tu éteindre ce feu avec quelques gouttes d'eau ?'. 'Je sais que je ne peux pas. Mais au moins, je fais ma part et j'espère que les autres ressentiront mes efforts. Si tous les animaux suivent mon exemple, nous réussirons à dominer les flammes et à sauver notre forêt'"* ».

Derrière cette histoire « élémentaire », se trouve la rationalité du nouveau modèle de «citoyenneté écologique globale », c'est-à-dire un nouveau statut de citoyens de la « Création et de la Nature » qui, selon le *Pape François*, constitue la condition nécessaire pour une nouvelle alliance entre la personne et l'environnement; elle représente une nouvelle manière de comprendre les droits et les devoirs environnementaux qui doivent trouver leur fondement dans la responsabilité écologique et dans le principe d'équité et de solidarité intergénérationnelle.

Colella 'Il principio di «non regressione ambientale» al centro del Global Pact of Environment. Il contributo dell'esperienza francese al diritto ambientale comparato' (2019) 2 *Diritto e giurisprudenza agraria, alimentare e dell'ambiente* 1.

[53] D. Amirante (cur.), *La forza normativa dei princìpi giuridici e il diritto ambientale. Profili di teoria generale e di diritto positivo* (Cedam 2007) 33.

[54] Y. Aguila, 'Vers un Pacte mondial pour l'environnement' in M. Deguergue et U. Ngampio (cur.) *Fragment d'Univers. Melanges en l'honneur du professeur Jean-Marie Pontier* (Presse Universitaires D'Aix-Marseille 2020) 60. «Fondé tant sur le droit de vivre dans un environnement sain que sur le devoir de prendre soin de l'environnement, le Pacte mondial donnera aux citoyens les moyens juridiques d'être des acteurs de la protection de la planète. Il reconnaîtra les principes fondamentaux de prévention et de réparation des dommages faits à l'environnement et établira les outils pour les mettre en œuvre (droits à l'information et à la participation du public, droit d'accès à la justice environnementale)»; voir <https ://globalpactenvironment.org/le-pacte/quest-ce-que-le-pacte/>.

Articles

The Estado ambiental de derecho under the 'state of siege': COVID-19 and Spanish environmental law

Enrico Buono*

Abstract

The aim of this essay is to assess the impact of the COVID-19 pandemic on the Spanish legal framework of environmental protection.

Evidence and experience are showing that the current pandemic is deeply rooted in anthropogenic climate change. Despite the evidence, the health crisis has initiated a season of regressive reforms in the Spanish Autonomous Communities that is undermining the Spanish environmental legal system.

This study provides a brief overview of the levels of environmental regulation in the Spanish Autonomic State, while discussing the implications of the two nationwide states of emergency declared so far.

* Ph.D. in Comparative Law and Integration Processes, Adjunct Professor in Italian and Comparative Public Law, Università degli Studi della Campania Luigi Vanvitelli (Naples, Italy); Investigador Visitante, Universidad Católica Boliviana San Pablo (La Paz, Bolivia).

In light of this regressive trend, the *Estado ambiental de derecho* – so often invoked in Spanish-speaking legal scholarship – is currently under the 'state of siege': that is, the – somewhat paradoxical – restriction of environmental rights, just when the pandemic has demonstrated their utmost importance for the prevention of future zoonotic diseases.

Keywords

Spanish Environmental Law – States of Emergency in Spanish Constitutional Law – Climate Change in the Anthropocene – Zoonotic Pandemics

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Introduction: the 'spillover' of emergency constitutionalism onto environmental law in the Anthropocene

As recently remarked by Inger Andersen, executive director of the United Nations Environment Programme,[1] the pandemic crisis has dramatically highlighted the close interrelation between anthropogenic climate change and the emergence of zoonotic diseases (75% of newly diagnosed infectious diseases)[2] such as SARS-CoV-2.

[1] United Nations Environment Programme and International Livestock Research Institute, *Preventing the Next Pandemic: Zoonotic diseases and how to break the chain of transmission* (Nairobi, Kenya, 2020) 4.

[2] Ibid.

This health emergency has provided further evidence to prove the correctness of the *Anthropocene Thesis*:[3] the impact of human activity on the Earth ecosystem has long reached geological proportions, creating the conditions for a backlash from nature.

As the world grapples with the pandemic, legal scholars are mostly involved with the restrictions of fundamental rights imposed by the states of emergency declared throughout the globe – and justly so.

However, another *spillover* is currently occurring in the legal arena, which is no less dangerous than the species jump from bats to human lungs. In fact, it can be argued that emergency constitutionalism is *spilling over* environmental law, resulting in *rollbacks*[4] that are causing a 'legal downgrade'[5] of environmental policies and regulations in different legal orders.

According to Amirante, 'we are witnessing to some attempts in using the COVID-19 as "cover-topic" for environmental law downgrades'.[6] This regressive trend is overtly justified by economic concerns about the post-COVID recovery agenda, paradoxically restricting environmental rights just when the pandemic has demonstrated their utmost importance for the prevention of future zoonotic diseases.

Since Spanish local Autonomous Communities (*Comunidades Autónomas*) can enforce their own environmental legislation, Spain represents an interesting case study on the challenges faced by multilevel environmental governance systems in a pandemic stress test.

As a matter of fact, the *Estado ambiental de derecho* – so often invoked in Spanish-speaking legal scholarship[7] – is currently under the 'state of siege': the health crisis has initiated

[3] S. Dalby, *The Anthropocene Thesis*, in M. Juergensmeyer, S. Sassen, M.B. Steger and V. Faessel (eds), *The Oxford Handbook of Global Studies* (OUP 2018); L. Kotzé, *Earth System Law for the Anthropocene*, (2019) 11 Sustainability 23, 6796; L. Kotzé, *Earth system law for the Anthropocene: rethinking environmental law alongside the Earth system metaphor* (2020) 11 *Transnational Legal Theory* 1-2, 75; E. Cocciolo, *Capitalocene, Thermocene and the Earth System: Global Law and Connectivity in the Anthropocene Age*, in J. Jaria-Manzano and S. Borràs (eds), *Research Handbook on Global Climate Constitutionalism* (Edward Elgar 2019); Jaria-Manzano, *Law in the Anthropocene*, in Jaria-Manzano and Borràs (eds), *Research Handbook on Global Climate Constitutionalism* (Edward Elgar 2019); Jaria-Manzano, *La Constitución del Antropoceno* (Tirant lo Blanch 2020).

[4] The term *rollback* has been aptly used to describe how environmental rules were reversed under the Trump administration: see K.H. Engel, *Climate Federalism in the Time of COVID-19: Can the States "Save" American Climate Policy?* (2020) 47 Northern Kentucky Law Review 116, 10. See also N. Popovich, L. Albeck-Ripka and K. Pierre-Louis, *95 Environmental Rules Being Rolled Back Under Trump*, *New York Times* (New York, 21 December 2019).

[5] D. Amirante, *"Tangled up in green": the tight connection between COVID-19 and the environment* (Law on the State of Emergency Conference, Asian Law Centre, Melbourne Law School, The University of Melbourne, 16-17 June 2020) 412.

[6] Ibid.; see also D.R. Boyd, *COVID-19: "Not an excuse" to roll back environmental protection and enforcement, UN rights expert says*, *United Nations High Commissioner for Human Rights News* (Geneva, 15 April 2020); Amnesty International, *Responses to COVID-19 pandemic must not ignore the climate crisis*, *Amnesty International Public Statement* (London, 14 May 2020).

[7] J. Jordano Fraga, *La Administración en el Estado ambiental de Derecho*, (2007) Revista de administración pública 173, 101; G. Mesa Cuadros, *Derechos ambientales en perspectiva de integralidad. Concepto y fundamentación de nuevas demandas y resistencias actuales hacia el Estado ambiental de derecho* (Universidad Nacional de Colombia 2013). See also E. Talancha Crespo, *Hacia un Estado Ambiental de Derecho*, *El Litoral* (Santa Fe, 1 July 2010).

a season of regressive reforms in some *Comunidades Autónomas* (hence CC. AA.) that is lowering national environmental standards under the effect of centrifugal forces.
This entails a further paradox: the intrinsic asymmetry of the distribution of competences – which brought about the advancements of the Spanish environmental legal model – has also generated the rollback phenomena taking place today.
The ultimate aim of this study, therefore, is to assess the impact of the COVID-19 pandemic on the Spanish legal framework of environmental protection through the lens of interlevel conflict.
This paper is comprised of three distinct sections.
The first section provides a reasonably comprehensive overview of the Spanish environmental constitutional and regulatory framework; the second section discusses the implications of the two nationwide states of emergency declared so far, while reviewing their constitutional foundations. The paper ends with a brief analysis of a case study demonstrating how environmental rollbacks are affecting the legal protection of the Mar Menor coastal lagoon in the Region of Murcia.

1. The *Estado ambiental de derecho*: the Spanish environmental constitutional and regulatory framework

It has commonly been assumed that the 1978 Spanish Constitution (hereinafter CE) was the first[8] constitutional text to expressly provide for the protection of the environment.
The 1972 Stockholm Declaration was a major influence on the constituent assembly debate on the drafting of Article 45 CE,[9] which consequently bears a striking similarity to its principles and choice of wording.[10]

[8] The closest precedent might be represented by Article 66 of the 1976 Constitution of the Portoguese Republic: 'Everyone shall possess the right to a healthy and ecologically balanced human living environment and the duty to defend it (…)'.

[9] J. Gálvez Montes, *Comentario al artículo 45*, in F. Garrido Falla (ed), *Comentarios a la Constitución* (Civitas 2001); see also A.E. Pérez Luño, *Artículo 45. Protección del medio ambiente*, in Ó. Alzaga Villaamil (ed), *Comentarios a la Constitución española de 1978* (Cortes Generales 1996-1999).

[10] Principle 1 of the 1972 Declaration of the United Nations Conference on the Human Environment: 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations […]'; cf. Article 45 CE: '1. Everyone has the right to enjoy an environment suitable for personal development, as well as the duty to preserve it; 2. The public authorities shall safeguard rational use of all natural resources with a view to protecting and improving the quality of life and preserving and restoring the environment, by relying on essential collective solidarity […]'.

In fact, both provisions enforce the right to 'enjoy an environment' that ensures 'quality of life', 'dignity' and 'well-being', further emphasizing the relationship between natural resources preservation and a dignified human existence.[11]

The body of case law developed by the Constitutional Court of Spain (*Tribunal Constitucional*, hence TC) seems to validate this interpretation: the historical *Sentencia del Tribunal Constitucional* (hereinafter STC) 102/1995[12] clearly stated the *entanglement* of dignity – 'a transcendent constitutional value', enshrined in Article 10 CE[13] – and the 'inalienable right to inhabit the environment'.

The Spanish environmental legal system thus deepens its roots in the Constitution, consistent with the protective purpose – reaffirmed in a recent TC judgment (STC 233/2015)[14] – 'to face degradation phenomena and threats of all kinds that can compromise the survival of natural heritage, […] and […] negatively affect the quality of life itself in human habitats, given their interdependence'.

The legal nature of the 'right to enjoy an environment suitable for personal development' is still debated,[15] due to its vagueness: according to the prevailing interpretation, the right established in Article 45.1 CE can be defined a genuine 'subjective right' (STC 32/1983),[16] but this claim is still highly controversial. Several constitutional decisions have supported the opposite theory, arguing that Article 45 CE represents a 'guiding principle, not a fundamental right' (SSTC 233/2015; 84/2013; 199/1996).[17]

What seems certain is the *teleological dimension* of the constitutional recognition of this right, as an overarching principle which every level of government has to comply with (STC 126/2002).[18]

On the other hand, the implementation and transposition of European principles and ECtHR judgments have given the 'right to enjoy an environment suitable for personal de-

[11] The aforementioned Article 66 of the 1976 Constitution of the Portoguese Republic is, not surprisingly, indexed *Del ambiente y la calidad de vida*.

[12] Sentencia del Pleno del Tribunal Constitucional 102/1995, (26 of June 1995)

[13] Article 10 CE: '1. The human dignity, the inviolable and inherent rights, the free development of the personality, the respect for the law and for the rights of others are the foundation of political order and social peace; 2. The principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain'.

[14] Sentencia del Pleno del Tribunal Constitucional 233/2015 (5 November 2015).

[15] F.S. Yarza, *Medio Ambiente y derechos fundamentales* (CEPC Tribunal Constitucional Madrid 2012), 359; F. Delgado Piqueras, *Régimen jurídico del derecho constitucional al medio ambiente* (1993) 38 Revista española de derecho constitucional, 53; B. Lozano Cutanda, *Derecho ambiental: algunas reflexiones desde el derecho administrativo* (2016) 200 Revista de Administración Pública, 420;

[16] Sentencia *del Pleno del Tribunal Constitucional 32/1983, de 28 de abril*: 'The right (…) to enjoy an environment suitable for personal development belongs to all Spaniards and the basic conditions for its exercise are equally guaranteed to all by the State'.

[17] Cf. Lozano Cutanda (n 16) 421.

[18] Sentencia del Pleno del Tribunal Constitucional 126/2002 (20 of May 2002)

velopment' considerable substance, through the enforcement of the connected rights to physical integrity and privacy.[19]

Article 149.1.23 CE[20] lays the foundation of the multilevel architecture of Spanish environmental governance, as it articulates the allocation of competences between the State and the CC. AA.

The aforementioned article establishes the exclusive competence held by the State over 'basic legislation on environmental protection, without prejudice to the powers of the Autonomous Communities to establish additional protective measures'.

At State level, basic legislation provides wide frameworks that often incorporate principles developed by international and European institutions; on the other hand, CC. AA. can achieve a higher level of detail in the exercise of their conferred competences.[21]

Basic legislation must leave sufficient room for subnational regulations to thrive, while setting minimum standards to be met in any case; of course, the CC. AA. are allowed to establish higher levels of protection (SSTC 170/1989; 118/2017).

Drawing a clear demarcation line is not always so easy: the complex and 'multifaceted'[22] features of environmental protection can produce overlapping and potential conflict between central and local competences, given their transversal nature.

According to constitutional rulings, the distribution of competences is violated when State basic legislation entails more than just establishing limits for local actors, with one relevant exception: the *supraterritoriality* clause.

Defined in STC 22/2014 as the exceptional attribution of local powers to the State, supraterritoriality can be invoked under two conditions: first, a state of exception, justified by necessity and urgency; secondly, the alleged impossibility of introducing coordination and equal distribution of competences.

Before proceeding to the actual inquiry into the role played by the supraterritoriality clause during the pandemic, it seems necessary to briefly review the most relevant statutes

[19] ECtHR Judgment *López Ostra v Spain* App no 16798/90 (ECtHR, 9 December 1994) broke new ground in this regard, both in Spain and abroad; *Guerra and Others v Italy* 116/1996/735/932 (ECtHR, 19 of February 1998); *Hatton v UK* App no 36022/97 (ECtHR, 8 of July 2003). See also C. Ruiz Miguel, *La CEDH et l'Espagne: statut juridique, pratique et signification* (2020) 43 DPCE Online 2.

[20] Article 149 CE: '1. The State holds exclusive competence over the following matters […]; xxiii) basic legislation on environmental protection, without prejudice to the powers of the Autonomous Communities to establish additional protective measures; basic legislation on woodlands, forestry, and livestock trails'.

[21] It should be reminded that the CC. AA. have adopted their own basic institutional laws, the Statutes of Autonomy, in accordance to Article 147 CE: '1. Within the terms of the Constitution, the Statutes shall constitute the basic institutional rules of each Autonomous Community and the State shall recognise and protect them as an integral part of its legal order; 2. The Statutes of Autonomy must contain: […] the powers assumed within the framework established by the Constitution and the basic conditions for the transfer of the services corresponding to them'.

[22] J. Sanz Larruga, *Situación actual y nuevas perspectivas del derecho ambiental de Galicia. La normativa ambiental básica del Estado: evolución, contenidos y nuevas tendencias* (2009) 5 Actualidad Jurídica Ambiental; see also the aforementioned *Sentencia del Pleno del Tribunal Constitucional 118/2017, de 19 de octubre*.

enacted in Spain on environmental matters, although their extended discussion is beyond the scope of this paper.

Statal legislation can be summarized in terms of environmental protection techniques.

Demanialization (ie the establishment of the State public domain)[23] has represented one of the most effective techniques for the protection of environmental common goods, in accordance with Article 132.2 CE.[24] This is evident in the case of continental waters: water resources belong to the public domain since the entry into force of the *Leyes de Aguas* (1866 and 1879). The complete demanialization of continental waters was confirmed by the *Ley 29/1985, de 2 de agosto, de Aguas*, as reformed by the *Real Decreto Legislativo 1/2001* (*Texto Refundido de la Ley de Aguas* or TRLA).

The *Ley 22/1988, de Costas* and the *Ley 43/2003, de Montes* have similarly stated that coastal areas and communal forests are part of the public domain.

The framework for integrated pollution prevention and control has been laid down by the *Ley 16/2002, de 1 de julio, de Prevención y Control Integrados de la Contaminación* and the *Ley 22/2011, de 28 de julio, de residuos y suelos contaminados*, as reformed by the *Real Decreto Legislativo 1/2016*. Its purpose, as stated in Article 1, is to 'prevent or […] reduce and control atmospheric, water and soil pollution, by establishing an integrated pollution prevention and control system, in order to achieve a higher protection of the environment as a whole'.

An *autorización ambiental integrada* (integrated environmental authorization) is a mandatory legal requirement for the opening of industrial sites. The autonomous communities shall appoint the competent bodies, responsible for deciding whether or not to grant environmental authorizations, in accordance with the principles set out in Article 4 (prevention of contamination, prevention and management of wastes, energy efficiency, accident prevention).

The national law on environmental impact assessment is the *Ley 21/2013, de 9 de diciembre, de evaluación ambiental*, which establishes uniform rules throughout national territory, pursuant to the aforementioned Article 149.1.23 CE.

According to Article 5, environmental assessment is the 'instrumental administrative procedure for the approval or adoption of plans and programs, as well as for the authorization of projects or […] for the administrative […] control of projects subject to […] prior notice, through which the potential significant effects on the environment […] are analyzed'. The

[23] According to the *Sentencia del Pleno del Tribunal Constitucional 227/1988, de 29 de noviembre*, demanialization is: 'a technique primarily aimed at excluding the asset involved from private legal trade, protecting it through a series of exceptional rules deviating from private law. The property in the public domain is thus above all a *res extra commercium*'.

[24] Article 132 CE: '1. The legal system governing public domain and community property shall be regulated by law, on the principle that they shall be inalienable and imprescriptible and not subject to attachment or encumbrance; 2. The property of the State public domain shall be that established by law and shall, in any case, include coastal area, beaches, territorial waters and natural resources of the economic zone and the continental shelf; 3. The State and National Heritage, as well as their administration, protection and preservation, shall be regulated by law'.

competent bodies have the power to impose sanctions for those projects that do not comply with environmental impact assessment.

The rights to access to information, public participation and access to justice in environmental matters are enforced by the *Ley 27/2006, de 18 de julio, por la que se regulan los derechos de acceso a la información, de participación pública y de acceso a la justicia en materia de medio ambiente*.[25] In accordance with the established case law of the European Court of Justice,[26] Title II enacts a distinctly open regime for the dissemination of environmental information. Title III requires that any decision of a public authority related to the environment implies public participation, while Title IV creates specific access procedures for justice and administrative protection in environmental matters.

The *Ley 26/2007, de 23 de octubre, de Responsabilidad Medioambiental*, as reformed by the *Ley 11/2014*, outlines unlimited environmental responsibility, based on the prevention and polluter pays principles.

In consonance with the principle of *liability without fault*, the legal nature of this responsibility is defined as strict liability (*responsabilidad objetiva*): regardless of any subjectivity of the fault, the responsible party must restore damaged natural resources to their baseline condition.

The notion of relevant environmental damage comprises any deleterious and measurable change of a natural resource, whether direct or indirect, such as the degradation of air, water and soil, the disturbance to ecosystems and the extinction of wildlife.

Below the State level, the competent authorities of the 17 CC. AA. have further powers on environmental matters, granted by their *Estatutos de Autonomía* (Statutes of Autonomy);[27] even municipalities have autonomous environmental powers, recognized according to the *Ley 7/1985, de 2 de abril, Reguladora de las Bases del Régimen Local* (LRBRL, as reformed by the *Ley 57/2003, de 16 de diciembre, medidas para la modernización del Gobierno Local*).[28] The complete analysis of subnational legislation is well beyond the scope of this study.

Interestingly, with regard to the impacts of climate change, Cocciolo remarked that the years between 2012 and 2018 were characterized by the substantial inactivity of the central

[25] The adoption of this law transposes Directive 2003/4/EC of 28 January 2003 on public access to environmental information and Directive 2003/35/EC of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment.

[26] Case C-233/00 Commission of the European Communities v French Republic [2003] ECR I-04395.

[27] For the in-depth analysis of the environmental provisions enacted in the *Estatutos de Autonomías* see A. Nogueira López, *A Rolex o a setas. Comunidades Autónomas, cambio climático y modelo económico* (2020) 11 Revista Catalana de Dret Ambiental 1, 4-5.

[28] Article 25.2 LRBRL: 'The Municipality shall exercise […] its own powers, within the framework of State and Autonomous Communities' legislation, over the following matters: […] b) Urban environment: in particular, parks and public gardens, management of urban solid waste and protection against noise, light and atmospheric pollution in urban areas'.

government.[29] This *inactividad climática* was nevertheless compensated by the legislative activity of the CC. AA., leading towards an alleged *climate federalism*,[30] up for the challenges of energy transition and climate change.

Therefore, three laws have been approved: the *Ley del Parlamento de Cataluña 16/2017, de 1 de agosto, del cambio climático*; the *Ley del Parlamento de Andalucía 8/2018, de 8 de octubre, de medidas frente al cambio climático y para la transición hacia un nuevo modelo energético en Andalucía*; the *Ley del Parlamento de las Illes Balears 10/2019, de 22 de febrero, de cambio climático y transición energética*.

These three bills share the same *bottom-up approach* advocated by the Paris Agreement on Climate Change of 2015, establishing a decentralized line of action to fulfill the Agreement's long-term temperature goals.

The Catalan *Ley 16/2017* pursues the goal of reducing greenhouse gas emissions, devising instruments to achieve energy transition towards full carbon neutrality. Its preamble states that 'in terms of competence, this law is a substantially environmental act. Its object and its purposes inevitably give it this character'. Albeit 'the competence in environmental protection is a shared competence', basic State legislation (Article 149.1.23) cannot 'prevent the *Generalitat* from establishing its own policies in this area' or undermine autonomic competence (*punto III preámbulo*). The wording of the preamble reflects the historical moment of tension in Catalonia's relationship with Spain;[31] from a regulatory standpoint, the following articles thoroughly outline advanced *philoclimatic* principles and guidelines, but have drawn criticism for their lack of concrete measures and continued reference to future regulations.[32]

Notwithstanding, the law was challenged and upheld by the TC for unconstitutionality. It was alleged that the Catalan Law invaded the exclusive competences of the State in matters of basic legislation on environmental protection and energy policy (Article 149.1.13, 149.1.23 and 149.1.25 CE).

[29] E. Cocciolo, *Cambio climático en tiempos de emergencia. Las comunidades autónomas en las veredas del "federalismo climático" español*, (2020) 11 Revista Catalana de Dret Ambiental 1.

[30] Ibid. 14.

[31] On the topic of the Catalan constitutional conflict see G. Poggeschi, *La Catalogna: dalla nazione storica alla repubblica immaginaria* (2018 Editoriale Scientifica); Poggeschi, *La definitiva approvazione del nuovo statuto di autonomia della Catalogna. Un passo avanti verso una maggiore asimmetria nell'Estado autonómico?* (2006) 3 DPCE, 1340.

[32] A. de la Varga Pastor, *Estudio de la Ley catalana 16/2017, de 1 de agosto, del cambio climático, y comparativa con otras iniciativas legislativas subestatales*, (2018) 9 Revista Catalana de Dret Ambiental 2, 52.

STC 87/2019[33] declared all references to the aforementioned emission limits unconstitutional, establishing the primacy of 'a rigid and *top-down* conception'[34] of European competition principles, with blatant disregard for the Paris Agreement.[35]

Most of the provisions of the Andalusian *Ley 8/2018* are directory. The Andalusian law does not draw mandatory parameters or a clear set of climate change targets, outlining instead a very complex regulatory architecture that involves too many actors. To date, there has been no clear development or funding of these measures.[36]

In addition, *Ecologistas en Acción* have contested the bill for having 'suspended Paris' by not adhering to the emission reduction target of 40% and by misleadingly comparing the 2030 goal to the emission level of 2005, instead of the year 1990 (to which both the Kyoto Protocol and the Paris Agreement refer).

Mora Ruiz explicitly referred to the impact of this law as 'decaffeinated',[37] due to its lack of specificity.

Nogueira López has aptly highlighted the importance of the 'learning process'[38] derived from STC 87/2019: as a result, the Balearic *Ley 10/2019* has settled the distribution of competence with a comprehensive explanatory memorandum. In an attempt to avoid a declaration of unconstitutionality akin to that of the Catalan *Ley 16/2017*, the Balearic law insists on the proportionality of its measures, without setting any quota for reducing greenhouse gas emissions.

As of December 2020, the national *Proyecto de Ley de Cambio Climático y Transición Energética* (PLCCTE) – submitted to the *Cortes Generales* on May – is still suffering from delays and will not be discussed until next March. The Spanish Climate Change Law has accumulated years of delay and more than 700 amendments. It is but one of the three pillars of the *Marco Estratégico de Energía y Clima* (MEEC), along with the *Estrategia de Transición Justa* and the *Plan Nacional Integrado de Energía y Clima* (PNIEC) 2021-2030.

[33] A. de la Varga Pastor, *La ley catalana de cambio climático tras la sentencia del Tribunal constitucional. Estudio de las repercusiones de la sentencia y su evolución legislativa*, (2020) 11 Revista Catalana de Dret Ambiental 1.

[34] Cf. Nogueira López (n 27) 25.

[35] S. Simou, *La configuración filoclimática del derecho de propiedad* (2017) 3 InDret. S. Galera Rodrigo, *Las competencias en materia de clima: La complejidad jurídica del gobierno multinivel*, in Galera Rodrigo and Mar Gómez Zamora, *Políticas locales de clima y energía. Teoría y práctica* (INAP 2018), 227-29; Nogueira López, *Cuadrar el círculo. El complejo equilibrio entre el impulso de la economía circular y un proceso de liberalización ambicioso* (2019) 3 InDret.

[36] M. Mora Ruíz, *La respuesta legal de la Comunidad autónoma de Andalucía al cambio climático: estudio sobre la Ley 8/2018, de 8 de octubre, de medidas frente al cambio climático y para la transición hacia un nuevo modelo energético en Andalucía* (2020) 11 Revista Catalana de Dret Ambiental 1.

[37] Ibid. 10.

[38] Cf. Nogueira López (n 27) 8.

The *Proyecto* has already been criticized for not taking into consideration the paradigms of circular economy and not seizing the chance to tax GHG emissions,[39] but it can still be considered a step forward in the direction of a decarbonized economy.
A process that has been abruptly halted by the global pandemic and the subsequent declaration of the state of emergency.

2. *Estado de derecho y estado de alarma*: the Spanish Autonomic State in the time of COVID-19

Spanish emergency constitutionalism – and its ability to meet the challenges of the pandemic crisis – have already been the subject of much investigation: a comprehensive review would thus be beyond the constraints of this study.
However, a number of fundamental provisions must be briefly illustrated here.
Article 116 CE[40] represents the cornerstone of the Spanish constitutional framework for emergency situations, listing the *estados excepcionales* in order of increasing restrictions on basic freedoms: the *estado de alarma* (state of alarm, paragraph 2), the *estado de excepción* (state of emergency, paragraph 3) and the *estado de sitio* (state of siege, paragraph 4).
Article 116 does not exhaust the definition of these states of exception, referring back to an organic law for the regulation of their conditions, competences and limitations.
The promulgation of *Ley Orgánica 4/1981, de 1 de junio, de los estados de alarma, excepción y sitio* – hence LOAES – has filled the gap by providing the guiding principles and the legal regime of the states of emergency.

[39] A. Pallares Serrano, *Análisis del anteproyecto de ley de cambio climático y transición energética: luces y sombras* (2020) 11 Revista Catalana de Dret Ambiental 1, 36; L. Presicce, *Legislación básica de protección del medio ambiente (Segundo semestre 2020)* (2020)11 Revista Catalana de Dret Ambiental 2.

[40] Article 116 CE: '1. An organic law shall regulate the states of alarm, emergency and siege (martial law) and the corresponding competences and limitations; 2. A state of alarm shall be declared by the Government, by means of a decree decided upon by the Council of Ministers, for a maximum period of fifteen days. The Congress of Deputies shall be informed and must meet immediately for this purpose. Without their authorisation the said period my not be extended. The decree shall specify the territorial area to which the effects of the proclamation shall apply; 3. A state of emergency shall be declared by the Government by means of a decree decided upon by the Council of Ministers, after prior authorisation by the Congress of Deputies. The authorisation for and declaration of a state of emergency must specifically state the effects thereof, the territorial area to which it is to apply and its duration, which may not exceed thirty days, subject to extension for a further thirty-day period, with the same requirements; 4. A state of siege (martial law) shall be declared by absolute majority of the Congress of Deputies, exclusively at the proposal of the Government. Congress shall determine its territorial extension, duration and terms.; Congress may not be dissolved while any of the states referred to in the present article remain in operation, and if the Houses are not in session, they must automatically be convened. Their functioning, as well as that of the other constitutional State authorities, may not be interrupted while any of these states are in operation. In the event that Congress has been dissolved or its term has expired, if a situation giving rise to any of these states should occur, the powers of Congress shall be assumed by its Standing Committee; 6. Proclamation of states of alarm, emergency and siege shall not modify the principle of liability of the Government or its agents as recognised in the Constitution and the law'.

The core principle that guides the enactment of the *estados excepcionales* is the proportionality principle: according to Article 1.2 LOAES 'the measures to be adopted in the states of alarm, emergency and siege, as well as their duration, will in any case be those strictly essential to restore normality. These will be applied in a manner proportionate to the circumstances'. A state of emergency cannot be declared unless 'extraordinary circumstances' render 'maintaining normality through ordinary powers' impossible (Article 1.1 LOAES). In any case, the declaration of the states of alarm, emergency and siege 'does not interrupt the normal functioning of the constitutional powers of the State' (Article 1.3 LOAES).
The three different *estados* offer dedicated solutions to address different needs,[41] within an escalating approach: what follows is a condensed summary of the legal regulation of the *estado de alarma*, as it was most interestingly declared twice during the COVID-19 crisis.
The state of alarm (Articles 4 to 12 LOAES) can be declared during natural disasters, health crises, or severe shortage of essential goods: these catastrophic circumstances share the characteristic of 'political neutrality',[42] as they represent a danger to the physical safety of citizens, but do not directly threaten the established order of the State.
The *estado de alarma* is declared by the Government following a decree of the Council of Ministers. Article 116.2 CE determines the contents of this decree,[43] which 'shall specify the territorial area to which the effects of the proclamation shall apply'. According to the aforementioned constitutional provision, the state of alarm can be declared for a maximum period of fifteen days, which can be extended with the authorization of the lower house of the Congress of Deputies: by way of example, during the first wave of the pandemic – between 14 March and 21 June – the *estado de alarma* was extended six times.
According to Article 11 LOAES, the declaration of the state of alarm can impose restrictions to constitutional rights, including restrictions on the freedom of movement, temporary requisition of assets and rationing of essential goods.
Spanish emergency law was never enforced until December 2011, when the Zapatero government declared the first *estado de alarma* in contemporary Spanish history in response to an air traffic controller strike.
Finally, with the *Real Decreto 463/2020, de 14 de marzo*, the government led by Pedro Sánchez declared a nationwide state of alarm to address the COVID-19 emergency.

[41] V. Álvarez García, *El Coronavirus (Covid-19): Respuestas jurídica frente a una situación de emergencia sanitaria* (2020) 86-87 El Cronista del Estado Social y Democratico de Derecho, 10.

[42] P. Cruz Villalón, *El nuevo derecho de excepción (Ley organica 4/1981, de 1 de junio)* (1981) 2 Revista Española de Derecho Constitucional, 93.

[43] Sentencia *del Pleno del Tribunal Constitucional 83/2016, de 28 de abril* has stated that the system of sources of Spanish emergency law comprises also this government decree, which rises to rank and value of law. See also V. Faggiani, *Los estados de excepción ante los nuevos desafíos: hacia una sistematización en perspectiva multinivel* (2020) 24 federalismi.it, 30; cf. C. Cerbone, *L'esperienza spagnola nella gestione delle emergenze: una democrazia a prova di contagio?*, in F. Niola and M. Tuozzo, *Dialoghi in emergenza* (2020 Editoriale Scientifica), 79.

It has been argued that the aforementioned Royal Decree has transcended the boundaries of the *estado de alarma*, imposing restrictions that more closely reflect the suspensions (Article 55 CE) of the *estado de excepción*:[44] reproducing its content is beyond the scope of this paper, but it is sufficient to refer the suspensions of all commercial, recreational, cultural, educational and religious activities.

Commenting on multilevel governance of the pandemics in the CC. AA., Poggeschi has most aptly highlighted how this decree has achieved a strong 'centralization'[45] of emergency management under the direction of the President of the Government.

The author acutely remarks that 'if at the beginning of the crisis the centralization of competences (…) was assumed according to the emergency logic of a regional state', during the so-called *desascalada* phase federal features have taken over autonomic ones, in the sense of greater collaboration between central government and regional governments'.[46]

In order to face the second wave of the COVID-19 pandemic, the central government has decreed a new national state of alarm on October 25 2020, which was extended until May 2021.

3. The *estado de sitio (ambiental)*: environmental 'rollbacks' in the Mar Menor coastal lagoon

It could be argued that another state of emergency has gone largely unreported: a *state of* (*environmental*) *siege*, mainly consisting of a *Law Decree pandemic*,[47] which is generating a negative trend in environmental protection standards amongst the Spanish Autonomous Communities.

More specifically, this section gives an account of the environmental regulatory rollback pushed during the COVID-19 pandemic in the Region of Murcia, while briefly addressing the long-debated question of the Mar Menor coastal lagoon.

The Mar Menor coastal lagoon – part of a Specially Protected Area of Mediterranean Importance (SPAMI) – stands at the crossroads of strong economic interests (intensive irri-

[44] R. Rodríguez Fernández, ¿Estado de Alarma o Estado de *Excepción?* (2020) 9627 Diario La Ley.

[45] Poggeschi, *Le Comunità autonome spagnole di fronte alla crisi Covid-19: una fase di "federalismo autonómico" per la Spagna* (2020) 43 DPCE Online 2. In the environmental field, a '*recentralization*' trend in the allocation of competences has been most aptly noted by L. Casado Casado, *La recentralización de competencias en materia de protección del medio ambiente* (Institut d'Estudis de l'Autogovern Barcelona 2018).

[46] Ibid. 1565: 'In this crisis the role of the Autonomous Communities has been fundamental, and a sort of new cooperative federalism, compared to the asymmetric regionalism which has ruled Spain for decades, is probably emerging, which may be defined "federalismo autonómico"'.

[47] S.M. Álvarez Carreño, *La pandemia de decretos-leyes que ponen en riesgo el medioambiente*, *The Conversation* (Melbourne, 7 July 2020).

gated agriculture, fisheries, coastal tourism) and the need to preserve its delicate marine ecosystem.

The overuse of nitrate fertilizers in agriculture has determined unprecedented eutrophication crises in 2016 and 2019, turning the once called *Crystal Sea* into a *green soup.*[48] The declining state of the Mar Menor represents a most interesting case study in the balancing of economic growth and sustainable development, much to the detriment of environmental protection. This case can demonstrate how the pandemic has been a powerful catalyst for environmental law downgrades.

Not surprisingly, the *Pacto por el Mar Menor* association has denounced that 'the Law Decrees approved during lockdown have cast the shadow of ecocide over the Mar Menor'.

The current regressive trend begun with the *Decreto-Ley 2/2019, de 26 de diciembre, de Protección Integral del Mar Menor*, later converted into the *Ley 3/2020, de 27 de julio, de recuperación y protección del Mar Menor*. Three Law Decrees were adopted by the regional government in the wake of the pandemic: the *Decreto-Ley 3/2020, de 23 de abril*, later converted into *Ley 2/2020, de 27 de julio, de mitigación del impacto socioeconómico del COVID-19 en el área de vivienda e infraestructuras*, the *Decreto-Ley 5/2020, de 7 de mayo*, later converted into *Ley 5/2020, de 3 de agosto, de mitigación del impacto socioeconómico del COVID- 19 en el área de medio ambiente* and the *Decreto-Ley 7/2020, de 18 de junio, de medidas de dinamización y reactivación de la economía regional con motivo de la crisis sanitaria (COVID-19)*.

Much of the criticism that this *Law Decree pandemic* has attracted relates to the exclusion of Parliament from codecision – due to the very nature of emergency decrees – and the alleged influence of the *Confederación Regional de Organizaciones Empresariales de la Región de Murcia* (CROEM). According to Álvarez Carreño, 'a regressive reform, whose spirit contradicts the environmental principles of the European Union, is thus consolidated and we hope it can be challenged before the competent Courts at the first convenient opportunity'; the author also reminds that many associations are already demanding the declaration of its unconstitutionality.[49]

For the sake of clarity, the harmful effects of these provisions have to be jointly examined. There are at least three relevant implications: the potential increase in air and water pollution levels; the sensible reduction of administrative controls; the danger of hasty authorization procedures.

Firstly, the decree allows an increase of the pollution index (comprising production of waste, discharges and emissions) subject to environmental assessment from 15% to 30%. A

[48] R. Salassa Boix, *De la sopa verde al mar de cristal: una propuesta tributaria para la eutrofización del Mar Menor en tiempos de COVID-19*, (2020) 11 Revista Catalana de Dret Ambiental 2.

[49] Álvarez Carreño, *Derecho y políticas ambientales en la Región de Murcia (Segundo semestre 2020)* (2020) 11 Revista Catalana de Dret Ambiental 2.

disappointing setback at a moment when the trend should lead towards a decarbonized, sustainable and less polluting economical model.
Secondly, the environmental assessment of new development plans and urbanization projects is ascribed directly to city councils: the number of inhabitants required to confer this power is reduced from 50.000 to 20.000 inhabitants. Furthermore, the power to exclude specific projects from the obligation to carry out an environmental impact assessment has been granted to the regional government. The already scarce guarantees of an independent and objective evaluation of the projects are diminishing, in light of the responsibilities assumed by city councils in the assessment of new development plans and urbanization projects.
Lastly, said guarantees of adequate and sufficient evaluation are further reduced, by restricting consultation and public information time slots and by offering express authorizations within 30 days for 'unsubstantial' modifications and extensions. Combined with meager financial resources, this could possibly lead to hasty authorizations that worsen negative environmental impacts, instead of preventing them.
Overall, these provisions indicate that the Murcian decrees are favoring short-term private benefits at the cost of the resilience of the existing environmental protection legal framework.
The ecological collapse of the Mar Menor clearly exemplifies the conflicting relationship between private economic freedoms and environmental preservation, a major recurring factor in the legislation examined so far. It can be argued that prioritizing private business profit does not generate greater wealth in the long term. The short-sightedness of the Murcian Government's political agenda becomes more evident if the repercussions of climate change are taken into proper account: the Region of Murcia is one of the most threatened by and vulnerable to the impacts of global warming, as tragically demonstrated by the recent Storm Gloria.

Conclusion: towards an *autonomic climate federalism*?

Nogueira López has entitled a recent work – already mentioned in this article[50] – *A Rolex o a setas. Comunidades Autónomas, cambio climático y modelo económico*: the well-known Basque joke quoted by the author[51] is a brilliant and fitting metaphor for the inquiry conducted so far.

[50] Cf. Nogueira López (n 27).

[51] Two Basques were scaling the mountains looking for mushrooms when suddenly one of them found a gold Rolex on the ground, sharing the discovery with joy to his friend, he reacted angrily, 'Patxi, let's see if we can focus, are we here for mushrooms or Rolex's?'.

Notwithstanding its limitations, this study has tried to demonstrate how the 'golden sparkle' of the 'emergency Rolex' has sidetracked Spanish policymakers – at both the regional and national level – from foraging the 'mushrooms' of climate change management, laying at the very root of the pandemic crisis. The severe level of endemic interlevel conflict – intrinsically linked to the Spanish model of *competitive regionalism*[52] – has highly contributed to this 'distraction'.

The Spanish environmental legal framework is, in fact, extremely complex: its openness and flexibility borders on indeterminacy, especially in the definition and division of shared competences between the State and the Autonomous Communities.[53] Besides, Spanish 'constitutional and statutory mosaic' does not provide 'an adequate system of institutional relations',[54] making it extremely difficult to overcome the '*dinámica de litigios competenciales*'[55] and to establish multilevel cooperative strategies.[56]

Nevertheless, in recent years the CC. AA. played a crucial role in the implementation of environmental policies, putting climate change back at the center of the national political agenda. As Nogueira López reminds, decentralization is a positive factor that could potentially help legal experimentation and testing of best practices, in line with the European Committee of the Regions' encouragement addressed to regions and cities to guide the gradual transition towards the new systemic model and test new solutions before 2030. This vision of regionalism and municipalism as 'laboratories of democracy and experimentalism'[57] points towards the development of a proper '*autonomic climate federalism*', founded on the European principles of cooperative federalism. A *supraterritoriality clause* – akin to the one developed by the case law of the TC, described earlier – could (and should) be invoked in case of circumvention of minimum environmental standards.

The pandemic has shown that the Spanish model allows a certain fluidity between centralized government and autonomic management.

Once a proper understanding of the similarities[58] between environmental and health crises is gained and diffused, the denounced rollback phenomena will be – hopefully – more readily contained.

[52] Cf. Poggeschi (n 45).

[53] M. Alberton, *La praxis de las relaciones intergubernamentales en España: un examen cuantitativo y cualitativo de la cooperación en materia ambiental* (2020) 11 Revista Catalana de Dret Ambiental 2.

[54] Ibid. 4.

[55] Cf. Nogueira López (n 27) 28.

[56] R. Galera, *Políticas locales de clima: una razón (adicional) para renovar la planificación (¿local?) en España*, in M. Bassols Coma, J. Gifreu i Font and Á. Menéndez Rexach (eds), *El derecho de la ciudad y el territorio. Estudios en homenaje a Manuel Ballbé Prunés* (INAP 2016), 490-93.

[57] M. Ballbé, *El futuro del Derecho administrativo en la globalización: entre la americanización y la europeización*, (2007) 174 Revista de Administración Pública, 259.

[58] P. Villavicencio Calzadilla, *La pandemia de COVID-19 y la crisis climáticas: dos emergencias convergentes* (2020) 11 Revista Catalana de Dret Ambiental 1.

Articles

Indigenous peoples' rights and covid-19 in the Amazon: a comparative analysis between Brazil and Peru

Thiago Burckhart*

Abstract

The aim of this article is to analyze, in a public comparative law approach made by a complex and critical perspective, the legislative initiatives related to the rights of indigenous peoples that have arisen in the context of the health crisis of Covid-19 in Brazil and Peru, focusing particularly on the common elements related to the protection of their lands. The hypothesis is that although significant legal norms have been produced for the protection of Indigenous Peoples in both countries, they have: 1) problems of applicability, and 2) problems of legitimacy. The conclusion of the article confirms the research hypothesis and also points to the problem of the time lapse of the new legal norms and to the problem of land in the Amazon, which remains an open geopolitical issue. The article is therefore divided into three parts: I – Amazon, Covid-19 and rights of Indigenous Peoples in Brazil and Peru; II – New legal instruments in Brazil and Peru; III – Between texts and contexts: rights of indigenous peoples in the Brazilian and Peruvian Amazon in comparative analysis.

* Ph.D. in Comparative Law and Integration Processes, Università degli Studi della Campania Luigi Vanvitelli (Naples, Italy).

Keywords

Indigenous peoples' rights – Covid-19 – Amazon – Brazil – Peru

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Introduction

In the first half of 2020, the rapid spread of the new coronavirus disease (Covid-19) across the globe had a considerable impact on the dynamics of political and legal relations. Its characterization as a *Pandemic* by the World Health Organization (WHO) implied on the adoption of restrictive measures around the world, ranging from the ban on travel to the imposition of rigid lockdowns – as in China and Italy – to millions of peoples and for a long period of time. This is a large "world health crisis", for which its real effects have not yet been fully accounted for, as the search for a possible cure remains in force. Indeed, the management of this crisis by the States has produced what can be called the "*politics of pandemic*", or even, the "*law of pandemic*", which are the result of the different responses adopted to face it.

It can be said that the health crisis had a direct or indirect impact on all societies of the globe. However, it is notable that there are certain communities which, due to social and biological conditions, are more acutely impacted. The Indigenous Peoples of the Amazon rainforest make part of these communities and register – until now – high rates of contagion and lethality due to Covid-19. Brazil and Peru are two states in South America that share a great border in the Amazon, where indigenous peoples of different ethnicities and cultures live. Both countries were – until October 2020 – among the fifteen hardest hit in terms of contagion and lethality worldwide – only Brazil being the third country in contagion and the second in deaths. Amazon rainforest was – and has been – a region particularly affected by the spread of the disease, and the Brazilian and Peruvian Indigenous Peoples who live in it directly suffer from a historically imposed *political and legal vulnerability process* in which, with the rise of the pandemic, is largely deepening.

Taking it in consideration, this article aims to analyze the legislative initiatives related to the rights of Indigenous Peoples that emerged in the context of the world health crisis in Brazil and Peru, focusing particularly on the common elements related to the protection of

their lands, from the beginning of the outbreak until October 2020. The study is made by a comparative public law methodology in a complex and critical perspective, dialoguing with a sociological perspective of law. The hypothesis to be investigated is that although certain legal norms have been produced for the protection of Indigenous Peoples in both countries, they have: 1) *problems of applicability*, which have boosted their judicialization; and 2) *problems of legitimacy*, which are related to the degree of adequacy to indigenous ways of life, intercultural dialogue and the participation of these peoples in the making-process of these norms. The article is therefore divided into three parts: I – Amazon, Covid-19 and rights of Indigenous Peoples in Brazil and Peru; II – New legal instruments in Brazil and Peru; III – Between texts and contexts: rights of indigenous peoples in the Brazilian and Peruvian Amazon in comparative analysis.

1. Amazon, Covid-19 and rights of Indigenous Peoples in Brazil and Peru

The Mexican anthropologist Rodolfo Stavenhagen starts one of his most important books, written in 1988[1], stating that "land" is a "complex problem" – *un problema complejo* –for Latin American Indigenous Peoples, essentially linked with the archaic agrarian structure of different countries and with the diverse agrarian reform and counter-reform processes that have taken place on the continent. After 30 years, his statement continues to make sense, especially when looking at the geopolitics of law in Amazon. Its cultural and biological richness and diversity has repeatedly been the subject of geopolitical and geoeconomic disputes, most recently marked by the increase in *extractive activities*[2] and *mineral exploitation*. This characteristic deepens the dynamics of inequality and vulnerability of the peoples who live in the forest, among them, the Indigenous Peoples, who face the daily violation of territorial rights[3].

Brazil and Peru are two cross-border countries that have large territories and indigenous populations in the Amazon. In Brazil, the Amazon area – legally called the "Legal Amazon" (*Amazônia Legal*) – corresponds to 5,034,740 km2, equivalent to 59.1% of its total territory, in which around 170 ethnic groups live in 422 indigenous lands recognized by the Brazilian State. This is equivalent to 23% of the total Brazilian Amazon territory and 98.2%

[1] R. Stavenhagen, *Derecho Indígena y Derechos Humanos en América Latina*, (1988), Instituto Interamericano de Derechos Humanos, Ciudad de México, pp. 09: "A complex problem is that of the land of Indigenous Peoples, linked as it is to the general problem of the agrarian structure and to the various agrarian reform and counter-reform processes that have taken place in different countries of the continent", my translation.

[2] Comisión Interamericana de Derechos Humanos (2019), *Pueblos Indígenas y tribales en Panamazonia*: situación de los Pueblos Indígenas y tribales de la Panamazonia, Organización de los Estados Americanos, pp. 14.

[3] E. Heck, F. Loebens, P.D. Carvalho, *Amazônia Indígena: conquistas e desafios* (2005), *Estudos Avançados*, Universidade de São Paulo.

of the extent of indigenous lands throughout the national territory. In Peru, the Amazon comprises 782,826 km2, equivalent to 60.9% of its territory. It inhabits 51 indigenous peoples spread in 2,851 "communities", of which 2,158 are officially recognized by the Peruvian State[4]. These peoples have an active and indispensable role in the conservation of the forest *in situ* and in the improvement of agrobiodiversity in the Amazon, through the use of their respective traditional knowledge on land cultivation and conservation practices. Along with, they are *agents of socio-environmental sustainability*, not only for the Amazon rainforest, but for the entire planet[5].

The Amazon region and its Indigenous Peoples have been particularly hit by the recent Covid-19 pandemic. The health emergency directly or indirectly impacts the management of indigenous lands and the guarantee of the territorial rights[6] for their enjoyment, as pointed out in the recent Report of the UN Special Rapporteur on the Rights of Indigenous Peoples, indigenous peoples "face higher risks of dying of the disease, of experiencing discrimination and a disproportionate impact as a result of confinement measures, and of being left without support to defend their peoples from intensifying rights violations even as the pandemic rages"[7].

There are at least three factors that contributed to the intensification of contagion in these places that demonstrate the interference by States in guaranteeing the rights of Indigenous Peoples: 1) the continuous and permanent invasion of Indigenous lands by companies and individuals for mineral exploitation – which happens more incisively in the Brazilian Amazon; 2) the lack of State protocols for the delivery of food and essential goods to indigenous populations in their lands; and, 3) the precarious indigenous health systems in the region, which have problems with testing, tracing and controlling the pandemic.

The fact that both States do not have official data on the number of infected Indigenous Peoples is a major problem in formulating an adequate response regarding these populations. In effect, on the date of October 20th, 2020, according to official data from John Hopkins University, Brazil had 5,250,727 confirmed cases of covid-19, ranking third in the overall ranking of affected countries – behind the United States and India – and a total of 154,176 deaths – second in the world, just behind the United States – which represents a lethality rate of 2.9%. Peru, on the same date, had 870,876 confirmed cases – ranking eighth in the general ranking – with 33,820 deaths officially registered.

[4] Comisión Interamericana de Derechos Humanos, (n. 3), pp. 201-206.

[5] As states M.C. Cunha, M.W.B. Almeida, *Indigenous People, Traditional People and Conservation in the Amazon* (2000), 129 2 *Daedalus*, Cambridge.

[6] The term "territorial rights" expresses the ownership by Indigenous Peoples of their lands, and also makes reference to other rights that are correlated to it, as environment, culture, intercultural dialogue, etc.

[7] J.F.C. Tzay, *Rights of Indigenous Peoples: note by the Secretary-General A/75/185* (2020), United Nations General Assembly, pp. 5.

According to official data, Peru is the second country in the world and the first in the Americas in terms of *per capita* mortality, with 1.021 deaths per one million people [8]. However, there is no official government survey in both countries to collect data regarding the number of Indigenous Peoples infected by Covid-19[9]. The data, therefore, are recorded by the communities themselves and compiled by Non-Governmental Organizations. In Brazil, the *Instituto Socioambiental* records 37,219 confirmed cases, 856 deaths and 158 affected people as of October 20[10]. In Peru, the data from 20th August shows that at least 21.921 Indigenous Peoples have been infected by Covid-19, and 384 deaths, according to the data collected by Asociación Interétnica de Desarrollo de la Selva Peruana (Aidesep)[11].

In a Report published in September 2020 by the "*Plataforma Indígena Regional frente à COVID-19*", it states out that "From a group of 13 countries considered, Brazil, Peru and Guatemala present the highest number of cases of contagion in indigenous populations, representing 72.5% of all cases in the region"[12].

Through data analysis, it is notable, therefore, that due to a variety of circumstances and political decisions, Amazonian Indigenous Peoples are in a context of epidemiological and social vulnerability regarding Covid-19. It directly affects the rights of Indigenous Peoples, especially the right to their land, but not only[13]. Indeed, it represents a contrast with the rights of Indigenous Peoples recognized in the constitutional sphere of both countries. It is important to emphasize that despite the expansion of the range of rights and the multilevel dynamics of protection for Indigenous Peoples – at the intranational, constitutional, regional and international levels – there is still a gap between constitutional determinations and their effectiveness – its *factual concretization*.

By all means, Brazil and Peru are two countries that have a high level of constitutional protection of the rights of Indigenous Peoples. The 1988 Brazilian Constitution dedicates the Chapter VIII (arts. 231 and 232) only for the rights of Indigenous Peoples, recognizing

[8] The data can be found in the official Website of John Hopkins University: https://coronavirus.jhu.edu/map.html.

[9] In Brazilian context, there is the data provided by SESAI (Special Secretary of Indigenous Health), but this data is characterized by sub notification, because it only takes in consideration the cases and deaths that happened inside Indigenous lands recognized by Brazilian State, leaving out several other peoples and individuals. For further information, see the survey of the "*Instituto Socioambiental*" available on its official website. In the Peruvian case, bulletins from the Ministry of Health do not specify the ethnic origin of coronavirus victims (https://gestion.pe/peru/sin-datos-oficiales-indigenas-de-peru-hacen-su-recuento-de-victimas-de-covid-19-noticia/).

[10] As the disponible data of *Instituto Socioambiental* in the Website: https://covid19.socioambiental.org/.

[11] Data disponible in https://www.actualidadambiental.pe/minsa-mas-de-21-mil-indigenas-fueron-contagiados-de-covid-19-en-la-amazonia/.

[12] M.C. Kain, A. Martinez (Coords.), *Los Pueblos Indigenas ante la pandemia de covid-19* (2020) Tercer informe regional. Comunidades Resilientes. La Paz: Filac, (my translation).

[13] In a complex perspective and a proficient dialogue with Interamerican Human Rights System, the rights of Indigenous Peoples can be conceived in an "essential core" approach, in which the right to land remains in its centrality and irradiated all other rights: rights of nature, cultural rights, right to water, among others. For a deepen analysis, see: M.P. Melo; T. Burckhart (2020), *Direitos de Povos Indigenas no Brasil: o 'nucleo essencial de direitos' entre diversidade e integracionismo*, *Revista Eletrônica do Curso de Direito da UFSM*, v. 15, p. 1-28.

in it their social organization, customs, languages, beliefs and traditions, in addition to the original rights over the lands they traditionally inhabit (art. 231, § 2)[14]. It also recognizes the permanent possession of lands traditionally occupied by Indigenous Peoples and their right to exclusive enjoyment of the richness of the soil, rivers and lakes that make part of these lands (art. 231, § 2). The Constitution settles that their lands are inalienable and unavailable, and their rights on the land are imprescriptible (art. 231, § 2 °). The Constitution also recognizes Brazilian Amazon as part of the national heritage (art. 225, § 7 °).

In the legal sphere, the *Statute of the Indigenous* (Law n. 6.001/1973[15]) also established provisions that guarantee the right to land of Indigenous Peoples. Although the law predates the Constitution, it currently reinforces, in what is compatible, the constitutional text. In its article 2 it states that the Union, States and Municipalities must act to protect Indigenous communities and preserve their rights, by guaranteeing permanence in their lands, providing them with the resources for their development, according to their culture (item V); and by guaranteeing the permanent possession of the lands they inhabit (item IX). Likewise, the text of the Statute also established the mechanisms for regulating the right to land of Indigenous Peoples, set out in article 17 onwards.

In the Peruvian Constitution, however, the terms "Indigenous" or "Indigenous peoples/communities" are not expressly mentioned, but rather "peasant and native communities"[16], as established in Article 88, in which includes the concept of "Indigenous Peoples"[17]. The Constitution established the State obligation in supporting agrarian development, in addition to guaranteeing property rights over land, either privately or communal, or even in any other associative form (art. 88). The text also guarantees the autonomy of these communities within the scope of their organization, in communal work and in the use and disposition over their lands, as well as regarding the economic and administrative issues. Ownership of their land is considered to be imprescriptible (art. 89). It is a constitutional duty of the Peruvian State to respect the cultural identity of the peasant and native communities (art. 89). The Constitution also points that the State must promote the sustainable development of the Amazon, through an appropriate legislation (art. 69).

In the legal field, Peru has a specific law on the right to prior and informed consultation[18] related to legislative or administrative measures that directly affect them (Law n. 29785). And it also has the Law no. 28736 which specifies the protection of Indigenous or "Origi-

[14] For an analysis on Indigenous Peoples Rights in Brazil, see: E.H. Kayser, *Os direitos de povos indígenas no Brasil: desenvolvimento históricos e estagio atual* (2010) Traduzido por Maria da Gloria Lacerda Rurack, Klaus Peter Rurack. Porto Alegre, Sergio Antonio Fabris, 2010.

[15] Known in portuguese as "*Estatuto do Índio*".

[16] In spanish, "*Comunidades Campesinas y Nativas*".

[17] For an in-depth analysis of indigenous rights in Peru, ver: F. Ballon Aguirre (2004), *Derechos de Pueblos Indigenas*, Defensoria del Pueblo, Lima.

[18] In Brazil, this right is only guaranteed by the text of Convention 169 of the International Labor Organization, which makes up the Brazilian legal system through the Decree n. 5.051/2004 and reaffirmed by Decree n. 10.088/2019.

nal" Peoples in a situation of initial contact – isolated. This last law recognizes the right to land of these peoples, restricting the entry into the lands of who do not belong to their own ethnic groups (art. 4, d), in the same way as it recognizes the intangible character of Indigenous reserves (art. 5) and the procedures to be adopted in the case of entering reserves (Exceptional Authorization of Entry, according to art. 6).

The historical vulnerability in the effectiveness of these rights, which was reported in detail in the recent report on the situation of Indigenous Peoples in South America, written by the former UN Rapporteur on the Rights of Indigenous Peoples in 2016[19], deepens considerably in the context of the Covid-19 pandemic[20]. It happens because in addition to the health crisis, both Brazil and Peru were already passing through a context of *multiple crises*: political, economic and social; in which, together with the *pandemic crisis*, produces a peculiar context of mistrust in institutions[21] and, consequently, in the absence of a clear "risk communication" during the emergency, which results in the lack or difficulty of effectiveness of the existing legal provisions.

2. New legal instruments in Brazil and Peru

On March 11th, 2020, the World Health Organization officially declared the then "outbreak" of the new coronavirus as, in reality, a *pandemic*, reviewing its declaration made on January 30th of the same year in which it recognized the new coronavirus as a Public Health Emergency of International Concern (PHEIC)[22]. From a practical point of view, however, the international declaration of a "pandemic" does not represent a significant difference from an PHEIC, but it operates as a "warning" to States to take measures aimed at curbing the spread of the disease in which, at that moment, it already had community transmission in all continents.

On the American continent, the Inter-American Commission on Human Rights issued a historic resolution (Resolution 01/2020) on "*Pandemic and Human Rights in the Americas*". The Resolution points out that the Americas are the continent in which the social

[19] United Nations General Assembly, *Repport of the Special Rapporteur on the rights of Indigenous Peoples* A/HRC/33/42 (2016), Human Rights Council.

[20] As Boaventura de Sousa Santos points out, "[...] their bodies are more vulnerable due to socially impoverished living conditions due to racial or sexual discrimination that are subject to it. When the spring comes, vulnerability increases, which is more exposed to the spread of the virus and is found in places that never give medical attention: slums and poor settlements in the city, remote villages, internment camps for refugees, prisoners, etc." (my translation). B.S. Santos, *La cruel pedagogia del vírus* (2020), *CLACSO*, Buenos Aires, pp. 72.

[21] In a pandemic context, delegitimating political institutions is a central problem, because it turns difficult to create an adequate response from the political point of view if the population of a given State do not believe in the Institutions and the Public Authorities.

[22] The denominations "Public Health Emergency of International Concern (PHEIC)" and "Pandemic" are technical categories of the World Health Organization Regulations, "Annex 2 of the International Health Regulations" (2005).

inequality is more evident, with a large lack of access to basic common goods such as drinking water, food and with populations suffering from environmental pollution and the lack of access to adequate housing. The Resolution further established the need of States in the region to develop "intersectional" policies that specify measures for "historically excluded or high-risk groups", such as Indigenous Peoples[23]. In its operative part, the Resolution brings a specific topic for "*Indigenous Peoples*" (items 54 to 57) recommending to the American countries to proceed with: 1) the dissemination of information about the pandemic in their specific languages; 2) unconditional respect for non-contacted and/or voluntarily isolated peoples; 3) take all actions to protect their rights, especially the right to health; and, 4) refrain from taking legislative and administrative measures that authorize extractive projects in indigenous territories during the pandemic.[24].

At the internal level of the States, Brazil and Peru developed legislative responses to manage the pandemic and, in particular, to affirm the rights of Indigenous Peoples. The first legislative measures were taken in Brazil with the enactment of Law n. 13.979/2020, known as "*Quarantine Law*"[25], which provides measures to internally manage the Public Health Emergency of International Concern resulting from the new coronavirus. The Law was urgently deliberated, approved and promulgated, three days after the declaration of the National Public Health Emergency carried out by the Brazilian Ministry of Health (through the Ordinance n. 188, of February 3rd, 2020). In Peru, two Presidential Decrees regarding the pandemic were promulgated on March 15th. The first (Emergency Decree n. 026-2020) established exceptional and temporary measures to prevent the spread of Covid-19 in the national territory; and the second (Supreme Decree n. 044-2020) declares the State of National Emergency due to Covid-19.

Since then, states have also enacted specific legislation regarding the rights of Indigenous Peoples.

In Brazil, the Law n. 14.021/2020 was promulgated on 7th July, enacting social protection measures for the prevention of contagion and the spread of Covid-19 in indigenous territories, and also creating the *Emergency Plan to Face Covid-19 in Indigenous Territories*. The aforementioned Plan aims to ensure access to the basic elements needed to maintain the health conditions of Indigenous Peoples and for the treatment and recovery of those infected (art. 4). Among the measures, under the responsibility of the Union[26], there is the need to guarantee universal access to drinking water (art. 5 °, I); free distribution of medicines, hygiene materials, cleaning and disinfection of surfaces to indigenous communities,

[23] As states the Preamble, III.

[24] Interamerican Commission on Human Rights, *Resolution n. 001/2020*: Pandemic and Human Rights in the Americas (2020).

[25] For an analysis of its content and processement, see: D. Ventura, F.M.A. Aith, D.H. Rached, *The Emergency of the new Coronavirus and the "Quarentine Law" in Brazil* (2020) *Revista Direito e Práxis*, Ahead of Print, Rio de Janeiro.

[26] Brazil, differently from Peru, is a Federation composed by three entities: Union, states ans municipalities.

for those officially recognized or not, including in the urban context (art. 5, II and art. 9, II); participation of Multiprofessional Indigenous Health Teams (art. 5, III) and access to rapid tests (art. 5, IV); emergency supply of hospital beds (art. 5, V, a), with the acquisition and availability of ventilators and blood oxygenation machines (art. 5, V, b). It also sets the provision of internet points in indigenous territories in order to facilitate access to information, avoiding the displacement of indigenous people to urban centers (art. 5, VIII) and the preparation and distribution of information material on the symptoms of Covid-19 through accessible language (art. 5 °, VI and art. 3 °).

The Plan also specifies quarantine measures for professionals who enter indigenous lands (art. 5, III) and, likewise, establishes that the isolation and quarantine measures applied to Indigenous Peoples must take into consideration their epidemiological vulnerability and the characteristics of their community life (art. 5, § 2). In addition, the National Law also lays down a specific chapter that concerns with "Food and Nutritional Security", in which states the Union's obligation to provide food, through the distribution of assistance food baskets (art. 9, § 3). Likewise, the National Law also establishes a specific chapter for "Indigenous Peoples isolated or in recent contact". In this part, it specifies that only in case of imminent risk, exceptionally and through a specific plan articulated by the Union, any type of approximation for the purposes of preventing and combating the pandemic will be allowed (art. 11). The Law obliges the Federal Government to prepare, within 10 days, a contingency plan for outbreaks and epidemics specific to each Indigenous Peoples (art. 11, II), and the suspension of activities near the areas with occupation of isolated Indigenous Peoples (art. 11, IV). However, it allows the remain of religious missions in place through the approval of the responsible medical service (art. Art. 13, § 1°).

In the regulatory scope, it is worth mentioning three regulations issued by the Fundação Nacional do Índio (FUNAI, federal authority responsible for Indigenous Peoples): Normative Instruction no. 9/2020, Ordinance no. 413/2020 and Ordinance no. 419/2020. The regulations contrast one with each other regarding the protection of the territorial rights of Indigenous Peoples. The Normative Instruction no. 9, of April 16th, 2020, determines a new regulation regarding the attribution of the *Declaration of Recognition of Limits of Private Rural Properties*. With the change brought up by it, FUNAI may issue the document only for indigenous lands already recognized, ratified or regularized by the presidential decree – according to the administrative procedure – without mentioning the use or experience on the land. However, the ordinances n. 413 and 419, published respectively on March 13th and 17th, 2020, determine temporary measures to prevent infection and spread of the new coronavirus within the scope of FUNAI. They suspend the granting of new authorizations to accessing Indigenous lands, except for those necessary for the continuity of the provision of essential services to communities (art. 3, § 1 of Ordinance 419/2020).

More recently, the Provisional Measure n. 1005, of September 30th, 2020, edited by the Brazilian President of the Republic, states the establishment of protective sanitary barriers in Indigenous areas. Its objective is to control the transit of people and goods in these areas in order to avoid the contagion and spread of the covid-19. Those health barriers are made up of federal civil servants or active-duty military personnel.

In Peru, the Legislative Decree n. 1489, published on May 10th, 2020, determines actions for the protection of Indigenous and Original Peoples within the framework of the health emergency of Covid-19[27]. In its Preamble, the decree recognizes the vulnerability of the Indigenous Peoples of Peru and the need to establish programs, actions and mechanisms that may allow their attention and facilitate food assistance during the emergency. The purpose of the decree is to establish actions in four different axes (according to art. 2): I – guarantee and compliance with linguistic rights; II – promote the provision of public services in the mother tongue; III – guarantee of articulation mechanisms with public entities that provide services for indigenous care; and, IV – to safeguard the life, health and integrity of Indigenous Peoples, especially those who are in isolation and / or initial contact (art. 2, a, b, c and d).

The Decree lays down the need for the central government to act in partnership with local governments to implement culturally appropriate intervention strategies for the protection of Indigenous Peoples in the following areas: I – health response; II – territorial control; III – supply of essential goods and products; IV – information and alert; and V – protection of Indigenous Peoples in a situation of isolation or in a situation of initial contact (art. 4.3, a, b, c, d, and e). Regarding the territorial control, the Decree imposes the need to identify fluvial and land control points in regions with a massive concentration of Indigenous communities for the implementation of control actions (art. 5.2, a and b).

Likewise, the decree imposes the suspension of the processes of authorizations for accessing indigenous territories, except for cases strictly related to guaranteeing the health and safety of these peoples (art. 9.1). In those cases, protocols and procedures also established by this Decree must be directly followed (art. 10, a, b and c). Emphatically, the Decree also determines the need for pertinence and cultural adequacy in services and actions related to the emergency of Covid-19 (art. 6); the need to translate all the information related to the emergency, under the responsibility of the Ministry of Culture (art. 8); the strengthening of the functions of protecting agents within the framework of the emergency (art. 12); the means of financing the indicated actions (art. 13); and intersectoral coordination to comply with the provisions of the Decree, with the Ministry of Culture being directly responsible (art. 7).

In Peru, the actions related to intercultural adequacy and to Indigenous Peoples in the situation of isolation and in the situation of initial contact had already been, more timidly, established within the scope of the Ministry of Culture through Resolution n. 109-2020, promulgated on March 25th, 2020. It should also be mentioned that the Ministry of Health of Peru enacted, on May 21st, 2020, the Ministerial Resolution n. 308-2020, in which it approves the entitled "*Plan de Intervencion del Ministero de la Salud para Comunidades In-*

[27] Although it bears the name of "Legislative" Decree, it is a rule issued by the Executive Branch, by the President of the Republic, in view of Law no. 31011/2020, which delegates to the Executive Branch the power to legislate on various matters regarding to the emergence of Covid-19.

digenas y Centros Poblados Rurales de la Amazonia frente a la Emergéncia del Covid-19". The latter is a Technical Document that states measures to reduce adverse effects in the context of the pandemic in the Peruvian Amazon.

3. Between texts and contexts: rights of Indigenous Peoples in Brazilian and Peruvian Amazon in a comparative perspective

The historical problems regarding Indigenous lands and rights both in Brazil and in Peru directly affects the effectiveness of the new legislations that are aimed at protecting these Peoples and their territorial rights during Covid-19 pandemic. This observation remains valid today with the advent of the world health emergency, and deepens in a context marked by *multiple crises* – political, economic and social. It is possible to state that the contexts of crisis – and, specially, multiple crises – are characterized, to a large extent, by the weakening of constitutional guarantees of certain rights[28], particularly those rights that in "stable times" already had weak guarantees.

Taking this in consideration, a careful analysis of the processes of elaboration and application of the new legislative initiatives related to the protection of Indigenous Peoples, especially those aimed at protecting their territories, may identify at least two problems that, however, are closely intertwined: 1) *the problem of applicability*; and, 2) *the problem of legitimacy*. The *problem of applicability* concerns precisely its lack, a problem reported by Amazonian indigenous communities and also by the national and international press of both countries[29]. It inexorably boosted the process of judicialization of Indigenous Peoples' rights in both countries. The *problem of legitimacy*, on the other hand, concerns the lack of participation of indigenous representatives in the process of drafting standards, the degree of adequacy in Indigenous way of life, intercultural dialogue and also the non-inclusion of Indigenous lands that have not yet been administratively recognized by the State in the Public Policies, generating legal uncertainty.

[28] For a deepen analysis, see: L. Ferrajoli, *Le garanzie costituzionale e i diritti fondamentali*, (2007) 1 *Teoria Politica*.

[29] T. Hansen, *How covid-19 could destroy Indigenous communities*, *BBC* (30 july 2020), In: https://www.bbc.com/future/article/20200727-how-covid-19-could-destroy-indigenous-communities ; Y.S. Praeli, *'It's taking away our wise men': COVID-19 hits Peru's Indigenous People hard, Montagobay*, *Mongabay News* (26 august 2020), in: https://news.mongabay.com/2020/08/its-taking-away-our-wise-men-covid-19-hits-perus-indigenous-people-hard/; L. Franco, *Indigenous Peoples of Amazon, unprotected from the Covid-19 Pandemic*, *Atalayar* (16 september 2020), in: https://atalayar.com/en/content/indigenous-peoples-amazon-unprotected-covid-19-pandemic . N. Calapucha, *Amazonian Indigenous Peoples and COVID-19: 'We're not waiting for help as we know it'll never arrive'* (*Amnisty International,* 9 august 2020), in: https://www.amnesty.org/en/latest/news/2020/08/pueblos-indigenas-amazonia-covid19/ . See also: M. Barbosa; S. B. Marchioro, *Covid-19 in Brazilian Indigenous People: a new threat to old problems* (2020) 53 *Revista da Sociedade Brasileira de Medicina Tropical*.

The "judicialization of politics"[30] has become a common practice in most of the countries of the globe and, particularly, in South America. The ineffectiveness of the legal and constitutional provisions implies on the judicialization of the rights of Indigenous Peoples, in many cases as the only way in guaranteeing their rights. In Brazil, due to the actions and omissions of the Federal Government in the management of the pandemic, especially with regard to Indigenous Peoples, the *Articulação dos Povos Indígenas do Brasil* (APIB[31]), and six more Brazilian political parties, filled a lawsuit in the Supreme Federal Court (*Arguição de Descumprimento de Preceito Fundamental*, ADPF n. 709). It claims that the actions and omissions of the Federal Government are causing a "true genocide, which could result in the extermination of entire ethnic groups" and, therefore, require the immediate adoption of actions aimed at combating the pandemic among the Indigenous population[32].

The *ADPF n. 709* was filed on July 1st and its precautionary measure was granted on July 8th – one day after Law n. 14.021 entered into force[33]. The precautionary measure determines actions in two areas: related to Indigenous Peoples in isolation from recent contact and to Indigenous Peoples in general. Regarding the first group, the need for actions is determined for 1) the installation of sanitary barriers; and 2) installation of situation rooms – to the monitoration – with the participation of Indigenous communities and the *Ministério Público* (D.A. Office), *Defensores Públicos* (Public Defender's) and the *Conselho Nacional de Justiça* (National Council of Justice). Regarding the second group, the determinations are: 1) the need for emergency evacuation of land invaders is stated; 2) the extent of application of these actions on lands that have not yet been administratively recognized as indigenous territories; and 3) the elaboration and monitoring of a Work Plan for Indigenous Peoples[34] to be and applied by the Federal Government[35].

[30] For a critical analysis of this process, see: R. Hirshl, *The Judicialization of Politics,* (The Oxford Handbook of Political Science, Oxford University Press 2009).

[31] Articulation of Indigenous Peoples of Brazil.

[32] Supremo Tribunal Federal (2020), *Arguição de Descumprimento de Preceito Fundamental n. 709*, Reporter: Min. Roberto Barroso, access in: http://portal.stf.jus.br/processos/detalhe.asp?incidente=5952986.

[33] It is necessary to mention that this law was vetoed by the President of the Republic, Jair Bolsonaro, on crucial points related to: "access to drinking water", distribution of basic food baskets and free distribution of hygiene, cleaning and disinfection materials for indigenous territories, "to guarantee emergency supply in hospital and intensive care beds" and the obligation to buy ventilators and blood oxygenation machines for these communities. The Brazilian Congress, however, intervened to overturn these vetoes. According to: 'Senado Federal, Congresso derruba vetos de Bolsonaro à lei que protege indígenas na pandemia', *Senado Noticias* (19 ago 2020), in: https://www12.senado.leg.br/noticias/materias/2020/08/19/congresso-derruba-vetos-de-bolsonaro-a-lei-que-protege-indigenas-na-pandemia ; J. Oliveira, *Bolsonaro veta obrigação do Governo de garantir acesso à agua potável e leitos a indígenas na pandemia*, *El Pais Brasil* (09 july 2020), in: https://brasil.elpais.com/brasil/2020-07-08/bolsonaro-veta-obrigacao-do-governo-de-garantir-acesso-a-agua-potavel-e-leitos-a-indigenas-na-pandemia.html.

[34] The elaboration of the referred Plan was later rejected by the Brazilian Supreme Court, as it was considered "very vague" and "out of date" in a Court decision made in ADPF n. 709. Indeed, it resulted in the aforementioned Provisional Measure of n. 1.005/2020. According to: Supremo Tribunal Federal, *Arguiçao de Descumprimento de Preceito Fundamental n. 709*, op. cit.

[35] According to: Supremo Tribunal Federal, *Arguiçao de Descumprimento de Preceito Fundamental n. 709*, op. cit.

In Peru, to date, two actions have had important repercussions. The first was filed at the First Civil Court of the Loreto Court – an Amazonian Peruvian state that has the largest indigenous population. It is an *Accion de Amparo* made by the *Organizacion Regional de Pueblos Indigenas del Oriente* (ORPIO), with the support of Rainforest Foundation Norway, against the Ministry of Health, Ministry of Culture and other Ministries. The action points to the inefficiency of the aforementioned Resolution n. 308/2020 in its implementation at the Department of Loreto and requires, among other measures, the implementation of control and surveillance measures and mechanisms in the areas of access to indigenous lands. The lawsuit was admitted by the Loreto Judiciary Court on September 8th, 2020[36].
The second action was promoted in Peru by *Organizacion Nacional de Mujeres Indigenas Andinas y Amazonicas del Peru* (ONAMIAP)[37], with the support of EarthRights International, at the *Corte Superior de Justicia* (Superior Court of Justice), Lima, against the Ministry of Culture. Filed on July 30th, 2020, the petition specifically addresses the "*problem of legitimacy*", pointing to the vulnerability of the constitutionally protected content of the fundamental right to prior consultation of Indigenous Peoples, enshrined in arts. 6 and 7 of Convention 169 of the International Labor Organization and also by Law no. 29785, in the face of the Covid-19 pandemic[38]. The lack of participation of Indigenous Peoples in Peru during the process of elaborating the norms related to their protection during the pandemic represents a problem of legitimacy of the norms and political institutions of the country.
Likewise, the *Organizacion Regional de Pueblos Indigenas del Oriente* (ORPIO) had also warned the fact that the Legislative Decree n. 1489, issued by the Executive Branch, is not clear regarding the indigenous lands that are still in administrative process for their recognition[39]. It also calls into question the legitimacy of the rules issued during the pandemic context in Peru.
In Brazil, the "problem of legitimacy" was also faced by the Federal Supreme Court. It determined the need for these peoples to participate in the construction of a fruitful intercultural dialogue[40] and the respect for ILO Convention 169 and indigenous legislation prior to the pandemic. However, the action of the President of the Republic in vetting important provisions of the aforementioned Law no. 14.021/2020, as well as the attempts of its government to "deregulate" FUNAI's functions and duties during the pandemic – through the

[36] Orpio, *Poder Judicial admite demanda de ampara apresentada por ORPIO, que exige salud para las comunidades indígenas victimas del Covid-19*, (*Orpio*, 8 september 2020), in: http://www.orpio.org.pe/?p=2024.

[37] National Organization of Indigenous Amazonian Women of Peru.

[38] EarthRights, *ONAMIAP inicia accion judicial contra el Gobierno Peruano por poner em riesgo a los Pueblos Indigenas durante la pandemia del Covid-19, 30 july 2020*, in: https://earthrights.org/media/onamiap-demanda-amparo-gobierno-peruano-pueblos-indigenas-covid-pandemia/.

[39] Indeed, the administrative processes for the recognition of Indigenous Lands are slow both in Brazil and in Peru and, not infrequently, they keep for more than 20 years in analysis.

[40] In the decision made by the Supremo Tribunal Federal, (n. 33).

aforementioned Normative Instruction no. 09/2020 –, and the inclusion of the Draft Law n. 191/2020 – which is currently being discussed in the Chamber of Deputies and aims to regularize the exploitation of mineral resources, hydrocarbons and the use of water resources in Indigenous Lands[41] – can be considered problematic in terms of political and legal legitimacy.

Indeed, problems of applicability and legitimacy call into question the constitutional values and international agreements in both countries. The continuous-actions – and omissions – by the Federal Executive Branch against the rights of Indigenous Peoples impact, in the same way, the constitutional values and international treaties signed by the Brazilian and Peruvian State. Those are, therefore, problems that remain in force and deepen in a context of multifaceted crises.

Conclusions

The pandemic caused by the new coronavirus has deepened the dynamics of the crisis in Brazil and Peru, which make it is possible to speak of a *multifaceted pandemic crisis*. Indeed, the condition of political and legal vulnerability of Indigenous Peoples in both countries has bluntly deepen because of the pandemic and the high numbers of contagion among Indigenous Peoples. It directly impacts the dynamics of management of Indigenous lands – especially the role of Indigenous Peoples as actors in *socio-environmental sustainability* – and the original right over their own lands. The hypothesis of this article, therefore, remains confirmed, since 1) the *problem of applicability* and 2) the *problem of legitimacy* are projected as common features of the new legislative norms issued by the States in the face of the pandemic.

However, it should also be emphasized that in addition to these two problems (*applicability* and *legitimacy*), another one is still noteworthy: *that of time*. It is observed that the norms enacted – either by legislative or administrative means – by the States regarding Indigenous Peoples rights' have had a considerable period of time since the respective promulgation of the "State of Emergency" in both countries. They were enacted when South America had already been considered by the World Health Organization as a new epicenter of the pandemic, and when Covid-19 had already been spread throughout Indigenous territories of Brazil and Peru. This is particularly a factor that can help to understand both the ineffectiveness and illegitimacy of the norms and their consequent judicialization processes.

[41] For further details, see: D.F. Rocha, M.F.S. Porto, *A vulnerabilização dos Povos Indígenas frente à Covid-19: autoritarismo politico e a economia predatória do garimpo e da mineração como expressão de um colonialismo persistente* (2020) *FIOCRUZ*, Rio de Janeiro.

One of the consequences of the delay of the political response in Brazil was the complaint made to the International Criminal Court (ICC) against the current President, Jair Bolsonaro. The petition was signed by *UniSaude Union Network*, and argues that the President's actions and inactions constitute the crime of "inciting genocide", through the promotion of systematic attacks on Indigenous Peoples. The lawsuit is currently being analyzed by the Court. In Peru, one of the consequences of the delay in a political response is the worsening distrust of the Indigenous Peoples towards the Peruvian State and the fall in popularity of the then President of the Republic, José Manuel Saavedra – who during the pandemic was the target of an impeachment process, in which, however, he was acquitted.

It clarifies that the aforementioned "politics of pandemics" and "law of pandemics" produced in the context of Covid-19 pandemic find deep difficulties for its application, reproducing the "old problems" related to the applicability of Indigenous Peoples' rights in Brazil and Peru. The *old new problems* are directly related to the "problem of applicability" and the "problem of legitimacy" that follows on the historical and troubled affirmation of Indigenous Peoples' rights in Brazil and Peru.

In addition, it is possible to conclude, as already evidenced at the beginning of the work, that the land is still an ongoing and "problematic" issue for the Indigenous Peoples of the Amazon. And this is particularly a central element for understanding the vulnerability of Indigenous Peoples' rights in this part of the globe. Although the legal norms produced in Brazil and Peru get to respond to the precarious situation in which Indigenous Peoples find themselves in these countries in facing the pandemic, the "loopholes of the law", the "restrictive interpretations", the "legal deregulation" in the operational field of instructions and resolutions, and the political inability to articulate the response and control access to land in the Amazon demonstrate that the "land issue remains in force", as an open constitutional and geopolitical issue, which directly impacts on the rights of Indigenous Peoples.

Articles

Environment and Economics: the Ethics of Emergency in India and Brazil

Maria Sarah Bussi*

Abstract

The paper analyses the impact of the Covid-19 pandemic on environmental policies from the perspective of two BRICS countries, namely India and Brazil. The study of those legal systems becomes relevant in order to investigate the relationship between environment and economy in the post-modern era, especially evident in countries that in the past years have had an important growth of GDP. At the same time, the particular sensibility shown by them both at constitutional and international level for environmental values, consecrated in their charters of rights and in their commitments to cooperate for the sustainable development, makes clear the twisting of some principles of the neo-liberal scenario that is occurring during the health emergency. The concept of sustainability, as argued, probably needs to be reconsidered in light of recent events at a global scale, abandoning universalising tendencies.

Keywords

Covid-19 Pandemic – Environmental Law – BRICS countries – Transformative constitutionalism – Sustainable Development

* Ph.D. candidate in *Diritto comparato e Processi di integrazione*, Università degli Studi della Campania 'Luigi Vanvitelli' (Italy).

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«Keep your eye glued to the telescope, Sagredo, my friend.
What you're seeing is the fact that
there is no difference between heaven and earth.
Today is 10 January 1610.
Today mankind can write in its diary: Got rid of Heaven.»
B. Brecht, *Life of Galileo*, scene III

1. The advent of the pandemic and some 'ancient' concepts belonging to environmental law

The coming of the pandemic contingency silhouetted against a panorama of the environmental law mainly dominated by an ideal that emerged during the Nineties, i.e. the principle of sustainable development.

As well known, it was defined in *Our Common Future*, the Brundtland Commission Report published in 1987. It does not represent 'a fixed state of harmony, but rather a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are made consistent with future as well as present needs'.[1]

This idea of development, which meets the needs of present generations without compromising those of the future ones, is connected with an inter-generational approach, while not neglecting the intra-generational perspective.[2]

[1] The reference is to the *Report of the World Commission on Environment and Development: Our Common Future*, <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf> accessed 28 October 2020.

[2] The affirmation and the evolution of this concept are outlined by D. Porena, *Il principio di sostenibilità. Contributo allo studio di un programma costituzionale di solidarietà intergenerazionale* (Giappichelli 2017) 269 ff. The Author under-

The notion of sustainable development embodies in itself the construct of sustainability, but does not exhaust it, the latter being a constitutional key concept[3] that implies 'the aspiration that a certain value, currently present (the environment or the wealth of a country, the budget balance or tourism) may still be there also in the future'.[4]

Sustainability, as emphasised by some authors, relates Man to Nature looking for possible convergences that do not give prevalence to one or the other, so that one element could attract the other and absorb it.[5]

Sustainable development, criticised for its excessive abstractness, appears to be problematic in its enforcement because, in the search for balance between economic growth and the environment, it seems to play the role of a mere policy guiding principle, devoid of perceptive scope, even though it is loaded with ethical significance.[6]

During the health emergency, in those countries that have experienced the lockdown regime, newspapers and social networks have been inundated with pictures of cities and waters where animals came forward for conquering spaces that humans had left empty.

The 'revolution' of Nature, however, presents itself as a show fascinating to observe, but probably ontologically opposed to the paradigms that continue to orient the Anthropocene era.[7]

It is worthwhile wondering whether an equilibrium between environment and economy is still a sufficient purpose or a step forward is needed from (local and global) economies, in order to reconsider that relation between human and environmental spaces.

The Constitutions of India and Brazil, in spite of the evident differences in the protection of the environment at the constitutional level, both unveil a strong commitment of the State in ensuring the safeguard of a healthy environment, within the context of a broader guarantee to the protection of social and economic rights.

This undertaking to give relevance to the social dimension appears to respond, under the taxonomic profile, to the 'transformative role' that can be found in some postcolonial constitutions.[8]

lines that the emphasis placed on equity has fostered interpretations oriented to solidarity, as a part of Italian doctrine has pointed out (ibid 271). On the topic see R. Bifulco, *Diritto e generazioni future: problemi giuridici della responsabilità intergenerazionale* (FrancoAngeli 2008) and R. Bifulco, A. D'Aloia (eds), *Un diritto per il futuro: teorie e modelli dello sviluppo sostenibile e della responsabilità intergenerazionale* (Jovene 2008).

[3] T. Groppi, *Sostenibilità e costituzioni: lo Stato costituzionale alla prova del futuro* [2016] 1 DPCE 43, 44.

[4] M. Cartabia, A. Simoncini (eds), *La sostenibilità della democrazia nel XXI secolo* (il Mulino 2010) 13, quoted by Groppi (n. 3) 45-46.

[5] As recalled by G. Cordini, *Diritto ambientale comparato*, in P. Dell'Anno, E. Picozza (eds), *Trattato di diritto dell'ambiente, Volume Primo. Principi generali* (Cedam 2012) 101-149, who harks back to the thought of Giorgio Lombardi.

[6] Porena (n. 2) 272.

[7] On the notion of Anthropocene see D. Amirante, *Del Estado de Derecho Ambiental al Estado del Antropoceno: una Mirada a la Historia del Constitucionalismo Medioambiental* [2020] 28 Revista General de Derecho Público Comparado 1.

[8] Cf. O. Vilhena, U. Baxi, F. Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (National Law University, Delhi Press 2014).

In the framework of this theoretical elaboration, one can appreciate the reasons that led, albeit in different ways (and through different paths, which will be outlined later on), to the recognition of a right to a healthy environment, but above all to its justiciability.
The pursuit of environmental protection not only with the recognition of a mere principle of state policy in this matter, but as a legal right, implying its enforceability, puts the legal scholar in front of the dilemma that afflicts every judge whenever he is called upon to decide on a social right. This conundrum has been cleverly synthesised in the binomial usurpation-abdication,[9] moving on the slippery slope made up of political priorities for managing public resources and implementation of rights.
In this context, what has the experience of Covid-19 brought along?
In 2019, with a GDP that amounted respectively to 2,875,142,314,811.9 and to 1,839,758,040,765.6, India and Brazil recorded a GDP annual growth equal to 5.0 and 1.1 %.[10]
In *Doing Business 2020* Report, India ranks among the ten countries which – through the implementation of regulatory reforms, especially in starting a business, dealing with construction permits, trading across borders and resolving insolvency – made greater advances in terms of ease of doing business.[11] At the same time, Brazil made reforms that led to an improvement with regard to 'Starting a business' and 'Registering property' indicators.[12]
As reported by the International Monetary Fund, these two countries have given important economic responses to the pandemic, in a context in which Indian GDP 'contracted sharply in 2020Q2 (-23.9 percent year-on-year)' and in Brazil 'the exchange rate has depreciated by about 22 percent since mid-February and by 29 percent since end-2019'.[13]
In particular, beside the modification of the foreign direct investment policy, Indian government has introduced, *inter alia*, some fiscal business support measures, while the Brazilian Executive has announced various 'fiscal measures adding up to 12 percent of GDP, whose the direct impact in the 2020 primary deficit is estimated at 8.4 percent of GDP'.[14]
Under this perspective, it appears useful and fruitful to analyse some recent questions that have arisen in India and Brazil involving environmental issues and consider them in the framework of the aforementioned economic measures adopted in the last months and

[9] O. LM Ferraz, *Between usurpation and abdication? The right to health in the Courts of Brazil and South Africa*, in Vilhena, Baxi, Viljoen (n 8) 379, refers to F.J. Michelman, *The Constitution, social rights, and liberal political justification* [2003] 1 International Journal of Constitutional Law 13.

[10] The data, which refer to the indicators 'GDP (current US$)' and 'GDP growth (annual %)', are available at <https://www.worldbank.org/>.

[11] Cf. World Bank, Doing Business 2020 (World Bank 2020), DOI: <10.1596/978-1-4648-1440-2> accessed 9 December 2020, 8.

[12] Ibid. 92.

[13] Cf. <https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19#I> accessed 3 October 2020.

[14] Ibid.

of the commitments assumed by BRICS countries since the First Meeting of Environment Ministers held in Moscow in 2015.

2. The attempted new regulation of EIA in India and the vacuum in public consultation

Despite the absence of an express recognition of a right to environment, the Constitution of India deals with the environment in articles 48A and 51A(g), both introduced by the *Constitution Forty-second Amendment Act* of 1976.

The former, inserted in Part IV of the charter dedicated to *Directive principle of State policy*, provides for a commitment of the State, which has 'to protect and improve the environment and to safeguard the forests and wild life of the country'. The latter, set out in Part IV-A of *Fundamental duties* states that every citizen must 'protect and improve the natural environment including forests, lakes, rivers and wild life' and 'have compassion for living creatures'.

Those provisions – which are expressive of an objective approach to environmental protection or in any case are limited to a position of duty as regards the subjective profiles – are counterbalanced by the activity of the Supreme Court of India that has elevated the collective interest in a healthy environment to an individual fundamental right.

With a hermeneutical operation the apex court, with its case law already dating from the Eighties, has included environmental protection into article 21, which ensures the right to life, by giving an extended interpretation of the term 'life' so as to include the meaning of 'quality of life'.[15]

One of the first steps towards this judicial construction – which occurred through the procedural remedy of public interest litigation, whose function in this matter was defined 'transformative'[16] – was taken with the decision *Subhash Kumar v. State of Bihar* in 1991. On that occasion the Supreme Court affirmed that the 'Right to live is a fundamental right under Art 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life'.[17]

However, already in the previous decision *Municipal Council Ratlam v. Shri Vardhichand*,[18] there emerges the connection existing between the protection of the environment and so-

[15] For an analysis of the link between the right to life and the right to healthy environment refer to J. Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (Kluwer Law International 2004), in particular 94 ff., but also M.A.A. Baig, *Environmental Law and Justice* (Regency 1996) and G.N. Gill, *Environmental Justice in India: The National Green Tribunal* (Routledge 2017).

[16] Gill (n. 15) 42.

[17] Cf. Supreme Court of India, *Subhash Kumar v. State of Bihar and Ors.*, 1991 AIR 420.

[18] Cf. Supreme Court of India, *Municipal Council, Ratlam v. Shri Vardhichand and Ors.*, 1980 AIR 1622.

cial justice, which represents the conceptual background in which the above 'extensive' reading developed.

In fact, the ideal of social justice[19] – enunciated in the Preamble and reaffirmed in articles 38 and 39 – permeates Parts III and IV of the Constitution, but article 21 surely represents a keystone for opening the way to 'restitutive Justice'.[20]

In *Vellore Citizens Welfare Forum v. Union of India* case, the Supreme Court definitively recognised that the constitutional and statutory provisions finalised to protect the environment have their source in 'the inalienable common law right of clean environment'.[21]

In order to implement this constitutional right, in the light of a preventive approach, the Indian legal system has drawn up an authorization system connected to the starting or renewal of economic activities, which is regulated by the *Indian Environment Protection Act* of 1986, the *Environment Protection Rules* of 1986 and the *Environmental Impact Assessment Notification*, 2006, all as subsequently amended.[22] It was finalised to obtain clearance from the institution that is currently known as the Ministry of Environment, Forest and Climate Change (MoEFCC) by submitting the projects to a procedure of Environmental Impact assessment (EIA). This is an administrative process that yet in the past created tensions in the dialectic between the Ministry and the project authorities, the first criticised for the delay in the granting of the authorisation and the second for 'failing to integrate ecological and economic considerations in decision-making'.[23]

On this ground, the existing relationship between economic conditions and the environment needs to be taken into due consideration, as it becomes more intense and unavoidable.

Indeed, the expression 'environmental racism' coined in the United States by the activist Benjamin Chavis,[24] in its being extreme, draws attention on a phenomenon that can characterise some geopolitical contexts where environmental problems mostly affect low-income areas.

[19] The term has a double sense; on the one hand, it implies 'the rectification of injustice in the personal relations of the people' and, on the other, it is oriented 'to remove the imbalances in the political, social and economic life of the people', cf. M. Saxena, H. Chandra (eds), *Law and Changing Society* (Deep & Deep Publications 2007) 190.

[20] Cf. Saxena, Chandra (n. 19) 193. About the Judiciary as 'an arm of the social revolution' see G. Austin, *The Indian Constitution. Cornerstone of a Nation* (Oxford University Press 1999) 164 ff.

[21] Cf. Supreme Court of India, *Vellore Citizens Welfare Forum v. Union of India and Ors.*, (1996) 5 SCC 647.

[22] For the consultation of Environmental clearances' regulation see <http://moef.gov.in/rules-and-regulations/environment-protection/environmental-clearance-general/> accessed 15 November 2020.

[23] Razzaque (n. 15) 168.

[24] Regarding environmental justice movements and Chavis's remarks on U.S. environmental policies and their effects in the socio-political context, see R.J. Lazarus, *Environmental Racism! That's What It Is* [2000] Vol. 2000 University of Illinois Law Review 255. The issue is again highly topical today in the United States, cf. M. Santiago Ali, *Environmental racism is killing Americans of color. Climate change will make it worse*, *The Guardian* (28 July 2020) <https://www.theguardian.com/commentisfree/2020/jul/28/climate-change-enviromental-racism-america> accessed 15 November 2020.

Some scholars used this argument to explain the Supreme Court of India's activism in environmental matters, starting from the finding that 'the poor and disadvantaged sections of the society pay a heavy price because of environmental degradation and, therefore, that their rights need to be protected'; on the contrary, the 'greenness' of judicial decisions has been interpreted by others as 'an attempt to reconcile different claims on behalf of development, environmental protection and human rights', responding definitively to the sustainable development principle.[25]

The issues connected to environmental clearances have assumed greater relevance in the last few years, and even more in the constancy of the Covid-19 emergency. In fact, far from involving only technical aspects, regarding EIAs the battle is being waged between two different approaches to the economic and investment policies of the country.[26]

Recently, it has been pointed out that 'investment by foreign companies and industry, enthusiastically supported by government, into sectors including energy and mining has on occasions resulted in unsustainable development'.[27]

Moreover, during the lockdown regime the draft of *Environment Impact Assessment Notification, 2020* was published in the Gazette of India,[28] for the purpose of modifying the regulation of clearances. A fact that per se may not arouse particular interest in ordinary circumstances (unless among the experts), considering also the numerous amendments occurred since the first notification of 1994,[29] at the current time has led to criticisms among public opinion and to some legal disputes, for two main motives.

On the one hand, the draft implies a lowering of standards of environmental authorizations. On the other, this occurred in a period during which the process of public consultation cannot produce its wide effects, for reasons connected to the health emergency.

Finally, an open letter was addressed to the Ministry of Environment from academics and scientists to ask for the withdrawal of the draft notification and the submission of a new proposal.[30]

[25] G. Sahu, *Environmental Jurisprudence and the Supreme Court. Litigation, Interpretation, Implementation* (Orient Blackswan 2014) 7 ff. The Author accounts for the doctrinal debates with regard to the role of Judiciary in the protection of the environment in India, not failing to report the critical voices. On this topic, see also Gill (n. 15).

[26] For an overview on environmental clearances regulation in India, see N. Chowdhury, *Environmental Impact Assessment in India: Reviewing Two Decades of Jurisprudence* [2014] 5 IUCNAEL EJournal 28.

[27] Gill (n. 15) 3.

[28] It is necessary to note that the draft was issued on the 23rd of March 2020, a day after the declaration of the national Janta Curfew and a day before the institution of the lockdown regime, and it was published on the 11th of April 2020 in the Gazette of India.

[29] For the EIA regulation, cf. <http://moef.gov.in/rules-and-regulations/environment-protection/environmental-clearance-general/> accessed 15 November 2020.

[30] The Wire published this open letter at <https://thewire.in/environment/students-researchers-environment-ministry-letter-revoke-draft-eia-2020> accessed 15 November 2020.

Among the critical points of the procedure initiated for reviewing the mechanisms for issuing environmental authorizations, one has been identified in the scarce publicity given to it, with the result of a limited public debate.

Regarding its merits, seven points are emphasised in addressing criticism to the draft, observing that it would undermine ecological and environmental security in India.[31]

The most relevant critical remarks, as noted, can be found in:

a) the provision of clause 26, which excludes from the regime of prior-EC or prior-EP the projects relative to a long list of activities, e.g. 'Solar Photo Voltaic (PV) Power projects, Solar Thermal Power Plants and development of Solar Parks' or 'Coal and non-coal mineral prospecting';
b) the reclassification of a variety of activities or the exemption of some projects from certain burdens, which subjects them to a less stringent regulation, in particular with reference to public consultation
c) the introduction of an *ex post facto* environmental clearance and the restriction, contemplated in clause 22, of the cognizance of violations to government authorities and to project proponents, providing for the payment of a late fee.

As underscored by some authors, apart from remarks that may be advanced in terms of compliance with the commitments deriving from international law, problematic issues from the point of view of domestic law can be identified in the violation of the principles of non-regression and 'polluter pays' as well as in that of intergenerational equity, and also in reducing the projects that require prior public consultation.[32]

In the face of the important changes that the Government intended to introduce through the draft in constancy of the pandemic, obvious problems connected to public consultation occurred. In fact, various judicial proceedings have been pursued in order to extend the deadline for the presentation of objections or suggestions to the MoEFCC fixed in sixty days.

Among others, with a decision taken on the 30th of June 2020, the High Court of Delhi, on the application of Vikrant Tongad, considering the expiry term to be unclear after the publication of another notification on the 8th of May which further extended the notice period, stated that the term for the objections would expire on the 11th of August.[33]

The petitioner also required the Court to adopt a writ of mandamus or *similia* for the publication of the draft in all the languages provided by the Eighth Schedule of the Constitution and the implementation of the consultation with the involvement of stakeholders. On

[31] Ibid.

[32] S. Shendye, O. Malpani, *The Conundrum of Ecology V. Economy: Analysis of the Eia Draft 2020* (*Law School Policy Review*, 9 July 2020) <https://lawschoolpolicyreview.com/2020/07/09/the-conundrum-of-ecology-v-economy-analysis-of-the-eia-draft-2020/> accessed 15 November 2020.

[33] The reference is to the order adopted by the High Court of Delhi on the 30th of June 2020, in *Vikrant Tongad v. Union Of India (MoEFCC)*, W.P.(C) 3747/2020.

this point, the bench constituted by the Chief Justice D.N. Patel and Judge P. Jalan adopted a direction addressed to the Government of India for the translation of the text and its publication on the institutional website of the States' Environment Ministries and Pollution Control Boards.[34]

The case of the draft of EIA Notification 2020 continued – as reported by the countless headlines dedicated to it by the press – involving other High Courts and the Supreme Court, albeit the latter not for reasons relating to the merit of the proposal.[35] Moreover, about 1.7 million comments have been sent to the MoEFCC, opening a political debate.[36] While the web is teeming with numerous campaigns for signing petitions,[37] under the OHCHR special procedures mechanism, with the Communication of the 31st of August addressed to the Government of India it was found that the provision of a *post-facto* clearance, in addition to being in contrast with the consolidated case law of the Supreme Court, is contrary to the principles of the environmental rule of law.[38]

3. Possible omissions of the Government with regard to the *Fundo Clima* and *Fundo Amazônia* in Brazil and the ADO 59 and 60 before the *Supremo Tribunal Federal*

Another environmental issue on which the Covid-19 pandemic has drawn attention is that of climate change, due to both the visible and the imperceptible effects that the lockdown regime has determined, for example, on air quality.[39]

Undoubtedly, although in 2018 Brazil was the country that produced fewer $MtCO_2$ emissions among the BRICS and was ranked fourteenth on a world scale, between South Africa

[34] Ibid.

[35] *Ex plurimis*, in the online press, see <https://www.downtoearth.org.in/news/environment/eia-notification-2020-delayed-till-september-7-72673> and <https://www.indialegallive.com/top-news-of-the-day/top-story/draft-eia-in-hindi-and-english-only-sc-stays-delhi-hc-contempt-proceedings-against-moef/> accessed 15 November 2020.

[36] Cf. <https://www.hindustantimes.com/india-news/environment-ministry-says-17-lakh-comments-on-draft-eia-notification/story-hIZhPzTM185fplOCeAAjGI.html> accessed 15 November 2020.

[37] See, e.g. the campaign launched on Change.org 'Withdraw EIA Notification 2020'.

[38] Cf. the Communication IND 13/2020 'Information received concerning the draft notification "Environment Impact Assessment Notification, 2020", issued by the Ministry of Environment, Forests and Climate Change, which, if published, will supersede the Environment Impact Assessment notification dated the 14th September, 2006 and its subsequent amendments' as part of mandates of Special Rapporteurs of the United Nations High Commissioner for Human Rights (OHCHR), available at <https://spcommreports.ohchr.org/>.

[39] On the topic of air quality, its causes and consequences, also with reference to Covid-19 see Health Effects Institute, *State of Global Air 2020. Special Report* (Health Effects Institute 2020). More generally, on the issue of climate change, see the report by World Meteorological Organization (WMO), *United in Science 2020. A multi-organization high-level compilation of the latest climate science information*, available at <public.wmo.int/en/resources/united_in_science> accessed 6 December 2020.

and Turkey,[40] the problem of air quality is currently strongly felt due to the phenomenon of deforestation resulting from fires in the Amazon.

In a recent report by Human Rights Watch, IPAM and IEPS, it was observed that 'Amazon is an exceptional bulwark against climate change in this regard, storing approximately 100 billion tons of carbon […] and removing about 600 million tons per year from the atmosphere'.[41] Actually, in past years the Brazilian government was a forerunner in perceiving the importance of climate issues and inquiring into the climatic changes that took place in its territory and more generally in South America during the twentieth century.[42]

In this respect, it is necessary to consider the pioneering approach of the Brazilian Constitution of 1988 concerning the right to a healthy environment.[43]

In fact, article 225 states 'All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations'.[44]

Among Brazilian scholars, the right to an ecologically balanced environment is definitely qualified as a fundamental right, in a frame in which the catalogue of fundamental rights, in accordance with article 5 § 2, is to be considered open.[45]

If the provision is the expression of an '*antropocentrismo alargado*' – as argued by some scholars – which combines anthropocentric, ecocentric and biocentric visions and the environment is considered as an intangible asset, it is clear that this right has also a collective dimension, so the solidaristic perspective becomes relevant.[46]

This seems to be confirmed also by the placement of article 225 in Title VIII, dedicated to 'The Social Order' and where social rights are recognised.

[40] Cf. J. Kirton, *BRICS Climate Governance in 2020*, paper presented at *BRICS at Ten: Challenges, Achievements and Prospects*, Gaidar Forum, Ranepa – Moscow, January 15, 2020 available at < http://www.brics.utoronto.ca/biblio/Kirton_BRICS_Climate_Governance_2020.pdf> accessed 6 December 2020, which refers to the data available at <http://www.globalcarbonatlas.org/en/CO2-emissions>.

[41] Cf. Human Rights Watch – Instituto de Pesquisa Ambiental da Amazônia – Instituto de Estudos para Políticas de Saúde, *"The Air is Unbearable". Health Impacts of Deforestation-Related Fires in the Brazilian Amazon*, August 2020, <https://ipam.org.br/bibliotecas/the-air-is-unbearable-health-impacts-of-deforestation-related-fires-in-the-brazilian-amazon/> accessed 6 December 2020, 14.

[42] J.A. Marengo, *Mudanças climáticas globais e seus efeitos sobre a biodiversidade: caracterização do clima atual e definição das alterações climáticas para o território brasileiro ao longo do século XXI* (2nd edn, Ministério do Meio Ambiente 2007). For updated projections on climate change in Brazil it is possible to consult the PCBr platform by INPE – *Instituto Nacional de Pesquisas Espaciais* of brazilian *Ministério da Ciência, Tecnologia e Inovações*, available at <http://pclima.inpe.br/>.

[43] With regard to the trends of environmental constitutionalism in Latin America, see D. Amirante, *L'ambiente preso sul serio. Il percorso accidentato del costituzionalismo ambientale* [2019] Fascicolo Speciale DPCE 1, 22 ff.

[44] As laid down in article 225 *caput* of the Constitution of the Federative Republic of Brazil. The text in English is available at <http://www2.senado.leg.br/bdsf/handle/id/243334>.

[45] Cf. A.J. Krell, *Comentario ao artigo 225, caput*, in J.J. Gomes Canotilho, G.F. Mendes, *et al.* (eds), *Comentários à Constituição do Brasil* 2078-2085 (Saraiva/Almedina 2013).

[46] Ibid.

Seen through the lens of its objective connotation, the right to a healthy environment implies a duty of preservation for the public powers, the content of which is explained in § 1 of the provision.

In fact the latter imposes, in the interests of effectiveness, '*diferentes instrumentos de defesa ecológica*',[47] e.g. the creation of protected areas or the undertaking of environmental impact assessment that respond to the theory of the *Constituição ecológica*.[48]

Before the spread of the pandemic, the *Supremo Tribunal Federal* of Brazil (hereafter referred to as the STF) had the occasion to offer a thorough reading of article 225, in particular of the sustainable development principle contained in it with the mention of present and future generations.

Among others, in the decision made in the *ação declaratória de constitucionalidade* (ADC) 42,[49] starting from the consideration that '*a Carta de 1988 consistiu em marco que elevou a proteção integral e sistematizada do meio ambiente ao status de valor central da nação*' to the point that the Brazilian Constitution is known as *Constituição Verde*, the apex Court has given a broader interpretation of sustainability in the context of the theoretical premises that led to the scrutiny of the rules of the new Forest Code.

The STF – refusing any antagonism between economic development and environmental protection and referring to the thought of R. L. Revesz and R. N. Stavins, which combines intergenerational equity with dynamic efficiency[50] – addresses the complex issues connected to the theory of the '*vedação do retrocesso*' in environmental matters. In the Brazilian panorama, indeed, the *princípio da proibição de retrocesso ambiental*[51] only partially finds its correspondence in the well-known principle of non-regression, because it expresses a '*"vedação ao legislador de suprimir, pura e simplesmente, a concretização da norma", constitucional ou não, "que trate do núcleo essencial de um direito fundamental" e, ao fazê-lo, impedir, dificultar ou inviabilizar "a sua fruição, sem que sejam criados mecanismos equivalentes ou compensatórios"*'.[52]

[47] A.J. Krell, *Comentario ao artigo 225 § 1º*, in J.J. Gomes Canotilho, G.F. Mendes, *et al.* (eds), *Comentários à Constituição do Brasil* (Saraiva/Almedina 2013) 2086.

[48] On this topic see L. de Faria Rodrigues, *A Concretização da Constituição Ecológica. A Norma Ambiental e as Ciências Naturais* (Lumen Juris 2015).

[49] Cf. Supremo Tribunal Federal, ADC 42, rel. min. Luiz Fux, P, j. 28-2-2018, DJE 175 de 13-8-2019. See also the *ação direta de inconstitucionalidade* (ADI) 3.540 MC, rel. min. Celso de Mello, P, j. 10-9-2005, DJ de 3-2-2006.

[50] Ibid. The STF quotes R.L. Revesz, R.N. Stavins, *Environmental Law*, in A.M. Polinsky, S. Shavell (eds), *Handbook of Law and Economics*, Vol. 1 (Elsevier 2007) 507.

[51] On this topic see VV.AA., *Princípio da Proibição de Retrocesso Ambiental* (Brasil, Congresso Nacional, Senado Federal – Comissão De Meio Ambiente, Defesa do Consumidor e Fiscalização e Controle 2011), available at <http://www2.senado.leg.br/bdsf/handle/id/242559> accessed 8 December 2020.

[52] A. Herman Benjamin, *Princípio da Proibição de Retrocesso Ambiental*, in VV.AA. (n. 51) 57-58, who refers to F. Derbli, *O Princípio da Proibição de Retrocesso Social na Constituição de 1988* (Renovar 2007) 298.

Thus the Constitution of 1988, as noted by Carducci, in the fundamental right to diversity, to healthy environment and to ecological balance would summarise a *Nomos-Ethnos* nexus that is reflected in the elaboration of litigation remedies by the legal system.[1]

On close examination, in June 2020, a group of political parties goes to *Supremo Tribunal Federal* to complain about possible omissions of the Union with regard to the *Fundo Amazônia* and the *Fundo Nacional sobre Mudança do Clima* (also known as *Fundo Clima*).

Those two funds are intended to finance projects aimed *latu sensu* to environmental protection. The first is designed to collect donations for investments in projects directed to prevent, monitor and combat deforestation and to promote the conservation of *Amazônia Legal*, while the second aims to guarantee resources to finance projects for the mitigation of climate change.[2]

With two *ações diretas de inconstitucionalidade por omissão* connected to one another,[3] the *Partido Socialista Brasileiro* (PSB), the *Partido Socialismo e Liberdade* (PSOL), the *Partido dos Trabalhadores* (PT) and the *Rede Sustentabilidade* complained, in one case, about the failure of the Union to adopt administrative measures in order to avoid the paralysis of the Amazon fund and, in the second case, about actions and omissions that would have compromised the functioning of the Climate fund.

Regarding the ADO 59, the petitioner stressed, in the light of the management of the fund and the approval of new projects, the non-compliance of the duty of environmental protection laid down in article 225, in the framework of joint administrative competence of article 23 VI and VII.[4]

[1] Cf. M. Carducci, *Nomos, Ethnos e Kthonos nel processo: verso il tramonto del bilanciamento? Spunti dal dibattito latinoamericano* [2014] 1 Federalismi.it 1, 7. The Author, in a comparison with the approaches of the Andean *nuevo constitucionalismo*, also gives an account of the doctrinal debates with regard to the interpretation of the notion of ecological balance contained in article 225 (ibid. 14 ff.). With regard to the litigation remedies for the environmental protection the *ação popular* provided by article 5 LXXIII of the Constitution is certainly the best known. Article 5 LXXIII states '*qualquer cidadão é parte legítima para propor ação popular que vise a anular ato lesivo ao patrimônio público ou de entidade de que o Estado participe, à moralidade administrativa, ao meio ambiente e ao patrimônio histórico e cultural, ficando o autor, salvo comprovada má-fé, isento de custas judiciais e do ônus da sucumbência*'.

[2] The *Fundo Amazônia* was instituted by the Decree No. 6.527 of August 1, 2008 and the management is entrusted to the *Banco Nacional de Desenvolvimento Econômico e Social – BNDES*; instead the *Fundo Nacional sobre Mudança do Clima*, created by the Law No. 12.114 of December 9, 2009, is bound to the Ministry of the Environment. For further study see the publication by Supremo Tribunal Federal – Secretaria de Altos Estudos, Pesquisas e Gestão da Informação Coordenadoria de Biblioteca, *Funcionamento do Fundo Nacional sobre Mudança do Clima (Fundo Clima) e do Fundo Amazônia. Bibliografia, Legislação e Jurisprudência Temática* (Supremo Tribunal Federal 2020), available at <http://www.stf.jus.br/arquivo/cms/bibliotecaConsultaProdutoBiblioteca/anexo/FundoClimaeAmazonia_out_2020.pdf> accessed 8 December 2020.

[3] For an overview on the *ação direta de inconstitucionalidade por omissão* (hereafter referred to as ADO), a constitutional legal action contemplated by article 103 § 2 of the Constitution, see L.L. Streck, *Jurisdição constitucional* (6th edn, Editora Forense 2019) 513 ff. In this case the reference is to ADO 59 e ADO 60 pending before the Federal Supreme Court.

[4] Cf. Supremo Tribunal Federal, ADO 59, rel. min. Rosa Weber, decisão monocrática de 31-8-2020, DJE nº 219 de 01/09/2020.

The circumstance that the Court was called to judge on one of the most relevant legal issues of contemporaneity, with a humanitarian, cultural and economic impact on the social and constitutional fabric represents one of the premises that led the Judge-Rapporteur to schedule a public hearing for the acquisition of more information, also of a scientific nature.[5] Along with this – as stated in the decision – if an inadequate or insufficient environmental protection is challenged, a proportionality test of the measures to be taken is requested with respect to the *de facto* situation, from the perspective of the principles of prevention and precaution.

Also in relation to the ADO 60,[6] later admitted as *arguição de descumprimento de preceito fundamental*,[7] a public hearing was held on the 21st and the 22nd of September 2020.[8] The latter, in the opinion of the Judge-Rapporteur, would be necessary in the broader context of the informative role that Constitutional Courts in general have, but most of all because in the petition the Union's actions and omissions alleged could supply such a picture of regression and lack in environmental protection since 2019 as to constitute an *estado de coisas inconstitucional*.[9]

Surely the problems connected to the deforestation of Amazon and thus those of climate change – as highlighted in the judgement – were exacerbated by the advent of Coronavirus, mainly due to attenuation of controls.

The two cases here reported are still pending before the *Supremo Tribunal Federal* of Brazil, but are we sure that the pandemic has exclusively produced a catalytic effect on environmental concerns or hasn't it had the merit of making visible something that otherwise would have been taken into consideration with too much delay?

[5] The public hearing was held on the 23rd and the 26th of September 2020 and the Judge-Rapporteur Rosa Weber underlined the importance that this step has for the decision that will be taken by the Federal Supreme Court, cf. <http://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=454103&ori=1> accessed 8 December 2020.

[6] Cf. Supremo Tribunal Federal, ADO 60, rel. min. Roberto Barroso, decisão monocrática de 28-6-2020, DJE nº 165 de 30/06/2020.

[7] Cf. Supremo Tribunal Federal, *arguição de descumprimento de preceito fundamental* (ADPF) 708, rel. min. Roberto Barroso. For an overview on the constitutional legal action contemplated by article 102 § 1 of the Constitution see L.L. Streck (n. 55) 525 ff.

[8] For a comment on the decision to schedule a public hearing, see M.A. Tigre, A. Goodman, *ADPF708 / Climate Fund. What to expect from Brazil's first public hearing on climate policy?* (*Gnbre*, 22 September 2020) <https://gnhre.org/2020/09/22/adpf708-climate-fund-what-to-expect-from-brazils-first-public-hearing-on-climate-policy/> accessed 8 December 2020.

[9] On the debated theoretical construct of the *estado de coisas inconstitucional*, see C.A. de Azevedo Campos, *Estado De Coisas Inconstitucional* (Editora JusPodivm, 2ª edição, 2019).

4. Rethinking (not only in BRICS countries) the relationship between environment and economy

The Covid-19 disease placed us before the limits of a development idea, which indeed even in a regime of ordinariness would probably require to be rethought.
Primarily, the reason that imposes a reconsideration of this paradigm is the climate emergency occurred in the last decade, announced by someone as an impending 'catastrophe',[10] but ignored by most.[11] The issue of climate change has shown the existing tension between the needs of our economies and those of environmental protection, intensifying it. Basically it represents, however, only one of the many pieces of coloured glass that the kaleidoscope of the environmental concern discloses.[12]
In hindsight, the spread of Covid-19 has had even shorter-term consequences on the environment.[13]
Already towards the end of the Eighties, U. Beck warned that in the age of advanced modernity, which can be identified in post-modernity, the social production of wealth systematically goes hand in hand with the social production of risk, thus distributive problems are flanked by those connected to the analysis of risks.[14]
Environmental risks arise from modernisation and now take on a global reach because every economic activity brings with it a risk that grows proportionally with the increasing of technical-scientific innovation.[15] Arguably, it is no longer enough to avoid the risk, or rather, the legal instruments elaborated to face it no longer seem able to cope with environmental problems, which in the last years have shown an exponential trend compared to technological progress.

[10] D. Amirante, *Aspettando la catastrofe. L'emergenza climatica fra storia della scienza e filosofia*, in G. Limone (ed.), *Il pudore delle cose, la responsabilità delle azioni*, L'era di Antigone. Quaderno di Scienze filosofiche, sociali e politiche (FrancoAngeli 2019) 143-151.

[11] During the pandemic the countries here analysed have faced, in different ways, the question of climate change. Regarding India, the Central Pollution Control Board of Ministry of Environment, Forest and Climate Change published on the 31st of March 2020 the report *Impact of Janta Curfew & Lockdown On Air Quality*, available at <https://www.cpcb.nic.in/air/NCR/jantacurfew.pdf> accessed 15 November 2020, while in Brazil they discussed the existing connection between deforestation of Amazonia, climate change and Covid-19, cf. P. Moutinho, A. Alencar, L. Rattis, V. Arruda, I. Castro, P. Artaxo, *The Amazon in Flames. Deforestation and Fire during the Covid-19 Pandemic*, Technical Note nº 4, June 2020, Instituto de Pesquisa Ambiental da Amazônia, available at <https://ipam.org.br/bibliotecas/the-amazon-in-flames-deforestation-and-fire-in-the-amazon-during-the-covid-19-pandemic/> accessed 15 November 2020.

[12] See, on this point, D. Amirante, *"Tangled Up in Green": The Tight Connection between Covid-19 and the Environment*, in AA.VV., *Law on The State of Emergency*, International Conference Proceedings 16-17 June 2020 (NHÀ XU$_2$T B$_2$N H$_2$NG Đ$_2$C 2020) 405-416 and D. Amirante, *Il Covid-19 fra sicurezza sanitaria e sicurezza ambientale* [2020] 2 Democrazia e Sicurezza 3.

[13] L. Leiroz, *Coronavirus brings serious environmental impact* (Info Brics, 21 July 2020) <https://infobrics.org/post/31410> accessed 8 December 2020.

[14] U. Beck, *Risk Society: Towards a New Modernity* (Sage 1992), it. transl., *La società del rischio. Verso una seconda modernità* (Carocci 2013) 25.

[15] Ibid. 28.

In a crescendo, in the development of the principles of environmental management, there has been a shift from a curative model to one founded on the precautionary approach.[16] Although, from a legal standpoint, an attempt has been made to offer an answer even to those uncertain risks, we must probably start from the teaching of the anthropologist Mary Douglas, who drew attention on the circumstance that the risk represents the product of a given social construction.[17]

The pandemic has set humankind before the weight of scientific uncertainty, which has not been taken into adequate consideration up to now, in so far as the Law has responded to our society's need for security with neopositivist approaches.[18]

In that same positivism, we can find indeed the root of the term sustainability.[19] The sociological paradigm of anthropocentrism, with its idea of a hierarchical scale, was consecrated in the era that follows the discovery of America and culminated between the 17th and 18th centuries, though it can even be dated back to Aristotle and Thomas Aquinas.[20]

On close examination, it should be pointed out that mechanicism and rational thought have led the western legal tradition towards a departure from possible ecocentric visions. In a recent discussion between a physicist and a jurist, the theoretical foundation of the economic paradigm that characterizes our society – the ethics of consumerism of Bauman's liquid society – can be traced back to the mechanistic worldview of the 16th century, because the prevailing idea of development is still mainly quantitative.[21]

On the contrary, the chthonic legal tradition (whose peoples live in harmony with Nature), from which all the other traditions derive, is 'genuinely environmentalist' and in a way that current Western ecologism fails to grasp in its wholeness.[22]

The process of constitutionalisation of sustainability was defined as a global trend, but the experience of the Andean *nuevo costitucionalismo* is in this sense undoubtedly the most representative.[23] In fact, through the recognition of a complex of rights connected to *buen*

[16] On the history of development and evolution of the triad of the principles of environmental management in a comparative perspective, see D. Amirante, *Diritto ambientale italiano e comparato. Principi* (Jovene 2003) 23 ff.

[17] For an analysis of the cultural theory of risk elaborated by M. Douglas in the framework of environmental sociology, see F. Beato, *I quadri teorici della sociologia dell'ambiente tra costruzionismo sociale e oggettivismo strutturale* [1998] 16 Quaderni di Sociologia Online 41, DOI: <https://doi.org/10.4000/qds.1520> accessed 31 October 2020.

[18] Amirante (n. 68) 47.

[19] The origins of the term sustainability were traced back to the Age of the Enlightenment by K. Bosselmann, *The Principle of Sustainability: Transforming law and governance* (2nd edn, Routledge 2017) 15.

[20] See V. Baricalla, *Natura e cultura occidentale. Tra mondo antico ed età moderna* (Oasi Alberto Perdisa 2002).

[21] F. Capra, U. Mattei, *Ecologia del diritto. Scienza, politica, beni comuni* (Aboca 2017) 34-35.

[22] As highlighted by H.P. Glenn, *Legal Traditions of the World: Sustainable diversity in law* (4th edn, OUP 2010), it. transl., *Tradizioni giuridiche del mondo. La sostenibilità della differenza* (il Mulino 2011) 115 ff. The Author emphasises the ecological footprint of the chthonic legal tradition pointing out that 'it is not just green: it is deep green' (ibid. 141).

[23] See Groppi (n. 3) 58.

vivir, a constitutional status has been given to the indigenous worldview, although even in those legal systems the anthropocentric vision has not been completely abandoned.[24]
However, the western legal tradition panorama was already permeated with legal and economic narratives nurtured with 'systemic blindness' and characterised by 'ingenuous equations between human balances and ecological balances'.[25]
As emphasised by some authors, definitively, 'the idea of a healthy environment can be an "elusive" concept, one for which there cannot "always be a universal standard"'.[26]
BRICS countries over the years have shown concern for the environmental crisis, developing forms of cooperation in a constant dialogue with the United Nations.[27]
At the 5th BRICS Environment Ministers Meeting held in Sao Paulo in 2019,[28] reiterating the intention to strengthen the cooperation mechanisms, reference was made to the 10th BRICS Summit Johannesburg Declaration.[29] The latter was characterised by a reaffirmation of the commitment to the implementation of the 2030 Agenda for Sustainable Development and the Sustainable Development Goals, understanding this principle in a triple dimension, namely the economic, social and environmental ones (paragraph 20). Furthermore, the commitment to cooperation in the energy sector was confirmed, in order to reach the transition towards more sustainable energy systems (paragraph 22), also in the sector of circular economy (paragraph 26).[30]
It is possible to state that the relationship between economies and environment is the theoretical locus in which the twisting of some concepts that characterise the neo-liberal scenario has taken place.[31]
BRICS countries represent a privileged place to observe this new backdrop of the globalised era, as the processes of change aimed at promoting more investments or intervening in environmental policies here discussed demonstrate.

[24] See S. Baldin, *I diritti della natura: i risvolti giuridici dell'ética ambiental exigente in America Latina*, in S. Baldin, M. Zago (eds), *Le sfide della sostenibilità. Il* buen vivir *andino dalla prospettiva europea* (Filodiritto 2014) 155-183.

[25] Cf. M. Carducci, *Natura (Diritti della)*, in R. Sacco (dir.), R. Bifulco, A. Celotto, M. Olivetti (eds), *Digesto delle Discipline Pubblicistiche*, Aggiornamento (Utet giuridica 2017) 486-521, 507 ff.

[26] The reference is to M. Kidd, *Transformative constitutionalism and the interface between environmental justice, human rights and sustainable development*, in United Nations Environment Programme, *New Frontiers in Environmental Constitutionalism* (UN Environment 2017) 120 that quotes L. Feris, *Constitutional environmental rights: An underutilised resource* [2008] 24 SAJHR 29, 35.

[27] Cf. Kirton (n. 40).

[28] The *Joint Statement for the 5th BRICS Ministers of Environment Meeting: Contribution of Urban Environmental Management to Improving the Quality of Life in Cities* held in Sao Paulo on August 15, 2019 is available on the website of *BRICS Information Centre* at <http://www.brics.utoronto.ca/>.

[29] The text of the *10th BRICS Summit Johannesburg Declaration* is available at <https://www.mea.gov.in/bilateral-documents.htm?dtl/30190/10th_BRICS_Summit_Johannesburg_Declaration> accessed 3 October 2020.

[30] Ibid.

[31] With regard to the consequences of Covid-19 on the neo-liberal paradigm see the indepth reflections made by R. Venkatesan, *Neoliberalism After Covid-19: Some Caution And Counter Arguments* (*Law School Policy Rewiew*, 14 October 2020) <https://lawschoolpolicyreview.com/2020/10/14/neoliberalism-after-covid-19-some-caution-and-counter-arguments/> accessed 15 November 2020.

If environmental law represents a symbolic post-modern law, for being regulated by principles,[32] probably recent events require reviewing those principles that have dominated our world so far, in light of a new paradigm that has become the main character of our present time, namely diversity.

The health emergency has put 'old' ideas in crisis, undermining their own premises.

Who knows if this experience has not shown that the ideal of sustainable development can no longer be itself, in the end, a victim of universalizing pressures, leaving room for post-pandemic sustainability more respectful of the local dimension.

[32] Cf. D. Amirante, *Post-Modern Constitutionalism in Asia: Perspectives from the Indian Experience* [2013] Vol. 6, No. 2 NUJS Law Review 213.

Articles

Silver lining or red herring. The impact of COVID-19 on Vietnam's air quality

Nguyễn Tiến Đức* and Bùi Đức Hiển**

Abstract

Since 2019, the novel coronavirus outbreak has shaken the world to its core in terms of the deadly mortality and economic turbulence. On a positive note, national restriction measures to stem the spread of the virus have unexpectedly ameliorated the environment. One of the silver linings is that air pollution in many parts of the world has witnessed a substantial improvement, especially in the heavily polluted countries as in the case of Viet Nam. That being said, it does not take a rocket scientist to discern that in the absence of concrete environmental commitments and actions Viet Nam's air pollution will remain even if the COVID-19 has ebbed. This Article suggests that the COVID-19 pandemic should serve as a wake-up call for the Vietnamese authority to embrace sturdier and more vigorous environmental laws and policies to fully address the worsening air pollution in the country. Thereby it also makes some recommendations for Viet Nam in this respect.

Keywords

COVID-19 – Vietnam – Air quality – Environment

* PhD Candidate, Vanvitelli Università; Research Fellow, Institute of State and Law, Viet Nam Academy of Social Sciences.
** PhD, Research Fellow, Institute of State and Law, Viet Nam Academy of Social Sciences.

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Introduction

At this juncture, let us reassert that the COVID-19 is in no way a "regular flu" as it has claimed more than 1 million lives worldwide and shown disinterest in slowing down regardless of borders or temperature[1]. Its catastrophic impacts are far from predictable as the world economy witnessed a steep downturn, and millions of jobs were tossed out of the window in less than a year. Moreover, the pandemic affected populations unevenly and unequally insofar as it may be deemed *de facto* discriminatory because individuals' private capacity to resist and adapt to the hardships differs greatly[2]. The COVID-19 pandemic has also posed a wide range of legal and policy conundrums in the situation of exception.
Nonetheless, the COVID-19 pandemic has engendered some unanticipated consequences on the environment. Facing rapid waves of the infectious disease, a large number of countries have imposed harsh measures nationwide. Mobility and travel restrictions, closure of schools and businesses, and prohibition of public gatherings were the last resort to contain the spread of the deadly virus. As a result, the atmospheric environment in many places witnessed a substantial improvement thanks to limited human activities. Anecdote has it that with the cruise ships gone and the souvenir stalls closed, "the nature [was] taking back Venice" as wild animals could be seen wandering around the city[3]. Even endangered leatherback turtles, which were last reported 8 years ago in Phuket (Thailand), have resurfaced on the beaches to lay eggs[4].

[1] For general data, John Hopkins University, at https://coronavirus.jhu.edu/, last accessed: 28 Oct 2020.

[2] For an empirical study on the unequal impacts of COVID-19, *see generally* H.H. Dang, T. L.D. Huynh, M. Nguyen, *Does the COVID-19 Pandemic Disproportionately Affect the Poor? Evidence from a Six-Country Survey* (2020) 13352 *Discussion Paper IZA DP*.

[3] J. Brunton, *Nature is Taking Back Venice: Wildlife Returns to Tourist-free City*, *The Guardian*, (London, 20 March 2020) https://www.theguardian.com/environment/2020/mar/20/nature-is-taking-back-venice-wildlife-returns-to-tourist-free-city, last accessed: 28 Oct 2020.

[4] N. Ocharoenchai, *In Thailand, the Return of the Leatherbacks*, *US News* (Washington D.C., 24 April 2020) https://www.usnews.com/news/best-countries/articles/2020-04-24/endangered-turtles-reclaim-thailands-beaches-during-coronavirus-lockdown, last accessed: 28 Oct 2020.

Against that backdrop, Viet Nam is not an outlier as the country has also experienced much better and cleaner air quality during and shortly after the nationwide lockdown. Yet as this Article suggests, we should not set the bar too high about the COVID-19's environmental side-effects. Failure to take bold environmental actions in the face of the COVID-19-induced crisis would likely retard the environmental progress. Worse yet, it may trigger a "race to the bottom" as governments seek to quickly revive their economies. Viet Nam's air pollution should be a wake-up call for the authority to thoroughly address the gnawing air quality concerns.

The structure of this Article comprises three main parts. The next section will provide a glance at the COVID-19 pandemic and its intersection with the atmospheric environment. It serves as a springboard to probe the case of Viet Nam's responses and environmental implications in section 3. The COVID-19 can be a red herring because it may make us fall for the misbelief in choosing either economic growth or the environment. Hence the virus-induced clean air would become an interim – rather than permanent – state. Of course, this phenomenon does not escape many environmental scholars' notice, who have sounded an alarm about rising environmental concerns[5]. Thereby in section 4 this Article will offer some legal and policy implications for Viet Nam government to spin out the clean air.

1. COVID-19, the Atmospheric Environment, and Viet Nam's Air Pollution

A novel respiratory virus that emerged in Wuhan (China) last December has spread to the rest of the world[6]. The virus can infect both people and animals, and can cause respiratory illnesses. The lethality of this new virus remains questionable. It seems to be less often deadly than the SARS or MERS-related coronaviruses, but more serious than the seasonal flu[7]. As of the time of writing, the pandemic has claimed almost 1.2 million lives worldwide, and well over 44 million infection cases[8].

Meanwhile, air pollution levels remain dangerously high in many parts of the world. According to the World Health Organization's estimates, nine out of ten people in the world

[5] *See*, e.g., D. Amirante, *Tangled up in Green: The Tight Connection between COVID-19 and the Environment, in Law on the State of Emergency* (2020), International Conference Proceedings PHÁP LUẬT VỀ TÌNH TRẠNG KHẨN CẤP (KỶ YẾU HỘI THẢO QUỐC TẾ), co-held by VNU School of Law (Viet Nam) and Melbourne University (Australia), 16-17 June 2020; D. Boyd, *COVID-19: "Not an excuse" to roll back environmental protection and enforcement*, UN rights expert says, OHCHR, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25794, last accessed: 15 Dec 2020.

[6] K. Sheikh, R. C. Rabin, *The Coronavirus: What Scientists Have Learned So Far*, *The New York Time*s (New York, 9 September 2020) https://www.nytimes.com/article/what-is-coronavirus.html, last accessed: 28 Oct 2020.

[7] *Id*.

[8] John Hopkins University, (n. 3).

live in the environment containing high levels of pollutants, and this results in 7 million premature deaths worldwide[9]. Major respiratory disorders and infections in children and adults are attributable to chronic and acute exposure to chemicals, such as air pollutants: PM (fine particulate matter), nitrogen dioxide (NO2), carbon monoxide (CO), sulfur dioxide (SO2)[10]. Air pollution might worsen the condition of COVID-19-induced respiratory diseases, increasing the risk of severe outcomes (hospitalization, intensive care, or death). Moreover, the viability of the virus in the environment could be enhanced due to short-term air pollution episodes, the local innate immunity of the respiratory mucous membranes[11]. It is evident that urban and industrial areas suffer more from environmental pollution than rural areas, COVID-19 intensity is expected to be higher in urban and populated areas.

In response, many countries imposed strict lockdowns to curb the spread of the virus. As a result, the atmospheric environment in other parts of the world has received a much needed respite as data collected by many ozone monitoring instruments have shown reduction of tropospheric trace gases related to air pollution[12].

In China, the government forced strictest lockdown measures on social and industrial activities. It thus reduced the number of vehicles on the road and shrank factory production, which resulted in a significant decline in measurable air contaminants[13]. The NO2 emission reductions was linked the transportation sector, while lower emissions from industries were the major cause for the decreases of PM2.5 (particulate matter of less than 2.5 micrometers), CO and SO2[14]. Concentrations of six major air pollutants during January-March 2020 in China were significantly decreased compared with previous years, citing a mean reduction of 20% for PM10, 15% for PM2.5, 25% for NO2, 6% for CO, and 21% for SO2[15]. Overall, the air quality in China greatly improved, most likely due to reduced emissions from the transportation and secondary industrial sectors.

[9] S. Yari, H. Moshammer, *The Effect of Ambient Air Pollution on Severity of COVID-19: Hospitalisation and Death* (2020) 3(1) *Asian Pacific Journal of Environment and Cancer* 15-6.

[10] Exposure to high concentration of particulate matters (PM), in particular micro particles with a diameter of 2.5 microns or less (PM2.5), increases the risk of air pollution-related diseases, including acute lower respiratory infections, stroke, heart attack, chronic obstructive pulmonary disease and lung cancer. Excessive ozone in the air can have a marked effect on human health. It can cause breathing problems, trigger asthma, reduce lung function and lead to lung diseases. Exposure to nitrogen dioxide (NO2) aggravates symptoms of bronchitis in asthmatic children. Sulfur dioxide (SO2) can affect the respiratory system and the functions of the lungs, and causes irritation of the eyes.

[11] S. Yari, H. Moshammer, (n. 10), p. 15.

[12] K. D. Kanniah et al. 'COVID-19's Impact on the Atmospheric Environment in the Southeast Asia Region' (2020) 736 *Science of the Total Environment* 2.

[13] *See* Q. Wang, M. Su, 'A Preliminary Assessment of the Impact of COVID-19 on Environment–A Case Study of China' (2020) 728 *Science of The Total Environment*; F. Dutheil *et al.*, *COVID-19 as A Factor Influencing Air Pollution?* (2020) 263 *Environmental Pollution*.

[14] Y. Wang *et al.*, *Changes in Air Quality Related to the Control of Coronavirus in China: Implications for Traffic and Industrial Emissions* (2020) 731 *Science of the Total Environment* 1-2.

[15] Q. Wang, M. Su (n. 14).

In a similar vein, many U.S. governors enacted executive orders in a bid to restrict the human-to-human transmission of the virus. It is reported that due to the government-backed shutdowns, the air quality in New York City, the most populous city in the United States, improved[16]. Daily concentrations of PM2.5 and NO2 were obtained from 15 central monitoring stations throughout New York city from January to May of 2015–2020, showing decreases in PM2.5 (36%) and NO2 (51%) concentrations shortly after the shutdown took place.

Southeast Asian countries have experienced an improvement of air quality caused by atmospheric aerosols[17]. Big cities, such as Bangkok (Thailand), Quezon city (the Philippines) and Kuala Lumpur (Malaysia), have recorded reductions in PM2.5, emanating from vehicle exhaust and industrial activities, up to 80% during the lockdown period[18]. In India, PM10, PM2.5, NO2 and CO concentrations analyzed during March-April from 2017 to 2020 in 22 cities over the country revealed reductions by 43%, 31%, 18% and 10%, respectively compared with previous years[19]. Significant reductions in CO (37.0% - 64.8%) and NO2 (24.1% - 54.3%) levels were also observed in Rio de Janeiro and Sao Paolo (Brazil)[20]. Similarly, these figures in Almaty (Kazakhstan) were 49% and 35%, while PM2.5 decreased by 21%[21].

In Vietnam, ambient air pollution has been exacerbating over the years. The country has been struggling with alarming air pollution that has been steadily rising with economic growth. Data from the World Health Organization (WHO) found that more than 60 thousand deaths from heart disease, lung cancer, stroke, chronic obstructive pulmonary disease and pneumonia in Viet Nam in 2016 were linked to air pollution[22]. A Report on Air Pollution by the Ministry of Natural Resources and Environment shows that the main sources of air pollution in Viet Nam are industrial production, transportation, construction, agricultural production and handicrafts, and improper waste management[23]. Viet Nam's concen-

[16] S. Zangari *et al.*, *Air quality changes in New York City during the COVID-19 pandemic* (2020) 742 *Science of The Total Environment*.

[17] K.D. Kanniah *et al.*, (n. 14), pp. 2-7.

[18] F. Arkin, *Asian COVID-19 Lockdowns Clear the Air of Pollutants*, *SciDev.Net* (London, 15 April 2020) https://www.scidev.net/asia-pacific/environment/news/asian-covid-19-lockdowns-clear-the-air-of-pollutants.html, last accessed: 28 Oct 2020.

[19] K.D. Kanniah *et al.* (n. 14), p. 9.

[20] *See* G. Dantas *et al.*, *The Impact of COVID-19 Partial Lockdown on the Air Quality of the City of Rio de Janeiro, Brazil* (2020) 729 *Science of The Total Environment*; L. Nakada, R. Urban, *COVID-19 Pandemic: Impacts on the Air Quality During the Partial Lockdown in São Paulo State, Brazil* (2020) 730 *Science of The Total Environment*.

[21] A. Kerimray *et al.*, *Assessing air quality changes in large cities during COVID-19 lockdowns: the impacts of traffic-free urban conditions in Almaty, Kazakhstan* (2020) 730 *Science of The Total Environment*.

[22] WHO, *More than 60 000 Deaths in Viet Nam Each Year Linked to Air Pollution*, at https://www.who.int/vietnam/news/detail/02-05-2018-more-than-60-000-deaths-in-viet-nam-each-year-linked-to-air-pollution, last accessed: 28 Oct 2020.

[23] *Id*.

tration of PM2.5 is above the global average for the past 20 years[24]. It is comparable to that of China – a country with a widely recognized high record of air pollution – and below countries currently with the most polluted air levels such as Bangladesh and India. Economic losses associated with ambient air pollution are estimated to cost Viet Nam more than 25 billion USD, which is equivalent of 5.5% of its Gross Domestic Product[25].

At the same time, Viet Nam has earned praise from the international community and its people for the effective COVID-19 responses. Harsh measures restrictions, such as face mask wearing requirement, mass quarantine, closure of borders, schools and non-essential shops, and prohibition of public gatherings, were swiftly put in place to flatten the curve. The lockdown during 1 to 21 April led to limited mobility and cessation of economic activities. This setting has provided researchers with a natural experiment to probe whether the stringent measures help alleviate the worsening air pollution levels.

In general, research has found that the lockdown imposed to combat COVID-19 improves air quality in Vietnam[26]. The average concentration of NO2 drop by approximately 24-32% two weeks after the curfew[27]. Particularly, the difference is more visible in urban and populated areas. In Hanoi, statistics show the correlation between economic activities and air pollution and sheds some light on the effects of different factors. Given reduced levels of activities in March and April, Hanoi's air quality improved significantly compared to the previous month and to the same months in the previous year. Among others, agricultural activity seems to exert a minimal impact while industrial manufacturing activities and road traffic are the main causes of the air pollution in Hanoi. PM2.5 dropped significantly as these activities gradually eased in March and April as the country set for the lockdown. It is estimated that two weeks after the lockdown the economic gains from better air quality are roughly 600 million USD[28].

However, the concentration of PM2.5 has started to rebound as economic activities restarted when the curfew was lifted. It is also suggested that the positive effects tend to fade away ten weeks after the lockdown[29].

[24] H.H. Dang, T. Trinh, *The Beneficial Impacts of COVID-19 Lockdowns on Air Pollution: Evidence from Vietnam* (2020) 13651 *Discussion Paper IZA DP* 2.

[25] World Bank, The Cost of Air Pollution: Strengthening the Economic Case for Action (Washington: World Bank Group, 2016).

[26] H.H. Dang, T. Trinh (n. 25), pp. 5-30.

[27] *Id*.

[28] *Id*.

[29] *Id*, pp. 6-8.

2. Viet Nam's Responses and Environmental Implications

Against the backdrop of the pandemic, the economy is very much up in the air as a great depression is looming large. Enterprises are prone to lay off or furlough workers, worsening the crisis facing Viet Nam and the entire world economy. Therefore, it is a critical moment for governments to step up actions and support for affected people and businesses. This is "one stone, two birds" as the government's support may help businesses weather the COVID-19-induced crisis and retain workers in employment, thus minimizing the shock of a social crisis.

For that purpose, governments have taken different policies. The U.S. and China are a clear example of divergent approaches to striking the balance between economic interests and environmental considerations. In terms of greenhouse gas (GHG) emissions, in March 2020, the U.S. Environmental Protection Agency has decided to relax environmental rules in response to the COVID-19 pandemic, giving way for power plants, factories and other facilities to make assessments on legal requirements on reporting air and water pollution[30]. In actuality, many other countries have loosened environmental safeguards of environmental rules in response to the COVID-19 pandemic[31]. In contrast, in May 2020, Chinese minister of environment stressed that ecological protection and green development shall remain priorities[32]. China also announced a total of 60 billion USD would be allocated to environmental protection in 2020, up from 57 billion USD last year. It would impose ultra-low emission standards at more steel mills and continue to tighten emissions controls at coal-fired power plants[33]. Yet, despite China's strong commitments, concentrations of affected pollutants have recently rebound to pre-pandemic levels in some Chinese provinces after the expiration of the COVID-19 quarantine period and resumption of normal activities[34].

At an international forum, the United Nations Special Rapporteur on human rights and the environment, David Boyd, has condemned the irresponsible loosening of environmental standards in exchange for economic gains, citing that these policy decisions are going to

[30] L. Friedman, *E.P.A., Citing Coronavirus, Drastically Relaxes Rules for Polluters*, at https://www.nytimes.com/2020/03/26/climate/epa-coronavirus-pollution-rules.html, last accessed: 28 Oct 2020.

[31] COVID-19 environmental roll back 'irrational and irresponsible': rights expert, UN News, https://news.un.org/en/story/2020/04/1061772, last accessed: 15 Dec 2020; *See also* D. Amirante (n. 7), p. 6; P. Viola, *Climate and Environmental Approaches in the United States and Canada at the Outbreak of the 2020 Pandemic* 2020 I(1) *Opinio Juris in Comparatione* 8.

[32] Xinhuanet, China Won't Relax Ecological, Environmental Protection: Minister, http://www.xinhuanet.com/english/2020-05/25/c_139087080.htm

[33] H. Huang, *COVID-19 and the Environment: Reflections on the Pandemic in Asia* (2020) 4(1) *EnviroLab Asia* 5.

[34] B. Silver *et al.*, *The Impact of COVID-19 Control Measures on Air Quality in China* (2020) 15 *Environmental Research Letters*; J. Ding et al., 'NOx Emissions Reduction and Rebound in China due to the COVID-19 Crisis' (2020) 46 *Geophysical Research Letters*.

aggravate, not remedy, the global environmental crisis that predates COVID-19[35]. Worse yet, according to Boyd, these actions will have an adverse impact on the environment and human rights, particularly the rights to life, health, water, culture, and food, as well as the right to live in a healthy environment[36]. Hence, the COVID-19 pandemic would turn into a catalyst for accelerating the existing environmental crisis facing humanity.

For now, Viet Nam has not witnessed an extensive downgrading of environmental rules. The government has enacted various support policies for those hard hit by the pandemic, such as relief package, tax relief, suspension of payment of social insurance, etc. To revive the aviation industry, the Ministry of Natural Resources and Environment (MONRE) has obtained the government's approval to cut the jet fuel tax from $0.13 per liter to $0.091[37]. The policy is effective till 31 December 2020. It is expected to temporarily ease the aviation industry's burden due to the record low demand. The tax collection ratio to total state budget revenue has increased from over 1% to around 4%[38]. In addition, the MONRE has recently proposed to the government measures to relieve enterprises from onerous environmental obligations. Its proposal includes deadline extension for wastewater monitoring, automatic and non-stop waste-gas monitoring systems, permit extension for licenses for processing hazardous wastes[39].

Since late March till now, with virtually no international arrivals, Viet Nam's tourism industry has become one of the worst victims of the COVID-19 pandemic. Many travel companies witnessed a year-on-year plummet in customer numbers and revenues. After the nationwide lockdown in April, the Ministry of Culture, Sports and Tourism launched a program "Vietnamese people travel Viet Nam" in a bid to stimulate domestic tourism[40]. The program aimed to popularize tourist destinations and tourist products through communication campaigns to attract domestic tourists. Support packages were also provided. Localities were advised to offer a range of incentives, such as ticket exemption or reduction at tourism spots, thus helping to boost the industry in the time of hardships. The number of domestic trips thus skyrocketed.

[35] COVID-19: "Not an excuse" to roll back environmental protection and enforcement, UN rights expert says, OHCHR, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25794, last accessed: 15 Dec 2020.

[36] Ibid.

[37] C. Thanh, *Giam 30% thue bao ve moi truong voi nhien lieu bay [Cut 30% environmental protection tax for jet fuel]*, https://thuvienphapluat.vn/tintuc/vn/thoi-su-phap-luat/chinh-sach-moi/29919/giam-30-thue-bao-ve-moi-truong-voi-nhien-lieu-bay, last accessed: 28 Oct 2020.

[38] X. Thinh, *Vietnam to cut 30% jet fuel environmental tax to back virus-hit carriers*, https://e.nhipcaudautu.vn/news/vietnam-to-cut-30-jet-fuel-environmental-tax-to-back-virus-hit-carriers-3335736/, last accessed: 28 Oct 2020.

[39] Official Dispatch No. 4729/BTNMT-TCMT by the Ministry of Natural Resources and Environment, https://thuvienphapluat.vn/cong-van/doanh-nghiep/Cong-van-4729-BTNMT-TCMT-2020-thao-go-kho-khan-san-xuat-kinh-doanh-trong-boi-canh-Covid-19-451893.aspx, last accessed: 28 Oct 2020.

[40] *See* T. Anh, *Thuc day thi truong du lich trong nuoc [Promoting domestic tourism market]* https://nhandan.com.vn/tin-tuc-du-lich/thuc-day-thi-truong-du-lich-trong-nuoc-459143/, last accessed: 28 Oct 2020; Kim Loan, Program on "Vietnamese People Travel Vietnam" Launched, http://news.chinhphu.vn/Home/Program-on-Vietnamese-people-travel-Viet-Nam-launched/20205/40064.vgp, last accessed: 28 Oct 2020.

In addition, Vietnam relies heavily on Chinese and South Korean tourists, which accounted for 56 percent of its international arrivals in 2019[41]. In September, the transport ministry made a proposal to the government on resuming commercial flights from Hanoi and Ho Chi Minh City to mainland China's Guangzhou, Japan, South Korea, and Taiwan from 15 September, and Laos and Cambodia starting 22 September[42]. Those are Asian countries that have made significant progress in containing the virus. Nevertheless, the proposal has been put on hold since medical authorities are still finalizing COVID-19 testing and quarantine protocol for individual arrivals[43]. Yet the prospect for a gradual and vigilant reopening for the aviation industry is within sight.

In general, it is a welcoming sign that Viet Nam has not embarked on an environmental "race to the bottom" in an attempt to revive quickly its industries. Some of environmental rules are relaxed to ease the COVID-19-induced burdens for enterprises, especially the aviation and tourism industries. Yet such actions have been taken with great care and provisionally, denoting that the authority have remained wary of those developments and potential impacts in the long run. The environmental tax relief for the aviation industry is an example to help restructure its financial capacity although the industry prospect would not certainly take off anytime soon due to low demand.

3. To Where from Here? Legal and Policy Implications for Clean Air in Viet Nam

To begin with, air pollution has been a perennial problem caused by many factors. From the policy-making viewpoint, regulating air pollution is a formidable challenge facing every nation because it touches upon various layers of the social life. As astutely observed by Eloise Scotford, this is simultaneously a problem of regulatory strategy – identifying appropriate measures to address air pollution; controlling individual behavior – each individual is responsible, to certain extent, for air pollution; policy priority – a tradeoff between economic growth and environmental concern; and governance – failure to regulate appropriate actors and monitor their compliance[44]. In addition, the acceptability of air quality remains nuanced and legalizing its threshold is a tough nut to crack. For sure, these issues had remained unresolved long before the COVID-19 pandemic hit.

[41] Pritesh Samuel, How Vietnam Contained COVID-19 and Why Its Economy Will Rebound, https://www.vietnam-briefing.com/news/how-vietnam-sucessfully-contained-covid-19.html/, last accessed: 28 Oct 2020.

[42] N. Nam, *Vietnamese Carriers Prepare to Resume Int'l Flights*, https://e.vnexpress.net/news/travel/places/vietnamese-carriers-prepare-to-resume-int-l-flights-4160900.html, last accessed: 28 Oct 2020.

[43] D. Loan, *Vietnam Yet to Resume International Flights*, https://e.vnexpress.net/news/news/vietnam-yet-to-resume-international-flights-4161983.html, last accessed: 28 Oct 2020.

[44] E. Scotford, *Rethinking Clean Air: Air Quality Law and COVID-19* (2020) 32(3) *Journal of Environmental Law*, 349-353.

At the international level, the United Nations Sustainable Development Goals (SDGs) has set out targets on air quality so that by 2030, the world can witness substantial reduction in the number of air pollution-related deaths and illnesses (SDG target 3.9); and reduction in the adverse per capita environmental impact of cities with a focus on air quality (SDG target 11.6).

As the case of Viet Nam has shown, despite improvements in air quality during the lockdown, air pollution could worsen quickly in the recovery phase, as people have been desperate to travel, and businesses have ramped up production to make up for revenue losses. With the resumption of normal activities, the country has seen concentrations of air pollutants getting back to the pre-pandemic levels. Also, it highlights that the COVID-19 pandemic and gnawing environmental concerns are two interrelated yet independent issues. Albeit Viet Nam's good performance in containing the coronavirus, the root causes of Viet Nam's air pollution remain unaddressed.

Several key factors that can contribute to high air pollution levels in Viet Nam include power generation, industry, residential buildings, and transportation. Among those, coal-fired power is the main source of air pollution which contributes to 4,300 premature deaths in 2011[45]. Yet, coal consumption has increased significantly over the past decade and coal-fired power currently takes a major share of power generation, accounting for more than 40 percent of the country's total generated power[46]. The country expects to build 26 additional coal power stations after 2020, despite its plans to generate more electricity from renewable sources[47].

Besides, transportation contributes to worsen the problem. Many of vehicles in Viet Nam are old with limited and outdated emission control technology. On top of it, poor urban planning makes the situation even worse given the high population density in urban areas. Another problem is dust from construction sites. Of which thousands filled with trucks that are heavily loaded with sand and cement create perpetual dust storms in the big cities.

In order to meaningfully exercise the constitutional right to live in a clean environment[48], concrete environmental actions should be taken more seriously. Environmental authorities have devised short-term solutions, including tightening regulations on new vehicle emission standards, strengthening traffic control, dust management, enhanced monitoring of industrial emissions and bans on charcoal stove use, straw burning in cities. As one of the

[45] S. Koplitz *et al.*, *Burden of Disease from Rising Coal-fired Power Plant Emissions in Southeast Asia* (2017) 51(3) *Environmental Science & Technology* 1467-76.

[46] J. Baker, *This Clean Energy Champion Is Out to Break Vietnam's Coal Habit*, *Forbes* (Jersey City, 21 May 2018) https://www.forbes.com/sites/jillbaker/2018/05/21/thisclean-energy-champion-is-out-to-break-vietnams-coal-habit/#6e10ed0476b2, last accessed: 28 Oct 2020.

[47] B. Ngoc, *Vietnam Needs Just One, not 26 Coal Power Plants*, *VNExpress* (Hanoi, 7 June 2018) https://e.vnexpress.net/news/business/vietnam-needs-just-one-not-26-coal-power-plants-3759808.html, last accessed: 28 Oct 2020.

[48] Article 43 of the 2013 Constitution of Viet Nam. *See more* B.D. Hien (2011), *Ve quyen duoc song trong moi truong trong lanh o Viet Nam [On the Right to Live in A Clean Environment in Viet Nam]*, *Hanoi Law Review* 11, pp. 22-8.

authors has argued elsewhere, despite Viet Nam's myriad legal regulations on the environment, those related to air quality control remain fragmented and unsystematic[49]. There is no clear concept of air pollution control and atmospheric environmental capacity; Regulations on environmental impact assessment (EIA) on atmospheric environment are deficient and even cosmetic, leading to poor implementation[50].

Therefore, environmental scholars and activists are advocating a new law on clean air with the purpose to redress the shortcomings of the 2014 Law on Environmental Protection. The new law shall prescribe clearly the responsibilities of the State in controlling ambient air pollution. These include State responsibility of promulgating technical regulations on ambient air, standards on the concentration of toxic gases in the ambient air, emissions; atmospheric environmental capacity; State responsibility of investigating and assessing the current state of the air quality. Moreover, air environmental assessment must be mandated in strategic environmental assessment (SEA), environmental impact assessment (EIA) and environmental protection plan for investment projects and economic development activities that are likely to cause air pollution. It is necessary to promulgate a list of industries with high risk of causing air pollution, which should be discouraged or banned from investment, conditional investment.

The law must provide legal liability of organizations and individuals for violations, including the responsibility to compensate for damage to the air environment and to people's health, life, property and benefits. Legal liability should be based on the polluter pays principle. The cost of failure to comply with the law must outweigh the profits reaped by the polluter[51]. At the same time, the precautionary principle still bears little relevance to Viet Nam's environmental concerns[52].

Moreover, disclosure of the air quality should not be made occasionally but regularly. This aspect is also related to ensuring the right to access information about the air environment and the right to monitor and detect air pollution of the community and individuals. Communities have the right to be consulted about economic activities that are likely to affect them and their living environment, At the same time, it is necessary to promote the role of civil society organizations, the media and the press in participating in monitoring and detecting acts that pollute the air environment.

[49] *See generally* B.D. Hien, *Phap luat ve kiem soat o nhiem moi truong khong khi o Viet Nam hien nay [The Laws on Air Pollution Control in Vietnam]*, *The National Truth Publisher* (2017); B.D. Hien, *Trach nhiem boi thuong thiet hai ve suc khoe, tinh mang, tai san va cac loi ich hop phap khac do lam o nhiem moi truong o Viet Nam hien nay [Responsibility for Damage to Health, Life, Property and Legitimate Interests Caused by Environmental Pollution in Vietnam]* (2020) 2-3 *Journal of Legislative Studies* 71-5; B.D. Hien, *Hoan thien phap luat ve kiem soat o nhiem moi truong khong khi [Complete the Law on Ambient Air Pollution Control]* (2015) 4 *Journal of Legislative Studies* 58-62.

[50] *See* B.D. Hien (2017), *Id.*, pp. 63-172.

[51] Decree 155/2016/ND-CP of the Government on sanctioning of administrative violations in the field of environment. Accordingly, the highest penalty for a violation of an individual is 1 billion VND (43 thousand USD), and for organizations it is 2 billion VND (86 thousand USD). This is too low for the deterrent purpose.

[52] *See* B.D. Hien (2017) (n. 51), pp. 123-142.

In a long run, air pollution can be tamed by the use of greener vehicles. The State should phase out obsolete and polluting vehicles by providing incentives and subsidies, for example trading in old cars. The government could also enact enabling policies to encourage the use of electric vehicles (EVs), such as allowing only EVs in downtown and an income tax cut for EV manufacturers to make them more competitive and affordable. Fossil fuel subsidy reform could reduce the use of the dirty fuel and free up the current annual fossil subsidy of US$ 612 million or 0.3 percent of Vietnam's GDP for other welfare activities such as health, education and environmental protection[53]. The environmental protection tax regulation could be revised to better target polluting fuels such as diesel and coal. Carbon pricing would reduce the consumption and production of carbon-based products and promote a low-carbon economy.

Coal-fired power plants should be phased out. Instead, transition to a renewable electricity system would make a contribution to mitigating air pollution and climate change impacts. Enabling policies such as feed-in tariffs and reverse auctions for solar and wind power would pick up the pace of a recent boom in solar power in Vietnam[54]. The government can set out more ambitious targets for renewable energy, given its high potential for solar, wind and off-river pumped hydropower.

Conclusion

Despite the devastating health and economic toll on human beings, some environmentalists hold the hope that the global pandemic lockdown may be an opportunity to reset our ecological practices in order to delay or halt climate change. It is true that all over the world, travel limits have severely limited car and airplane traffic, so observable air quality has improved globally. However, as this Article suggests, the bar should not be set too high as the COVID-19's environmental side-effects are not long-lasting.

Apart from air pollution, various areas in Asia have witnessed an upsurge of environmental degradation activities, such as illegal logging, mining, and wildlife poaching due to lax environmental law enforcement during the pandemic period. The COVID-19 pandemic is not a cure for environmental diseases but a wake-up call for the humanity in protecting the mother nature. Bolder environmental actions are required to ensure our vision of a green world for all.

[53] T.N. Do, *Vietnam's Big Air Pollution Challenge* (*TheDiplomat*, 30 March 2020*)* https://thediplomat.com/2020/03/vietnams-big-air-pollution-challenge/, last accessed: 28 Oct 2020.

[54] *Id*.

Articles

The Fallout of Covid-19 on Environmental Law in the Middle East and North Africa

Zainab Lokhandwala*

Abstract

This paper analyses the impact of the Covid-19 pandemic on the Middle Eastern and North African (MENA) region against the backdrop of two themes: climate action and human rights. In the climate context, the renewable energy sector will certainly suffer in the immediate aftermath of Covid 19. At the same time, globally, renewables have shown more resilience than fossil fuels during this crisis, which may lead to increased investments in the long-term. Nevertheless, pre-Covid commitments and estimated future gains (if any) in renewables were not enough for combating climate change. The trajectory of regional climate action was slow and inadequate to begin with, and it is likely to suffer even further, owing to economic slowdown and relief measures that will pull resources away from climate action. In the human rights context, the Covid 19 crisis has led to increased authoritarianism and has added a new layer to existing human rights and humanitarian issues. As political stability is a prerequisite for the growth and execution of environmental law, public discontent against governments will only delay and detract the environmental agenda. Overall, these two legs of analysis show how the pandemic has led to a retraction of environmental law. Coming out of the crisis, there are many lessons to be learnt. Interdisciplinary approaches that draw a human-ecological-health nexus may offer solutions in the Middle East as in the world.

* PhD Candidate, Department of Law, SOAS University of London.

The Berlin Principles 2019 are a positive step in this direction which could pave the way for more ecosystemic and holistic environmental legal development.

KEYWORDS

Middle East and North Africa – Covid-19 – Climate Action – Human Rights

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1. Covid-19 and the Environmental Legal Perspective[1]

Middle Eastern and North African (MENA) countries, much like the rest of the world are in unchartered waters while tackling the Covid-19 pandemic. A lot is uncertain as on the date of this writing, given that different countries and regions within countries stand on different points of the pandemic curve. Recovery from the pandemic may be earlier (not necessarily faster) for some than others, depending on where they stand on this timeline. At this stage however, all MENA countries have imposed lockdowns or restrictions of varying degrees and are desperately trying to prepare for what will follow this crisis.
From an international perspective, many interconnections between the Covid-19 crisis and environmental law are evident: on the one hand, it could be argued that environmental law has failed to adequately articulate ecological-health linkages, so much so that the root

[1] The article has been submitted on May 2020.

causes[2] behind the spread of viruses such as habitat loss for wildlife and failed biodiversity conservation continue to be ignored by countries in the wake of the pandemic. Despite unprecedented shutdowns and disruptions in 'business as usual', conversations on appropriate land use, restoration of buffer zones[3] between humans and animals that shield us against pathogens, and strengthening of wildlife protection regimes have not been heard yet in the halls of power. While world leaders are clearly preoccupied with containing the immediate fallout of the crisis, these conversations need to at least start. Only long-term ecological thinking can curb the chances of future repeated outbreaks such as this one. On the other hand, environmental law can learn many lessons coming from this global pandemic.[4] By looking deeper into the origins and outcomes of the pandemic, responses of governments and societies at large can be predicted and prepared for in the environmental context.

While some international environmental law instruments have tied together the health of all life and the health of the planet, legal systems across the world have seldom taken such a holistic and ecosystemic approach. The Convention on Biological Diversity 1992 urges parties to be 'conscious …of the importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere.'[5] Furthermore, the Sustainable Development Goals 2015 promotes 'sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss'[6]. More recently, the Berlin Principles 2019 on One Planet, One Health, One Future, calls for the '[Retention of] essential health links between humans, wildlife, domesticated animals and plants, and all nature.'[7] This One Health concept was articulated in the 2004 Manhattan Principles, which were developed as a response to the severe acute respiratory syndrome (SARS) and H5N1 bird flu outbreaks. As a successor to the Manhattan Principles, the Berlin Principles focus on the animal-human-ecosystems interfaces. Within this context, they call for action towards issues of: (i) emerging and endemic zoonoses, that creates a disproportionate burden of coping with the disease on the global south; (ii) Antimicrobial resistance, as resistance may arise in animals, humans or the environment

[2] United Nations Environment Programme (UNEP), *UNEP Frontiers 2016 Report: Emerging Issues of Environmental Concern* (UNEP, 2016) 18-27.

[3] T. Trzyna, *Urban Protected Areas: Profiles and Best Practice Guidelines* (IUCN Best Practice Protected Area Guidelines, Series No. 22, 2014) 65.

[4] L.A. Duvic-Paoli, 'COVID-19 Symposium: The COVID-19 Pandemic and the Limits of International Environmental Law' (Opinio Juris, 30 March 2020).

[5] Convention on Biological Diversity 1992 (1760 UNTS 69), Preamble.

[6] UN General Assembly, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (2015) A/RES/70/1, Goal 15.

[7] Wildlife Conservation Society, Berlin Principles on One Planet, One Health, One Future' 2019, <https://www.wcs.org/one-planet-one-health-one-future> accessed 30 May 2020.

and can spread from one to the other; and (iii) food safety.[8] This kind of interdisciplinarity is imperative in analysing the causes and consequences of the Covid-19 crisis.
Coming to the MENA context, this paper churns out the legal fallout of the Covid 19 pandemic on the region by using supporting evidence from other spheres of literature: such as the medical/scientific/healthcare streams, human rights/humanitarian streams and the economic streams. It is the capacity and efficiency of healthcare systems, the ability of countries to regain economic strength and the emerging situation pertaining to human rights in the region that will shape the environmental law in the post-pandemic scenario. Hence, the impacts of Covid-19 on environmental law in the MENA region are found through such an outward-in analysis.
The paper identifies two areas of Covid-19 impacts within the MENA regional context. One, Covid-19's impact on climate action; and two, its human rights impacts. Through an examination of these two themes, the paper concludes by arguing that the development of environmental law will suffer in the region unless more interdisciplinary and health-human rights-ecology integrated approaches are adopted in the future.

2. Covid-19 and Climate Action

The Covid-19 health emergency has pushed the MENA region into an economic shock ensuring that all countries, sectors and enterprises, irrespective of their strength and capacity will bear the brunt of this crisis. The over-dependence on fossil fuels available in the region, weak economies and precarious governments in many countries, ongoing humanitarian conflict in some countries, and an overall dwindling political integration within the Arab world are factors that will exacerbate the effects of this shock. This section analyses the impacts of the pandemic on the growth of the green energy sector, and places this within the region's larger climate action strategy. It argues that while the renewable sector will suffer delays in growth, it may resume its growth trajectory in the longer term. This however will not be enough to combat climate change, because in a pre-pandemic scenario, most countries in the region were anyway not progressing at an adequate pace towards implementing their 2015 Paris Agreement commitments or the Agenda 2030's Sustainable Development Goals.

2.1. Covid-19 and Impact on Renewable Energy Sector

Prior to the pandemic, the region was in the slow process of increasing investments in the energy sector.[9] An intellectual shift in the direction of "greening the Middle East" has been

[8] J. Mackenzie and M. Jeggo, 'The One Health Approach: Why Is It So Important?' (2019) 4/2 Tropical Med Infectious Dis 88.

[9] H. Bahrampour, 'Evaluation of Renewable Energies Production Potential in the Middle East: Confronting the World's Energy Crisis' (2020) 14/1 Frontiers in Energy 42.

perceptible, even though fossil fuels remain the mainstay of the region.[10] The creation of a space for renewables within the policy discourse was seen as the first step in building a positive momentum around addressing climate change. The Covid-19 crisis has disrupted this stride, and renewables in the region, particularly solar and wind projects now face multi-fold challenges. These challenges are born out of: one, the slide in the demand on oil and its impact on the renewable sector; and two, supply chain disruptions and impacts on renewable energy projects.

2.1.a. *Slide in Demand for Oil*

Historically, low prices for oil have not boded well for the renewables sector, as cheap oil does not promote a switch to renewable energy. However, it is not clear if such a simplistic cause-and-effect logic will hold true in the long term. First, the oil industry was under tremendous pressure before the pandemic. The Russia-OPEC price war meant that OPEC governments, led by Saudi Arabia were diverting their resources towards winning this global race.[11] The historic and unsustainable rise in oil production in an oversupplied sector had increased investor scrutiny in oil, making renewables look more conducive and less risky for investment. Second, some oil-rich governments have invested billions of dollars in a move to reduce oil dependency over the next decades. Countries within the Gulf Cooperation Council's (GCC) have funded and set up projects under the aegis of the International Renewable Energy Agency (IRENA) in the past decade. Investments for projects in the pipeline will not be withdrawn, as this will would be unaffordable.[12] Third, spread of Covid-19 (January-March) saw a spiralling downturn in global oil prices due to reduced worldwide demand. The prices dipped so dangerously low that it brought two rival oil producers: the Organization of Petroleum Exporting Countries and its allies (OPEC+), and Russia to reach a historic agreement to cut oil production by 10 percent.[13]

Cheaper oil reduces competitiveness for renewables not just in the MENA region but worldwide. Unless oil prices bounce back to pre-pandemic levels, it will be difficult to attract investments into renewables. Governments will be less able to offset the price difference between fossil fuel and renewable energies, owing to cash crunches they will experience in the aftermath of the pandemic. Renewable-centric policymaking therefore will

[10] For example, Qatar aiming to host a 'carbon neutral 2022 FIFA World Cup'; 'Gord to Support Delivery of Qatar's Carbon-Neutral Football World Cup' *FIFA* (4 November 2019) <https://www.fifa.com/worldcup/news/gord-to-support-delivery-of-qatar-s-carbon-neutral-fifa-world-cuptm> accessed 30 May 2020. For a more detailed analysis: S.H. Ali, 'Reconciling Islamic Ethics, Fossil Fuel Dependence, and Climate Change in the Middle East' (2016) 50/2 Review of Middle East Studies 172.

[11] D. Sheppard (Energy Editor), 'Why the Oil Market is Even Weaker than you Think' *Financial Times* (29 April 2020).

[12] Many renewable energy programmes (up to 90GW energy capacity), mainly solar and wind power, have been planned in Egypt, Morocco, Saudi Arabia and UAE over the next 10 to 20 years. Of these, an estimated half are under execution, while the rest are in a tendering phase.

[13] D. Brower, A. Raval and D. Sheppard, 'Opec Secures Record Global Oil Cuts Deal under US Pressure', Financial Times 13 April 2020.

have to wait until oil prices rise again. Therefore, following the Covid-19 crisis, there may be little political will to push for increasing the share of renewable energy within the MENA's energy mix. However, in the longer term, the economic slowdown may reduce global demand for oil,[14] which may in turn force OPEC states to reduce supply. This long-term dip in demand may not severely impact independent power producers, as their profits do not depend solely on the vicissitudes of the energy market. This may leave renewables, such as solar and wind producers unaffected by the crisis in the long term.[15] Furthermore, in response to the Covid crisis, central banks across the world as in the Middle East have cut their interest rates to ultra-low (or even negative) levels in order to sustain their economies.[16] This could possibly reduce the high capital risk in renewables, making installation of small plants much cheaper.[17]

2.1.b. *Supply Chain Disruptions and Renewable Energy Projects*

The disruption in supply chains at a global and regional level have jeopardised many industries including the renewable sector. China is one of the most consequential energy consumers and producers of the world and was the first to impose widespread Covid-19 lockdowns. However, despite the overall drop in energy demand, solar and wind energy demand rose by 1-2%.[18] This is a significant rise for a country as large as China, where demand for other energy sectors dropped by 9-10% during the same period. While the Middle Eastern and Chinese energy markets and policies differ drastically, renewables emerging as a resilient sector amid the crisis in China will have an impact on the energy choices of the world. The positive trend of renewables making earnings while other sectors struggle to stay afloat has been seen across other parts of the world.[19] The degree of the transformative effect can only be gauged after the entirety of the Covid story has played itself out.

With regard to projects that are under construction, the disruption and in some cases complete breakdown of supply chains such as Middle Eastern linkages with China, USA, Italy and Spain have significantly slowed down or stopped the supply of the renewable technology. Contracts for solar panels, turbine blades and batteries have been suspended or

[14] R. Khalil (General Manager for Saudi Arabia and Egypt of Worley Renewable Energy), 'Comment' *Middle Eastern Economic Digest* (26 March 2020).

[15] *Ibid*: "This [fall in demand] is still at a level where new renewables and reverse osmosis [projects] can deliver savings to the system … so these tenders should proceed, … but uncertainty has certainly increased as off takers and policymakers take time to re-assess."

[16] 'Central Bank Rates' <http://www.cbrates.com/> accessed 30 May 2020.

[17] A. Kordvani and C. Dolphin, 'Covid-19 Pandemic – Can the Renewable Energy Sector Pass the Test?' *Lexology* (9 April 2020).

[18] X. Zhou, 'Renewables Emerge as Winners in During China's Covid 19 Lockdowns' *HIS Markit* (26 March 2020) <https://ihsmarkit.com/research-analysis/renewables-emerge-as-winner-during-chinas-covid19-lockdown.html> accessed 30 May 2020.

[19] L. Hook, 'Clean Energy Groups Dodge Coronavirus Crisis' *Financial Times* (29 April 2020).

terminated due to *force majeure*, and this will certainly drive up the cost of these projects. Countries in the region are still grappling with the legal issues that will arise out these contracts.[20] The question of who will bear what part of the additional cost, be it manufacturers from source countries, regional/domestic companies responsible for the project, or suppliers and contractors in the middle, will determine the fate of future contracts.

Ongoing contracts and projects in the renewable sector will survive mainly because divestment is a more expensive option, however the financing of future renewable energy projects in the MENA region will slump over the next few years. Again, through a long-term lens, the global lack of availability of finance will see a delay, if not a complete quash of new contracts and projects in the region. The most ambitious renewable energy programme in the region, Saudi Arabia's Vision 2030 may be revised and will most certainly be delayed in its launch. However, it is unlikely that it will be fully sacrificed.[21] One can only hope that at a time when the worst has passed, countries in the region will have learnt the lessons of renewable profitability and resilience and will push for a more aggressive green energy transition than they did a pre-Covid-19 era.

2.2. Broader Impact on the Middle Eastern Climate Strategy

Through the prism of impacts on renewable energy, broader impacts on Middle Eastern climate change mitigation strategy can also be gauged. The MENA region is already under many climatic threats, most prominently: severe heat, intense droughts and water scarcity. Different countries are being affected differently owing to the diversity of climate risks, for instance, Egypt, Tunisia and coastal small Gulf states are threatened by sea-level rise, while Morocco, Turkey and Jordan are at risk due to changes in precipitation that may affect surface water flow.[22] Added to this, the vulnerability of large sections of populations in low- and middle-income and conflict-ridden countries complicates mitigation and adaptation roadmaps. The contribution of the Arab world to global greenhouse gas emissions (GHG) is estimated at 4.2%, however the significant share of fossil fuels within national economic profiles shows that a global energy transition towards cleaner energy has to ensure that countries in the region find other alternatives that are practical and profitable.[23]

In an era when climate change law and policy are shaped through mainly nationally self-determined commitments, countries in the Middle East have been lagging. As described above, policymaking towards increasing the share of renewables within the energy mix

[20] Iraq has declared a *force majeure* on "all contracts and projects". The change in law this declaration brings will influence future investments.

[21] J. Bahout (Fellow, Middle East Program at the Carnegie Endowment for International Peace) in an interview with D. Gavlak, 'Why Covid-19 is a Double Whammy for Middle East Countries' *VOA News* (15 April 2020).

[22] J. Sowers and E. Weinthal, 'Climate Change Adaptation in the Middle East and North Africa: Challenges and Opportunities' (2010) The Dubai Initiative Working Paper 2, Harvard Kennedy School and Dubai School of Government.

[23] For example, 96% of power generation in the Middle East comes from fossil fuels. For a break-up on different countries in the region: Supra 8, Bahrampour 2020 at 43.

and national incomes have shown some progress in past few years. These shifts may be significant given the Middle East's particular fossil fuel dependencies, but when viewed against a larger backdrop of reducing global emissions to 2 degrees, these fall short by a fair margin.[24] Climate Action Tracker's (CAT)[25] 'Effort Sharing' study that looks at the effect of current emissions policies on the global effort towards the Paris Agreement's goals includes only 3 countries from the region – Morocco, UAE and Saudi Arabia.[26] The Intended Nationally Determined Contributions (INDCs) of both, the UAE and Saudi Arabia have been ranked as 'inadequate', while Morocco's has been ranked as 'sufficient'. Despite several countries articulating and implementing a climate policy, coupled with non-governmental and corporate efforts, by and large, these efforts are insufficient.

Notable efforts include, Morocco setting for itself the ambition target of achieving 50% renewables share with its energy mix by 2025; Tunisia being the first country in the region to insert climate change goals in its new constitution;[27] Jordan developing a national climate change policy in 2015; and Lebanon setting a target to reduce greenhouse gas (GHG) emissions by 15% before 2030. Egypt's National Strategy for Adaptation and its National Strategy for Sustainable Development that includes climate mitigation strategies has been a positive step for a country still reeling through sustained political instability. However, climate approaches are inseparable from the economic and political challenges that Arab countries face.[28] For instance, the recent collapse of the Lebanese economy, Algeria's, Sudan's and Egypt's weaning political health, and Iran's economic and political isolation had already placed environmental and climate action on the side-lines.

In the advent of the coronavirus, such actions will be further pushed into the background as countries will divert resources towards relief efforts. The Covid-19 impact on the development of climate change law and policy will depend on differentiated capacities of these states. Within the region, countries that do not have fall-back or discretionary resources, substantial sovereign funds and other access points of funding will feel the pain of the Covid-19 crisis to the maximum extent; this includes almost all countries except Saudi Arabia, UAE, Qatar and Kuwait.[29] Intra-regional transfers to Lebanon, Jordan, Egypt, Tunisia and Sudan have stopped, as they were anyway on the decline.[30] As on the date of this writing, no coun-

[24] O. Nematollahi et al, 'Energy Demands and Renewable Energy Resources in the Middle East' (2016) 54 Renewable and Sustainable Energy Reviews 1172.

[25] CAT is a coalition of four research organizations – Climate Analytics, Ecofys, New Climate Institute and Potsdam Institute for Climate Impact Research.

[26] CAT, 'Effort Sharing Assessment' <https://climateactiontracker.org/countries/> accessed 30 May 2020.

[27] Article 45, Tunisian Constitution 2014.

[28] B. Ozcan, 'The Nexus between Carbon Emissions, Energy Consumption and Economic Growth in Middle East Countries: A Panel Data Analysis' (2013) 62 Energy Policy 1138.

[29] T. Yousef, 'Economic Impact of Covid 19 in the Middle East' *Babel Podcast* (7 April 2020).

[30] Evidence: Lebanon's complete economic meltdown in the past few months. It took several weeks for any other country to react. The concern or involvement in Middle Eastern problems has been on a decline, as no one thinks the region

try, rich or poor, in the region has announced an economic relief package, a stimulus plan or any compensation for loss of jobs and salaries, primarily because none of them can afford it. For countries that are conflict-ridden and ergo especially fragile, such as Syria, Yemen, Iraq, Libya and parts of Palestine, the pandemic will exacerbate existing structural weaknesses. While the health crisis has led to novel instances of cooperation and ceasefires,[31] these are only temporary and short-lived, unless some evidence of a higher degree of political commitment to restore political and economic stability presents itself in the future.

3. Covid-19 and Human Rights

Environmental law has made strides in integrating human rights with the environment. Several international instruments call for the protection and respect of human rights, and such an integrated approach can also be seen in the Sustainable Development Goals. A well-trodden environmental justice route is via human rights adjudication.[32] The securing of environmental justice and the consequent evolution of environmental law through progressive interpretations of its principles can only happen through a harmonious relationship between state and citizenry. The Covid 19 timeline will delay the environmental law timeline within legal systems of the region owing to the fractured relationship between governments and people. It is hence imperative to introspect within the human rights implications of the Covid-19 crisis, as the collapse of constitutionalism and democratic values within the region cannot reconcile with environmentalism.

3.1. Human Rights Implications of Covid-19

Countries within the MENA region have not had the best human rights track records, but with special reference to Covid-19 crisis, the two dimensions stand out. One, emergency measures taken to combat the spread of the pandemic have led to the strengthening of authoritarian power in the region. Authoritarian governments have historically been most reluctant in taking environmental and climate change law seriously. The perceptible public anger in the region, especially following the Arab Spring of 2011 will see a further diminishing of public faith and trust in respective governments. Thus, if lockdowns and emergency actions are interpreted as potential manifestations of the preventive or precau-

demands the same geopolitical command, in an integrated manner, as it did in the 80s. Iran's involvement was a problem, but still, the IMF/WB did not bother, even in the late stages of the crisis.

[31] The pandemic has led to unprecedented cooperation between Israel and Palestine to coordinate health action in both countries. D. Dassa Kaye, 'Covid-19 Impacts on Strategic Dynamics in the Middle East' *The Rand Blog* (22 March 2020) <https://www.rand.org/blog/2020/03/covid-19-impacts-on-strategic-dynamics-in-the-middle.html> accessed 30 May 2020.

[32] C. Redgwell, 'Access to Environmental Justice', in F. Francioni (ed.), *Access to Justice as a Human Right* (OUP 2007) 153; J. Cameron and R. Mackenzie, 'Access to Environmental Justice and Procedural Rights in International Institutions' in A. Boyle and M. Anderson (eds), *Human Rights Approaches to Environmental Protection* (OUP 1996) 129.

tionary principles, it could be argued that they will create a negative public perception owing to the human rights they end up violating. This may not just delay environmental and climate action but end up creating a legal vacuum for years to come. Second, Covid-19's impact will be the hardest on Middle East's most vulnerable populations; those that are trapped in wars and conflicts. With health systems being disrupted or broken down, one can hardly be hopeful for positive environmental change unless security and the rule of law are restored in these parts.

3.1.a. *Emergency Measures and the Consolidation of Authoritarian Power*

The pandemic has led many countries in the world, as in the region to impose lockdowns, assume emergency powers, mobilise law and order forces and most importantly deploy wide-spread surveillance on its populations.[33] While this is being justified as the 'need of the hour', the sweeping and unchecked power that the current crisis allows governments to exercise raises many questions. In the regional context, debates around governance, corruption, economic crises and the proportionate and accountable use of power have already been ensuing since the 2011 Arab Spring. Widespread protests led by the youth, which in some cases managed to topple governments, while in others forced governments to make some socio-economic assurances, revolved around questioning the legitimacy of authoritarianism in the region.[34] The overall malaise of public discontent sparked by the Spring has been palpable since 2011 up till prior the Covid-19 crisis.

In 2011, some governments responded to the Arab Spring optimism with more repressive measures to tramp down the protests. In 2020 during the Covid-19 crisis, these governments have used all means possible in 'the typical authoritarian playbook' to further crack down on any political dissent in the guise of security and public health.[35] There are umpteen examples, from army helicopters hovering over Beirut[36] and Lebanese officials using social media to track and target protesters[37], to arrests in Morocco on the grounds of spreading fake news[38]; from Egypt revoking press credentials of reporters over coronavi-

[33] For example, "Prime Minister Benjamin Netanyahu of Israel recently authorised the Israel Security Agency to deploy surveillance technology normally reserved for battling terrorists to track coronavirus patients. When the relevant parliamentary subcommittee refused to authorise the measure, Netanyahu rammed it through with an 'emergency decree'." Y.N. Harari, 'The World after Coronavirus' *Financial Times* (20 March 2020).

[34] Supra n 30, Kaye 2020.

[35] K. Roth, 'How Authoritarians are Exploiting the Covid-19 Crisis to Grab Power' *Huma Rights Watch* (3 April 2020).

[36] H. Hamdan, 'Beirut in the Time of Coronavirus Outbreak' *Al-Monitor* (27 March 2020) <https://www.al-monitor.com/pulse/originals/2020/03/beirut-ghost-city-general-mobilization-empty-road-corona.html> accessed 30 May 2020.

[37] D. Amos, 'Lebanon's Government is Accused of Swarming WhatsApp to Catch Protestors' *NPR* (9 March 2020) <https://www.npr.org/2020/03/09/809684634/lebanons-government-is-accused-of-swarming-whatsapp-to-catch-protesters> accessed 30 May 2020.

[38] 'Morocco Makes a Dozen Arrests over Coronavirus Fake News' *Reuters* (19 March 2020) <https://www.reuters.com/article/us-health-coronavirus-morocco/morocco-makes-a-dozen-arrests-over-coronavirus-fake-news-idUSKBN2162DI> accessed 30 May 2020.

rus coverage[39] to Jordan's 1600 arrests on the grounds of lockdown violations[40]; from the Syrian Electronic Army's access to the Covid-19 app to spy on the opposition[41] and geopolitical changes the virus has prompted such as UAE's promise of 'humanitarian solidarity' to Bashar al Assad[42] to Turkey's draft law aimed at combating the spread of the virus that empowers the state to control, censor and strongarm social media sites.[43]

The virus has ensured the consolidation of authoritarian power by thwarting political opposition for now and in the future, making "democracy" coronavirus' first and most significant victim in the region.[44] This entrenchment of authoritarianism is dangerous in a post-2011 context. In the aftermath of the Arab Spring protests, some states had increased public spending and were partly financed by richer states in the region to offer economic packages to assuage the Arab Spring anger.[45] This 'buying of social peace' will fall apart now that national coffers run dry for all states, rich or poor.[46] The loss of jobs, lowering of wages and increase in public deficits that lead to the lowering of currencies will further aggravate public discontent up to a boiling point. The mobilisation of this new round of protests hangs in uncertainty during lockdowns and increased surveillance.

3.1.b. *The impact on the Middle East's most vulnerable populations*

The human rights implications for Middle East's most vulnerable populations are going to be catastrophic. The region is home to some of the worst ongoing humanitarian conflicts, such as in Libya, Yemen and Syria. Internally displaced persons and refugees are especially vulnerable to contracting the Covid-19 disease.[47] The spread of the virus cannot be effectively

[39] 'Egypt's Censors Shift into High Gear over Coronavirus Coverage' *Al-Monitor* (18 March 2020) <https://www.al-monitor.com/pulse/originals/2020/03/egypt-censors-journalists-arrests-coronavirus-coverage.html> accessed 30 May 2020.

[40] J. Arraf, 'Jordan Keeps Coronavirus in Check with One of the World's Strictest Lockdowns' *NPR* (25 March 2020) <https://www.npr.org/sections/coronavirus-live-updates/2020/03/25/821349297/jordan-keeps-coronavirus-in-check-with-one-of-world-s-strictest-lockdowns> accessed 30 May 2020.

[41] D. Matar, 'Media, Covid 19 and the Arab World' (SIS Insight Series, Briefing 1, 15 May 2020) <https://www.soas.ac.uk/interdisciplinary-studies/research/SISBriefing1.pdf> accessed 30 May 2020.

[42] 'Syria's Assad Receives a Call of Support from Abu Dhabi's MBZ' *Middle East Eye* (27 March 2020) <https://www.middleeasteye.net/news/coronavirus-syria-uae-bashar-al-assad-support-covid-19> accessed 30 May 2020.

[43] E. Sinclair-Webb, 'Turkey Seeks Power to Control Social Media' *Human Rights Watch* (13 April 2020) <https://www.hrw.org/news/2020/04/13/turkey-seeks-power-control-social-media> accessed 30 May 2020.

[44] L. Saleh, 'The Arab World between a Formidable Virus and a Repressive State' *Open Democracy* (6 April 2020).

[45] Oil-rich Gulf states financed stimulus packages focused on increasing employment rates, increasing wages, improving and building new infrastructure, and strengthening religious organizations. Such expansionary fiscal policies and intra-regional transfers of such packages succeeded in reducing the intensity of public anger. Egypt's President Abdel-Fattah el-Sisi made a dangerous by increasing the country's deficit at the cost of ramping up mega-infrastructure projects. GCC support in Morocco, Tunisia, Yemen, Iraq and Lebanon has been referred to as "the Middle East's shadow central bank" managed to reduce public anguish during the Arab Spring. Ibid.

[46] J. Alterman, 'Add Coronavirus to Other Crises, and the Middle East Faces a Catastrophe' *The Hill* (22 March 2020).

[47] M. Yacoubian, 'Coronavirus Prevention Extremely Difficult in Refugee IDP Camps in Middle East' *Al Arabiya* (18 March 2020).

stopped in crowded camps, while regional wars have left the health system in shambles.[48] Michel Olivier Lacharité, a crisis coordinator for Doctors Without Borders described the gravity of the situation by saying that: "This virus can kill more people in one month here in northern Syria than the regime killed in the last 10 years."[49] Along with people in conflict, the poorest sections of all Arab countries, including migrant workers, women, elderly and the disabled face a highly precarious future, given the health crisis itself and the economic hardship that will follow. While international and regional aid has been committed, weaknesses in structural and institutional links will impede the outreach of these aid efforts. Such regions face an increased risk of radicalisation leading to more violence.[50]

3.2. Deteriorating Human Rights and Humanitarian Conditions and the Future of Environmental Law

The disregard, blatant violation and incapacity to fulfil human rights can never bode well for the environmental and ecological advances. At the very outset, regional wars and conflict create a tremendous environmental impact and delay environmental/climate action. While literature has evolved to address the human cost and the economic costs of war and conflict, the environment has remained a silent victim, standing only on the side-lines of impact analysis. The United Nations Environment Programme's (UNEP) seminal report on 'Protecting the Environment during Armed Conflict' analyses twenty post-conflict environmental assessments to conclusively show the devastating effects of war and conflict on the environment.[51] It argued for the need to conceptually link environmental impacts within the humanitarian and human rights frameworks, where it is currently lacking. Furthermore, the journey towards peacebuilding also has massive implications for natural resource use and framing of rights of access and use for the future.[52]

With respect to the development of environmental law principles in light of the Covid-19 crisis, it is argued that lockdowns and emergency actions can be analogised as manifestations of the preventive or precautionary principles. Principle 15 of the Rio Declaration states that when, '[a] threat of serious damage exists, a lack of full scientific knowledge should not delay containment or remedial steps.'[53] This principle stands at the bedrock of taking proactive environmental action. In the pandemic context, governments have had *act* by calling for collective action, relying on scientific knowledge, looking to science for solutions out of the

[48] *Supra* n 30, Kaye 2020.

[49] E. Hill and Y. Al-Hlou, 'Wash Our Hands? Some People Can't Wash Their Kids for a Week' *New York Times* (19 March 2020) <https://www.nytimes.com/2020/03/19/world/middleeast/syria-coronavirus-idlib-tents.html?fbclid=IwAR1n4DoCWZQTPuzPl8GHQ6KthwGzxCOLrY9XYmg8_iJ-MgZY15C9nlwKiJs> accessed 30 May 2020.

[50] J. Burke, 'Opportunity or Threat? How Islamic Extremists are Reacting to the Coronavirus' *The Guardian* (16 April 2020).

[51] UNEP, *Report on Protecting the Environment during Armed Conflict: An Inventory and Analysis of International Law* (UNEP 2009).

[52] UNEP, *Report on From Conflict to Peacebuilding: The Role of Natural Resources and the Environment* (UNEP 2009).

[53] UN Commission on Human Rights, 'Human Rights and the Environment' (1994) E/CN.4/RES/65.

crisis, with an intention of working towards a collective outcome despite uncertainties. This crisis has also shown the importance of being prepared and acting in advance. In this sense, the Covid-19 pandemic and climate change have much in common.

It is however unlikely that these similarities will be heeded and be translated into policy action in the region. The Covid-19 crisis will not solve socio-economic problems, but only aggravate them leading to further human rights violations. Public mistrust that this will foster will not bode well for the development of bolder and innovative environmental principles, where governments are expected to act sans 'complete' or 'adequate' information. As this crisis has shown, governments have tended to accumulate more power for themselves when discretion or choice of action is afforded. Future governments in the region are most likely going to shy away from taking proactive environmental action owing to the combination of factors described above. Environmental law cannot progress where there is an absolute disconnect between governments and their populations. Reconciling this chasm is an ongoing struggle for the theoretical development of both environmental and human rights law.

Public tensions with governments that wrestle to aggrandise power place ecological concerns as a low priority. This also means that nature protection and conservation is seen as an independent agenda that can be allowed to slide to the bottom of the table of importance. As a result, 'zoonosis falls between the cracks'.[54] Pandemic preparation needs to be recognized as a part of sustainable development.[55] Holistic approaches in the future ought to work through a combination of climate change law, biodiversity law, sectoral environmental laws and robust environmental impact assessments. For the Middle Eastern region, the one health approach that reconciles different socio-ecological dimensions may be a possible step forward.[56] Such interconnections have been drawn in the past, but in specific contexts of pollution/emissions and health.[57] More broader environmental legal developments need to follow the SDG route. In the MENA region, sustainable development, therefore, ought to prioritise ecological conservation and preparedness of health systems. The UNEP's 2017 Resolution on Environment and Health sums this up aptly:[58]

[54] N.A. Robinson, *Employing Environmental Laws to Avert the 'Next' Pandemic: A Post-Covid-19 Agenda* (IUCN World Commission on Environmental Law Webinar Series on 'Addressing the Coronavirus (Covid-19): A Legal Perspective, 24 April 2020).

[55] Supra n 6, Berlin Principles 2019.

[56] W. Karesh and P. Formenty et al, 'Infectious Diseases' in *Connecting Global Priorities: Biodiversity and Human Health: A State of Knowledge Review* (CBD, UNEP, WHO 2015), <https://www.cbd.int/health/SOK-biodiversity-en.pdf> accessed 30 May 2020.

[57] R. Alaa Abbass, Prashant Kumar and Ahmed El-Gendy, 'An Overview of Monitoring and Reduction Strategies for Health and Climate Change related Emissions in the Middle East and North African Region' (2018) 175 Atmospheric Environment 33

[58] UNEP/EA.3/Res 4 (2017).

"*Recognizes that biodiversity loss is a health risk multiplier… that human, animal, plant and ecosystem health are interdependent; emphasizes in this regard the value of the "One Health" approach, an integrated approach which fosters cooperation between environmental conservation and the human health, animal health, and plant health sectors; encourages Member States and invites relevant organizations to mainstream the conservation and sustainable use of biodiversity to enhance ecosystem resilience, … as an important safeguard for current and future health and human well-being.*"

4. Conclusion

This paper has tried to analyse the impact of the Covid-19 pandemic on the Middle Eastern and North African region. It first sketches a background of the ecological-human-health nexus using the One Health approach articulated in the Berlin Principles 2019. It argues that environmental law generally needs to be re-thought[59] in this direction, and the lessons learnt from Covid-19 crisis can act as a catalyst for this change.

Against this backdrop, the impact of the pandemic is gauged for the MENA region. Two themes: one of climate action and the other of human rights are used to further understand how environmental law will be shaped out of the crisis. With respect to the first theme, it is argued that the renewable energy sector will certainly suffer in the immediate aftermath of Covid-19. However, globally renewables have been more resilient than fossil fuels during this crisis, and with a longer-term global dip of demand for oil, renewables attract more investments in the future. The MENA regional climate action strategy will also suffer due to the crisis, given that one, Paris commitments already made are not enough, and two, economic destabilisation will lead to attention being diverted away from climate action.

With respect to the second theme, it has been shown that the Covid-19 crisis has led to increased authoritarianism and increased human rights and humanitarian threats. It has been argued that political stability is a prerequisite for consistent law and policymaking for the environment. A fractured relationship between governments and their people will delay and even obliterate the environmental agenda for years to come.

Stitching these two themes together, one can see how the Covid-19 crisis has only led to the pushing back of environmental laws. Coming out of the crisis, more interdisciplinary approaches are the need of the hour that bridge the distance that currently plagues the human-ecological-health nexus. The Berlin Principles 2019 are a step in that direction, as they urge the world to '…ensure the conservation and protection of biodiversity, which interwoven with intact and functional ecosystems provides the critical foundational infra-

[59] N. Robinson, 'How Do We Prevent the Next Outbreak?' *Scientific American* (25 March 2020).

structure of life, health and well-being on our planet'.[60] There is a need now more than ever to further develop such interdisciplinary collaboration, such that governments; communities; and academic, scientific and business institutions utilise the knowledge of other disciplines and domains to include environmental and ecosystem health, social sciences and land use considerations in their work.

[60] *Supra* n. 6, Berlin Principles 2019, Principle I.

Os riscos dos retrocessos ambientais em Portugal e Angola em tempos de pandemia da Covid-19

Maralice Cunha Verciano*

Resumo

O artigo tem por objetivo analisar de que forma a legislação criada para enfrentar a pandemia de Covid-19 em Portugal e Angola poderá promover retrocessos ambientais na medida em que a promulgação de alguns diplomas legais podem colocar em risco os esforços na construção de um pensamento voltado para o desenvolvimento sustentável em cumprimento ao que dispõem os textos constitucionais dos referidos países, os quais preveem direitos e deveres para preservação de um meio ambiente sadio e equilibrado. Para tanto os dispositivos dos ordenamentos jurídicos analisados serão o Decreto-Lei no. 62-A/2020 e o Decreto Presidencial 117/20 em vigor em Portugal e Angola respectivamente, à luz da Constituição Portuguesa de 1976 e da Constituição Angolana de 2010.

* Maralice Cunha Verciano, PhD Candidate, Università Degli Studi Della Campania – Luigi Vanvitelli.

Palavras-chaves
Pandemia Covid-19 – Direito Ambiental Constitucional em Portugal e Angola – Decreto-Lei 62-A/2020 – Decreto Presidencial 117/20 – Retrocesso Ambiental

Abstract

The article aims to analyze how the legislation created to face the Covid-19 pandemic in Portugal and Angola could promote environmental setbacks, to the extent that the promulgation of some legal diplomas puts at risk efforts to build a thinking aimed at sustainable development, observing the constitutional texts of those countries, which provide rights and duties for the preservation of a healthy and balanced environment. Therefore, the provisions of the legal systems analyzed will be Decree-Law no. 62- A/2020 and Presidential Decree 117/20 in force in Portugal and Angola respectively, in attention to the Portuguese Constitution of 1976 and the Angolan Constitution of 2010.

Keywords

Pandemia Covid-19 - Constitutional Environmental Law in Portugal and Angola – Legislative Decree 62-A/2020 - Presidential Decree 117/20 - Environmental setback

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Introdução

A pandemia da Covid-19 tem ocupado o centro das grandes discussões no mundo acadêmico abarcando as várias áreas das ciências, sejam elas: sociais, políticas e jurídicas. No âmbito das Ciências Jurídicas, o Direito Constitucional e o Ambiental se destacam na medida em que se espera das Constituições com sua força normativa[1], a produção de leis infraconstitucionais que não rendam retrocessos aos direitos e tampouco omitam deveres já positivados em seus textos, quer por parte do Estado ou da sociedade. Assim, primar pela preservação do meio ambiente em meio à pandemia de Covid-19, em obediência aos

[1] K. Hesse, *A força normativa da Constituição*, Porto Alegre, 1991, p. 34.

princípios da precaução e da preservação, é fator preponderante para que as gerações vindouras não paguem um alto preço pelas calamidades presentes. Espera-se que, no contexto pandêmico, a degradação ambiental receba uma atenção mais robusta, tendo em vista que elas estão intimamente ligadas à saúde humana. A Covid-19 desponta como um inimigo invisível, causador de mortes em números assustadores, destruidor da economia mundial em países desenvolvidos e nos países do Sul Global[2].

Portugal e Angola não fugiram das crises econômicas de grandes proporções como consequência da Pandemia da Covid-19 e foram compelidos a criarem vários dispositivos legais baseados em suas Constituições para tentarem minimizar os impactos. Desta feita, os Decreto-Lei no. 62-A/2020, promulgado em Portugal e o Decreto Presidencial 117/20, em Angola, no período da pandemia, merecem análise detalhada com o objetivo de verificar se o Direito Ambiental Constitucional, tanto Português quanto Angolano, incorrem no risco de sofrerem retrocessos que possam desfavorecer o meio ambiente e trazer resultados negativos para a coletividade no seu todo.

1. O Direito Ambiental nas Constituições Portuguesa e Angolana

A Constituição da República Portuguesa, promulgada em 1976 logo após o período da ditadura imposto por Salazar, é uma das primeiras Constituições Europeias que de forma originária[3] comtemplaram o Direito Ambiental Constitucional no artigo 66 como direito de todos a um ambiente de vida humano sadio e ecologicamente equilibrado assumindo esse todos – Estado e sociedade - o dever de defende-lo[4].

Ao abrigo do artigo 91º da Constituição de Portugal, a preservação do equilíbrio ecológico, a defesa do ambiente e a qualidade de vida dos portugueses são prerrogativas que a política econômica do país deve ter em conta, coadunando-se com as políticas social, educacional e cultural na busca do desenvolvimento harmonioso da nação, incumbindo

[2] De acordo com Domenico Amirante, o impulso fundamental para uma mudança de perspectiva na proteção do meio ambiente tem vindo do chamado "Sul do Mundo". Por razões de caráter epistemológico e histórico, que levaram a configurar o tema do meio ambiente como técnico e periférico nos ordenamentos jurídicos da tradição ocidental e então, de certo modo retardaram a compreensão da sua "centralidade". Por outro lado, se podem individuar evidentes motivações, também em termos de imediata percepção dos riscos ambientais, que instigaram os países do Sul do mundo a colocar de maneira mais concreta e urgente as preocupações e as temáticas ambientais como elementos caracterizantes das escolhas básicas do ordenamento constitucional. Neste sentido, o respeito pelo meio ambiente e a sustentabilidade (não tanto do desenvolvimento, quanto da organização social e constitucional no seu complexo) tornam-se verdadeira e realmente pré-condições dos direitos e ascensão dos fundamentos do mesmo ordenamento constitucional. D. Amirante, *L'ambiente preso sul serio. Il percorso accidentato del costituzionalismo ambientale*, in *Diritto pubblico comparato ed europeo*, Numero speciale, 2019, p. 1-32.

[3] *Ibid*.

[4] Constituição da República Portuguesa. (2005). Diário da República, n.º 155 – I Série - A.

ao Estado a tarefa de, quer seja por meios próprios ou através de apelos a iniciativas populares prevenir e controlar a poluição, criar espaços naturais e proteger as paisagem como forma de garantir a conservação da natureza. (Artigo 66 n. 2, letras a, c.).

O Legislador Português, demonstra ter buscado consolidar o Direito ambiental constitucional ao longo da vigência da Constituição de 1976, ainda que esta sofresse várias revisões - sete até o momento – na perspectiva de ter na Constituição um forte instrumento para enfrentar as problemáticas ambientais do país, como demonstra o artigo 66 que já passou por três alterações, sendo a última através da Lei Constitucional no. 1/97 de 20 de setembro, onde a expressão "desenvolvimento sustentável" foi incorporada ao regramento como sendo responsabilidade do Estado, estando dentre suas obrigações privilegiar a educação ambiental e o respeito pelos valores ambientais a fim de promover as políticas públicas que tenham o cunho ambiental por objetivo em todos os seus setores.

O ordenamento jurídico português conta com outras legislações fundamentalmente destinadas à proteção ambiental como é o caso da Lei de Bases do Ambiente, Lei n. 11/87 de sete de abril, que passou a definir as bases da política ambiental em cumprimento do disposto nos artigos 9º e 66º da Constituição da República, que traz dentre seus principais princípios o da prevenção, do equilíbrio, da participação. Somando-se a esses Diplomas legais encontram-se ainda a Lei n. 19/86 de 12 de junho que concede o direito ao acesso à informação sobre ambiente, a Lei n. 48/98 de 11 de Agosto que define as Bases da Política de ordenamento do território e de urbanismo, a lei n. 35/98 de 18 julho pela qual foi criado o Estatuto das Organizações não Governamentais de Ambiente, além da Lei n. 50/2006 de 29 de agosto que instituiu o Regime Jurídico das contraordenações ambientais.

Como visto, o ordenamento jurídico de Portugal possui sim, um considerável arcabouço infraconstitucional ambiental destinado a preservar e proteger o meio ambiente criado a partir da Carta Maior. Isso faz com que o Direito Ambiental Português seja considerado forte e visível, com total amparo Constitucional para que a preservação da natureza seja garantidora de uma sadia qualidade de vida, qualidade de vida essa, elevada ao grau de direito fundamental tanto para resguardar a geração presente quanto as futuras.

Todavia, mesmo tendo em conta a emergência imposta pela pandemia da Covid-19 no que se refere à criação de medidas para enfrentar suas consequências, sobretudo as de caráter econômico, o governo português ao sancionar o Decreto-Lei no. 62-A/2020[5] deu mostras de não levar em consideração o artigo 90º. Da Carta Maior que determina sejam os planos de desenvolvimento econômicos e sociais a responsabilidade de promover o crescimento da economia, o desenvolvimento harmonioso e integrado, que leve em conta a preservação do equilíbrio ecológico, a defesa do ambiente e qualidade de vida do povo português, ou seja, postergar legislação já aprovada no que tange a contenção da utilização de utensílios plásticos descartáveis que beneficiaria em muito o equilíbrio ambiental

[5] Decreto-Lei nº. 62-A/2020. (2020). I SÉRIE Disponível em: https://dre.pt/home/-/dre/141967954/details/maximized.

e faria jus ao termo 'desenvolvimento harmonioso e integrado' ditados na Constituição, demonstrando ainda que o Estado estaria cumprindo a sua parte no que diz respeito a defesa do ambiente e a qualidade de vida de todos os seus cidadãos.

No entanto, diante da decisão governamental de sacrificar o meio ambiente em função da economia com a entrado em vigor do Decreto supra citado, evitar um provável retrocesso ambiental, Ficará nas mãos dos próprios cidadãos que se sintam lesados em seu direito a um ambiente de vida humano saído e ecologicamente equilibrado, fazendo uso do disposto no artigo 52 da Constituição de 1976 que lhes assegura o direito de apresentar quer seja de forma individual ou coletivamente aos órgãos de soberania petições, representações ou queixas para a defesa de interesse geral através de ação popular se entenderem que seus direitos foram lesados no âmbito do direito ambiental (artigo 52 no. 1 e n.3).

No que se refere ao Direito Ambiental na Constituição Angolana, segundo observa Eduardo Mendes Simba & Pedro Kinanga dos Santos[6], a Lei Constitucional de 1975, promulgada em seguida à independência de Angola no mesmo ano, não consagrava qualquer norma ambiental, inclusive nas revisões constitucionais que a sucederam.

A preocupação em proteger o meio ambiente foi demonstrada bem timidamente somente em 1991 com a Lei Constitucional dos Cem, nome que recebeu a Lei Constitucional[7] promulgada no referido ano pelo fato de possuir cem artigos. Ela dispunha no artigo 12,a responsabilidade do Estado em promover a defesa e conservação dos recursos naturais, orientando a sua exploração e aproveitamento em benefício de toda comunidade que, segundo Eduardo Mendes Simba & Pedro Kinanga dos Santos[8], destinava-se a proteger tão somente os elementos que fossem naturais, excluindo, portanto, todos aqueles que não eram considerados dádiva da natureza.

O legislador Angolano, muito rapidamente, vai reconhecer a necessidade de proteger o ambiente de forma mais consistente, um ano depois da Lei Constitucional de 1991, pois, na Lei Constitucional de 1992 no artigo 24, o direito a viver num ambiente sadio e não poluído passa à categoria de direito fundamental, dispondo que: artigo 24º. 1. Todos os cidadãos têm o direito de viver num ambiente sadio e não poluído. 2. O Estado adota as medidas necessárias à proteção do ambiente e das espécies da flora e da fauna nacionais em todo território nacional e a manutenção do equilíbrio ecológico. 3. O Estado pune os atos que lesem direta ou indiretamente ou ponham em perigo a preservação do ambiente"[9]. Percebe-se então, que num curto espaço temporal o Constitucionalismo Angolano toma um viés progressista em comparação aos seus textos anteriores, pois, em um único

[6] E. Mendes Simba, P. Kinanga dos Santos, *Direito do Ambiente Angolano,* Luanda, 2018, p. 82.

[7] Lei Constitucional de Angola nº 12/91. 1991. Diário da República, n.º 19, I Série, n.º 1, com as alterações da Lei de Revisão n.º 23/92, publicada no D.R.n.º38, I Série.

[8] E. Mendes Simba, P. Kinanga dos Santos, *cit.*.

[9] Lei Constitucional de Angola de 1992. (1992). No. 38 Série I -Disponível em: http://cedis.fd.unl.pt/wp-content/uploads/2016/01/LEI-CONSTITUCIONAL-1992.pdf.

artigo reconhece o direito fundamental ao meio ambiente sadio, sem poluição, incumbindo o Estado de adotar medidas de proteção ambiental de forma a promover um equilíbrio ecológico, além de já prever medidas sancionatórias para atos lesivos ao meio ambiente.
O artigo 24 da Lei Constitucional Angolana de 1992 foi primordial para que tanto as políticas, como as legislações ambientais, fossem mais bem elaboradas, quer seja no que diz respeito aos recursos naturais, quanto na gestão ambiental do país.
No período de vigência da Lei Constitucional de 1992, entraram em vigor em Angola a Lei de Bases do Ambiente de 1998, que traz dentro de seu texto muita similitude com o a Lei de Bases do Ambiente de Portugal de 1987 – muitos trechos possuem expressões exatamente iguais à Lei portuguesa- a Lei do Ordenamento do Território e do Urbanismo, a Lei das Terras, a Lei dos Recursos Biológicos Aquáticos, – todas promulgadas em 2004 e a Lei de Águas de 2002.
Em 2010, foi promulgada em Angola a Constituição que se encontra em vigor, ampliando o conteúdo referente à proteção ambiental, mencionando no n.2 o desenvolvimento sustentável, a utilização racional dos recursos naturais em detrimento do respeito pela sobrevivência das gerações futuras, dispondo que as atividades econômicas devem possuir uma correta localização dentro do território angolano, impondo a todos o dever de defender e proteger o meio ambiente.
A Constituição da República de Angola de 2010, pode ser considerada ainda mais progressista que a Lei Constitucional de 1992, dado que esta, por exemplo não fazia menção ao desenvolvimento sustentável, a utilização dos recursos naturais com racionalidade e tampouco a preocupação com o futuro ambiental da geração angolana vindoura.
Cumpre ressaltar que, enquanto a Lei de Bases do Ambiente Angolano apresenta grande semelhança com a Lei de Bases do Ambiente Português, podendo-se pensar que em alguns aspectos normativos ainda existe uma certa influência do colonialismo português sobre o ordenamento jurídico angolano, a Constituição da República Angola de 2010, em pouco se parece com a Carta Magna de Portugal. Ou seja, no que se refere à construção do seu constitucionalismo, Angola tem optado por uma soberania Constitucional para guiar o povo angolano após a sua independência.

2. Medidas tomadas em Portugal e Angola no enfrentamento à Covid-19 e o destino do Direito Ambiental

No enfrentamento da pandemia, tanto Portugal quanto Angola, foram compelidos a tomarem medidas de emergência na tentativa de conter a Covid-19, que como em outros lugares do mundo, também se alastrou pelos dois países. Portugal, até a confecção desse trabalho já havia publicado cerca de 400 medidas legais entre Leis, Decreto-Lei, Portarias, Decretos Regulamentares, dentre outros, nos âmbitos sociais e econômicos na tentativa de conter os estragos causados pela pandemia em solo português.

A exemplo do que aconteceu na Itália e na França, a pandemia tem causado econômica ou socialmente danos que se verão refletidos no desenvolvimento de Portugal nos próximos anos; uma preocupação que tem levando o governo português a tomar medidas drásticas, que podem vir a atingir os avanços positivos alcançados pelo direito ambiental ao longo das últimas décadas.

A promulgação do Decreto-Lei no. 62-A/2020, do dia 03 de setembro de 2020 pode ser considerado um indício do retrocesso ambiental que poderá ocorrer em Portugal em virtude da pandemia da Covid-19. Nesse Diploma Legal, o Governo Português entendeu ser oportuno prorrogar até 31 de março de 2021 o período para que os prestadores de serviços da área de restaurante e de bebidas possam se adaptar ao que já estava previsto para entrar em vigor no dia 03 de setembro de 2020 com a Lei no. 76/2019[10] que determinava a não utilização e não disponibilização de louças de plástico de utilização única nas atividades do setor de restaurantes e/ou bebidas no comércio varejista, em cumprimento ao estabelecido na Diretiva (UE) 2019/904 do Parlamento Europeu e do Conselho de 05 de junho de 2019[11].

A referida Diretiva promove as abordagens circulares que priorizam o uso de produtos reutilizáveis e aos sistemas de reutilização sustentáveis e não tóxicos em vez de produtos de utilização única com a finalidade de reduzir os resíduos gerados que se encontram no topo da lista da gestão dos resíduos já estabelecidos na Diretiva 2008/98/CE[12] do Parlamento Europeu e do Conselho. A Diretiva (UE) 2019/904 tem por objetivo contribuir para a concretização do Objetivo de Desenvolvimento Sustentável 12 das Nações Unidas (ONU), o qual visa a garantia dos padrões de consumo e de produção voltados para a sustentabilidade e que faz parte da Agenda 2030 para o Desenvolvimento Sustentável que foi adotado pela Assembleia Geral das Nações Unidas em 25 de setembro de 2015.

O motivo para adiar a entrada em vigor da Lei no. 76/2019 de acordo com o governo Português é o atual contexto de combate à propagação do novo Coronavírus SARS-CoV-2 e da doença COVID-19, pois, segundo ele, os operadores econômicos em virtude das imposições do fechamento e da suspensão das atividades não tiveram condições para escoar a existência dos utensílios de plástico de única utilização, nem tempo para preparar a transição para o novo regime, ainda que o próprio governo admita que Lei prorrogada contribuiria para a o aumento do impacto de determinados produtos de plástico no ambiente.

Segundo o governo, a justificativa do adiamento da entrada em vigor da Lei no. 76/2019 é a necessidade de clarear e harmonizar as disposições da referida Lei com a Diretiva (UE)

[10] Lei Nº 76/2020. (2020). No. 165 Série I Disponível em: https://dre.pt/web/guest/home/-/dre/124346827/details/maximized?serie=I&print_preview=print-preview&day=2019-09-02&date=2019-09-01.

[11] Diretiva (UE) 2019/904 do Parlamento Europeu e do Conselho de 5 de junho de 2019 relativa à redução do impacto de determinados produtos de plástico no ambiente. L155/1- 12/06/2019.

[12] Diretiva 2008/98/CE do Parlamento Europeu e do Conselho de 19 de novembro de 2008 relativa aos resíduos e que revoga certas diretivas.

2019/904, tornando claro os conceitos relevantes para a respectiva interpretação e execução da mesma, além de evitar a distorção de competitividade entre empresas que atuam no mercado único europeu, evitando com a medida legal, a prorrogação da vigência do *greenwashing* e a possibilidade de substituição de um produto descartável por outro, o que obstruiria a evolução das alternativas reutilizáveis.

Todavia, levando em consideração que a Diretiva de 2019 do Parlamento Europeu e do Conselho admite que o lixo marinho na União Europeia conta com um percentual de 80% a 85% de plástico, segundo medições realizadas por meio de contagens nas praias, dos quais 50% desse plástico é derivado de utensílios de utilização única e o restante estão relacionados aos artigos utilizados na pesca que são descartados após terem sido usados uma única vez para os fins a que se destinam, eles são raramente reciclados e tendem a tornar-se lixo, o que faz do problema do lixo marinho assunto particularmente grave a ser tratado, acarretando sérios riscos para os ecossistemas marinhos, a biodiversidade e consequentemente para a saúde humana, causando ainda prejuízos para o setor do turismo, para a pesca e para o transporte marítimo.

Sendo assim, a decisão do governo de promulgar um Decreto-Lei que adie por mais tempo a vigência da Lei destinada a conter a poluição provocada pelo consumo de utensílios de plástico pela população, necessária para tentar minimizar as consequências econômicas geradas pela pandemia, significa priorizar alguns setores da economia portuguesa em detrimento dos avanços que o meio ambiente em Portugal conquistou, seja através de dispositivos constitucionais ou infraconstitucionais, sobretudo, sacrificando a qualidade de vida sadia e o equilíbrio ecológico a que todos têm direito conforme originalmente dispôs a Constituição Portuguesa de 1976 no artigo 66 n. 1, o qual também determinou a responsabilidade do Estado na prevenção e no controle da poluição e dos seus efeitos (artigo 66 n. 2).

Nesse sentido, pode-se considerar que diante do Decreto-Lei no. 62-A/2020 do dia 03 de setembro de 2020, o direito ambiental constitucional português encontra-se em risco de sofrer retrocessos que, a depender das situações oriundas da pandemia, terão consequências muito mais graves para o meio ambiente no país.

No que se refere à Angola, uma das medidas que passaram a vigorar durante a pandemia da Covid-19, foi a promulgação do Decreto Presidencial no. 117/20 de 22 de abril de 2020[13], que dispões sobre o Regulamento Geral de Impacto Ambiental e do Procedimento

[13] Decreto Presidencial 117/2020. (2020). Disponível em: https://angolaforex.com/2020/04/24/diario-da-republica-i-a-serie-n-o-54-de-22-de-abril-de-2020/. No. 54 SÉRIE I.

de Licenciamento Ambiental que revogou os Decreto de no. 59/07 de 13 de julho[14] e o Decreto no. 51/04 de 23 julho[15] sobre as mesmas matérias.

Ainda que se trate de variáveis de comparação distintas, a análise é importante por se tratar, tal como o Decreto-Lei no. 62-A/2020 promulgado em Portugal, de dispositivos que interferem diretamente nas questões ambientais e no Direito Ambiental desses países, de forma a verificar se tal como no contexto português, esse novo regulamento provoca retrocessos conquistados pelo Direito Ambiental Angolano.

A Avaliação de Impacto Ambiental surge na Europa através da Diretiva Comunitária (Diretiva do Conselho de 27 de Junho de 1985 (L 175/40 de 05 de Julho de 1985), onde estabeleceu a necessidade de avaliação de determinados projetos públicos ou privados que poderiam repercutir sobre o meio ambiente, sendo essa normativa acolhida em outras legislações[16], como foi o caso do Ordenamento Jurídico Angolano.

Com o advento do Decreto Presidencial no. 117/20, o Regulamento do Licenciamento Ambiental em Angola passou a ter novas regras relativas a Avaliação de Impacto no ambiente visando regular os procedimentos ambientais e administrativos relacionados à implementação de projetos destinados à exploração dos recursos naturais que possam ter impactos não somente ambientais, mas podem alcançar impactos sociais significativos.

A justificativa da revisão dos Diplomas Legais anteriores e promulgação desse novo Decreto é, segundo o legislador Angolano, o fato das Leis Regulamentadoras que estavam em vigor não se encontrarem ajustadas à realidade socioeconômica do país. Com isso, verificou-se a necessidade de adequar os requisitos, os critérios e os procedimentos administrativos com o objetivo de ajustar a exploração dos recursos naturais ao princípio da precaução e da prevenção relativas aos possíveis danos ambientais ao qual a natureza estaria sujeita, mesmo que tais princípios não se encontrem citados explicitamente no Decreto Presidencial no. 117/20.

O novo Decreto cria um "Sistema Integrado do Ambiente", uma plataforma tecnológica online na qual são submetidos os pedidos de licenciamento ambiental, que deverão ser analisados levando-se em consideração o impacto que as instalações de exploração terão no equilíbrio ecológico. Tal análise será de responsabilidade das autoridades ambientais locais que têm a obrigação de realizar uma pré-avaliação ambiental das atividades que possam ter impacto sobre o ambiente, ou seja, a liberação do licenciamento estará sujeita a um processo prévio de avaliação que observe o equilíbrio ecológico e a harmonia am-

[14] Regulamento Sobre o Licenciamento Ambiental, Decreto n.º 59/07 de 13 de Julho, publicado no Diário da República n.º 84, I (2007). Série Luanda.

[15] Regulamento sobre Avaliação de Impacte Ambiental, Decreto n.º 51/04, 23 de Julho, publicado no Diário da República, n.º 59, I (2004). Série Luanda.

[16] L. Rocha, *Legislação de avaliação de impacte ambiental: um estudo comparativo entre Portugal e Angola*, in *Praxis Archaeologica*, 4, 2009, pp. 7 and ff.

biental e social. Somente depois de todo o estudo prévio por parte de autoridades devidamente qualificadas, é que a Declaração de Conformidade Ambiental poderá ser expedida. Nesse sentido, também o novo Documento Legal prevê auditorias ambientais durante um ano, ficando os custos decorrentes da recuperação dos danos, sejam estes ambientais ou sociais sob a responsabilidade dos empreendedores da atividade, não estando nenhuma atividade que o Diploma abrange excluídas de auditoria, tendo o Setor do Ambiente, órgão do Departamento Ministerial a responsabilidade de emitir ou não as licenças, tendo também o poder de suspender a licença concedida em caso de violação das normas ambientais.

Outra justificativa para a promulgação do Decreto Presidencial é a necessidade de regularizar as instalações de exploração dos recursos naturais já existentes, bem como a responsabilização tanto civil quanto criminal dos responsáveis pelo empreendimento quando do descumprimento de quaisquer das normas prevista na Lei Regulamentadora, sendo punível com multas na moeda do país – Kwanzas – conforme a gravidade da transgressão, da culpa ou do nível de dano causado ao ambiente.

Um avanço do Direito Ambiental que pode ser observado nesse novo Decreto é o fato do legislador destinar 20% (vinte por cento) das receitas provenientes das multas pela violação da legislação em vigor para o Fundo do Ambiente, tendo também a Administração Local do Estado na figura dos Municípios o direito de obter receitas provenientes das multas, caso estas venham a ser aplicadas.

Observa-se então, que enquanto o governo Português de certa forma, priorizou a economia e deixa de lado o direito ambiental e as urgências das problemáticas ambientais, abandonando suas conquistas, sobretudo, as possibilidades de criar uma sociedade mais consciente no que tange ao uso de utensílios de plástico descartáveis, tão prejudiciais ao meio ambiente, o governo Angolano tornam os meios para a exploração de seus recursos naturais mais exigentes através do Decreto Presidencial 117/2020, na tentativa de conciliar as necessidades de recuperação econômica, que certamente será de grandes proporções para o país nos anos futuros, com um desenvolvimento pautado nos princípios da precaução e preservação do meio ambiente, assegurados na Constituição Angolana de 2010.

Conclusão

A pandemia da Covid-19 tem ocupado o centro das discussões do mundo acadêmico no âmbito das várias áreas das ciências tanto sociais, políticas quanto as jurídicas, incluindo nesta última, o Direito Constitucional e o Direito Ambiental que têm sido a base para a produção de leis infraconstitucionais que sejam capazes de enfrentar o momento pandêmico sem, contudo, promover retrocessos aos direitos positivados nos ordenamentos jurídicos construídos antes da chegada da tragédia pela qual passa todos os países do mundo, incluindo Portugal e Angola. Esperava-se que mesmo no contexto da Pandemia da Covid-19, a degradação ambiental continuasse a receber a devida atenção a que faz

jus, dado que o meio ambiente saudável e equilibrado é a certeza da sadia qualidade de vida e do equilíbrio ecológico.

Todavia, no que se refere a Portugal, a promulgação do Decreto-Lei no. 62-A/2020 coloca em dúvida se direitos ambientais antes conquistados e previstos na Constituição de 1976 não sofrerão retrocessos, dado que tal decreto posterga a entrada em vigor da Lei no. 76/ de 02 de setembro, que determina a não utilização e não disponibilização de louça de plástico de utilização única nos restaurantes e no uso de venda de bebidas em outros estabelecimentos. O referido Diploma traz a justificativa de que a pandemia da Covid-19 dificultou a possibilidade dos estabelecimentos comerciais que usam esses utensílios, em virtude das imposições do fechamento e da suspensão das atividades não tiveram condições para escoar a existência dos utensílios de plástico de única utilização, nem tempo para preparar a transição para o novo regime. O referido Diploma traz a justificativa de que a pandemia da Covid-19, dificultou a possibilidade dos estabelecimentos comerciais que usam esses utensílios, não terem condições de escoar a existência desses vasilhames descartáveis, em virtude das imposições do fechamento e da suspensão das atividades laborais tampouco, tempo para preparar a transição para o novo regime.

Assim, sacrificar os direitos ambientais adquiridos ao longo das últimas décadas, sejam estes direitos constitucionais ou infraconstitucionais poderá provocar um retrocesso no direito ambiental português e no trabalho de conscientização quanto ao uso de utensílios de plásticos descartáveis que causam grande desequilíbrio na natureza.

Porém, nem todos os países colocam a economia em patamar superior à necessidade de preservação ambiental, como é o caso de Angola, que mesmo enfrentando uma grave crise econômica em virtude da pandemia da Covid-19, sobretudo, por se tratar de um país do Sul do mundo, com a promulgação do Decreto Presidencial no. 117/2020 sobre as novas regras para a exploração dos recursos naturais angolanos, com teor mais exigentes, parece optar por conciliar o desenvolvimento econômico do país à necessidade de evitar a degradação ambiental respeitando os princípios da precaução e da prevenção positivados na Constituição de 2010.

Ao se fazer a análise desses dois Diplomas Legais, levando-se em consideração países do chamado primeiro mundo como é o caso de Portugal e do Sul do mundo, em se tratando de Angola, chega-se à conclusão que o enfrentamento da pandemia da Covid-19 certamente exige medidas drásticas na tentativa de minimizar as consequências impostas pelo contexto pandêmico, contudo, sacrificar o meio ambiente em detrimento das questões econômicas podem trazer retrocessos irreparáveis para direitos ambientais adquiridos e dado a gravidade da situação dificilmente encontrarão um caminho para se recuperarem dentro das urgências que também as questões ambientais têm exigido.

Referências bibliográficas

Amirante D., *L'ambiente preso sul serio. Il percorso accidentato del costituzionalismo ambientale*, in *Diritto pubblico comparato ed europeo*, 2019, p. 1-32.

Constituição da República Portuguesa. (2005). Diário da República, n. 155 – I Série – A.
Decreto-Lei n. 62-A/2020. (2020). N. 209 Série I – Disponível em: https://dre.pt/home/-/dre/141967954/details/maximized.
Decreto Presidencial 117/2020. (2020). Disponível em: https://angolaforex.com/2020/04/24/diario-da-republica-i-a-serie-n-o-54-de-22-de-abril-de-2020/. N. 54 SÉRIE I.
Diretiva (UE) 2019/904 do Parlamento Europeu e do Conselho de 5 de junho de 2019 relativa à redução do impacto de determinados produtos de plástico no ambiente (2019). L155/1- 12/06/2019.
Diretiva 2008/98/CE do Parlamento Europeu e do Conselho, de 19 de novembro de 2008, relativa aos resíduos e que revoga certas diretivas (JO L 312 de 22.11.2008, p. 3).
Eduardo M.S., dos Santos P.K., *Direito do Ambiente Angolano,* (Ubi Iuris 2018).
Konrad H, *A força normativa da Constituição* (Sérgio Antonio Farias 1991).
Lei Constitucional de Angola nº 12/91. (ANO) Diário da República, n.º 19, I Série, n.º 1,com as alterações da Lei de Revisão n.º 23/92, publicada no D.R.n.º38, I Série.
Lei Constitucional de Angola de 1992. (1992). Disponível em: http://cedis.fd.unl.pt/wp-content/uploads/2016/01/LEI-CONSTITUCIONAL-1992.pdf.
Leonor Rocha, *Legislação de avaliação de impacte ambiental: um estudo comparativo entre Portugal e Angola*, in *Praxis Arqueologia*, 2009, p. 7.
Regulamento Sobre o Licenciamento Ambiental, Decreto n.º 59/07 de 13 de Julho, publicado no Diário da República (2007). n.º 84, I Série Luanda.
Regulamento sobre Avaliação de Impacte Ambiental, Decreto n.º 51/04, 23 de Julho, publicado no Diário da República, n.º 59, I (2004). Série Luanda.

Section 3

Tax law

Edited by

Domingo Jesus Jiménez-Valladolid De L'Hotellerie-Fallois

Articles

Tax measures adopted due to the COVID-19 emergency. A general overview*

Domingo Jesús Jiménez-Valladolid De L'Hotellerie-Fallois**

Abstract

The health and economic crisis created by COVID-19 has posed some challenges to national tax systems. The primary reaction of Governments in terms of taxation was aimed at alleviating the consequences of lockdowns and restrictions. In this sense, most countries have adopted specific measures regarding tax procedures, postponing the submission of tax returns and the collection of tax debts. Nonetheless, there are other measures that have been adopted in the field of direct and indirect taxes that are relevant to support some economic sectors. Additionally, the measures adopted to fight COVID-19 have also had consequences in the application of tax treaties. In this report, I outline the main measures adopted by the eight participating countries and analyze the existing trends in the tax measures adopted by these jurisdictions in the fight against COVID-19.

Keywords

COVID-19 – Pandemic – Tax measures

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** Associate Professor of Tax Law. Autonomous University of Madrid.

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I. Introduction

On 11th March 2020, the World Health Organization (WHO) declared COVID-19 as a pandemic due to the rapid spread of cases and outbreaks around the world. Since then, almost all countries in the world have suffered the consequences of the COVID crisis in the last few months[1]. Currently, the number of deaths due to COVID has surpassed 2.5 million and the total number of cases is over 100 million[2].

Most European and American countries have suffered two waves of the pandemic. While the first wave was characterized by the rapid and sudden increase in cases and deaths, the second wave has shown a steadier rise in numbers. As countries faced the spread of the virus, Governments were required to adopt measures to stop or minimize transmission. Accordingly, during the first wave most countries opted for locking down their population. Lockdowns included educational and social activities and even economic activities in some countries for weeks or months. During the second wave, lockdowns have still been adopted by some countries, although, in most cases, they have not yet reached the intensity of those adopted during the first wave.

These measures have demanded rapid action from the Governments and legislators to adapt their legal systems to the responses against the virus, including modifications in

[1] World Health Organization, *WHO Director-General's opening remarks at the media briefing on COVID-19 – 11 March 2020* (2020) https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 accessed 25 February 2021.

[2] World Health Organization, *WHO Coronavirus Disease (COVID-19) Dashboard* (last updated 24 February 2021) (2021) <https://covid19.who.int/> accessed 25 February 2021.

the tax field. Most measures adopted during the first wave were aimed at softening the consequences of lockdowns in tax procedures, postponing tax returns, improving and facilitating digital administrative procedures and other procedures as well as fragmenting or postponing the collection of taxes in some cases. As well as these measures, there were other measures that were targeted towards the recovery of economic activities due to the hiatus created by lockdowns, and measures aimed to facilitate the distribution of medical equipment and other supplies. Most of these measures were temporary. Afterwards, the pressure for increasing public funds and the need to face the economic consequences of lockdowns have motivated the adoption of some measures in the form of, inter alia, new taxes in some countries.

In this report, I will introduce some of the measures that are detailed in the national reports from eight selected countries (Argentina, Brazil, Canada, Colombia, Germany, Portugal, Spain, and Uruguay) in order to compare those adopted by each jurisdiction. As it will be shown there is some degree of coincidence in the tax measures adopted during the first wave from a procedural perspective, while material tax measures show, as expected, greater disparities. In the report, I will first focus on procedural tax measures adopted as a result of the COVID pandemic, secondly, I will deal with some direct and indirect tax measures, thirdly, I will address some international tax aspects that have been raised by the measures adopted and, finally, I will make reference to some of the new initiatives that have been adopted or proposed to overcome the economic crisis created by the COVID pandemic.

Before commencing, I would like to outline the huge effort made by the national reports and express my gratitude. Additionally, the work carried out by the external reviewers who helped improve the reports must be also highlighted.

II. Procedural tax measures adopted due to the COVID pandemic

As stated before, since there was no effective medical treatment nor vaccines when the global pandemic started, the only effective solution relied on confining the population in order to reduce the transmission of the virus. As a consequence, most countries opted for locking down their population and putting a halt to some non-essential economic activities. That was the case in the eight countries covered by this report where Governments made use of specific powers granted by emergency legislation to confine the population

and halt economic activities in order to avoid the rapid spread of the virus among the population[3].

Due to the lockdowns most administrative and judicial procedures were totally or partially suspended. Therefore, most countries opted for suspending tax procedures, including tax audits, and extending deadlines for the submission of tax returns and other reporting obligations[4], these extensions also affected the statute of limitations with respect to tax debts and liabilities[5]. Actions to ensure the collection of taxes through embargoes and other collection methods were also postponed in most countries[6].

At the same time, most governments have promoted the digitalization of tax procedures, encouraging citizens to use electronic means to communicate with the tax administration or receive official notifications, as on-site assistance was cancelled or reduced significantly during the emergency period[7]. An interesting case of digitalization was that of Colombia, where the Government passed an Order which allowed virtual tax and accounting audits

[3] This is the case for example of Argentina (M. Solange Screpante and N. Rubiolo, *Tax measures and COVID-19: Argentina* (2021) OJC. Special issue 2020 – Covid 19, § II); Germany (M. von Jähnichen, *Fiscal measures to counteract the economic consequences of the COVID-19 pandemic in Germany* (2021) OJC. Special issue 2020 – Covid 19, § I); Portugal (J.F. Pinto Nogueira, *Tax reactions to the SARS-CoV-2/COVID-19 pandemic in Portugal* (2021) OJC. Special issue 2020 – Covid 19, §§ I-II.1); or Spain (F.D. Martínez Laguna, *Taxation and COVID-19: Spanish Report* (2021) OJC. Special issue 2020 – Covid 19, § I). Brazil constitutes a special case as these measures were within the local and regional authorities' jurisdiction and not the federal Government's. See M. Seabra de Godoi and F. de Oliveira Silveira, *National tax measures adopted in Brazil in response to the COVID-19 pandemic crisis* (2021) OJC. Special issue 2020 – Covid 19, § I. Additionally, Uruguay, which was the country that saw the lesser impact in the first wave, seemingly imposed no lockdown, although there was a general stay-at-home recommendation and compulsory isolation was imposed in some cases. Nevertheless, some economic sectors were put on halt during the emergency (A. Laura Riccardi Sacchi, *National tax measures adopted in response to COVID-19 crisis: Uruguay* (2021) OJC. Special issue 2020 – Covid 19, § I.2).

[4] There are examples of this trend in all countries. See the cases of Germany (M. von Jähnichen, *Fiscal measures to counteract the economic consequences of the COVID-19 pandemic in Germany* (2021) OJC. Special issue 2020 – Covid 19, § IV); Argentina (M. Solange Screpante and N. Rubiolo, *Tax measures and COVID-19: Argentina* (2021) OJC. Special issue 2020 – Covid 19, § V); Brazil (M. Seabra de Godoi and F. de Oliveira Silveira, *National tax measures adopted in Brazil in response to the COVID-19 pandemic crisis* (2021) OJC. Special issue 2020 – Covid 19, §§ IV.1-IV.3); Canada (K. Haghgouyan, *Canada and Covid-19: Canadian tax measures adopted in response to the COVID-19 crisis* (2021) OJC. Special issue 2020 – Covid 19, § IV); Colombia (C.C. Rodríguez Peña and O.S. Cabrera Cabrera, *Tax measures implemented in Colombia during the health and economic emergency triggered by COVID-19* (2021) OJC. Special issue 2020 – Covid 19, §§ VI-VII); Portugal (J.F. Pinto Nogueira, *Tax reactions to the SARS-CoV-2/COVID-19 pandemic in Portugal* (2021) OJC. Special issue 2020 – Covid 19, §§ IV.3-VI.5); Spain (F.D. Martínez Laguna, *Taxation and COVID-19: Spanish Report* (2021) OJC. Special issue 2020 – Covid 19, § IV); and Uruguay (A. Laura Riccardi Sacchi, *National tax measures adopted in response to COVID-19 crisis: Uruguay* (2021) OJC. Special issue 2020 – Covid 19, § II.3).

[5] See the example of Spain (F.D. Martínez Laguna, *Taxation and COVID-19: Spanish Report* (2021) OJC. Special issue 2020 – Covid 19, § IV).

[6] Argentina, Portugal, and Brazil, for example, adopted interesting provisions in this field. See M. Solange Screpante and N. Rubiolo, *Tax measures and COVID-19: Argentina* (2021) OJC. Special issue 2020 – Covid 19, § V; J.F. Pinto Nogueira, *Tax reactions to the SARS-CoV-2/COVID-19 pandemic in Portugal* (2021) OJC. Special issue 2020 – Covid 19, § IV.5; and M. Seabra de Godoi and F. de Oliveira Silveira, *National tax measures adopted in Brazil in response to the COVID-19 pandemic crisis* (2021) OJC. Special issue 2020 – Covid 19, § IV.4.

[7] See, for example, the cases of Uruguay (A. Laura Riccardi Sacchi, *National tax measures adopted in response to COVID-19 crisis: Uruguay* (2021) OJC. Special issue 2020 – Covid 19, § II.3) and Portugal (J.F. Pinto Nogueira, *Tax reactions to the SARS-CoV-2/COVID-19 pandemic in Portugal* (2021) OJC. Special issue 2020 – Covid 19, § IV.7).

during the period of national emergency. However, this Order was struck down by the Colombian Constitutional Court due to its lack of justification[8].

From the taxpayers' perspective, most countries allowed taxpayers to comply with their obligations at a later date without incurring additional penalties or fines or to split or fraction their payments[9]. In some cases, e.g., in Germany, the legislator has exempted those taxpayers who had suffered serious effects as a result of the pandemic from making advance payments or reduced their amount accordingly[10]. Other countries, such as Portugal, opted to anticipate tax reimbursements as a mechanism for providing businesses and taxpayers with some liquidity to counter the economic effects of the pandemic[11]. Interestingly, in the case of Portugal, the Government passed a decree which set out specific cases of force majeure in order to justify non-compliance with tax obligations[12].

III. Direct taxes

III.1. Corporate income tax

Most countries did not adopt significant changes on their corporate income taxes due to the COVID-19 pandemic. As in the case of individuals, Governmental support has not been articulated using the tax system, instead subsidies and other direct payments have been introduced[13]. Additionally, some countries approved exemptions from social security contributions by enterprises whose activities were affected by the halt on economic activities[14]. An extraordinary measure approved by some countries, such as Germany or Argentina, provided for a subsidy of some salary payments to employees of enterprises affected

[8] C.C. Rodríguez Peña and O.S. Cabrera Cabrera, *Tax measures implemented in Colombia during the health and economic emergency triggered by COVID-19* (2021) OJC. Special issue 2020 – Covid 19, § VII.

[9] See, for instance, the cases of Canada (K. Haghgouyan, *Canada and Covid-19: Canadian tax measures adopted in response to the COVID-19 crisis* (2021) OJC. Special issue 2020 – Covid 19, § IV.1) or Uruguay (A. Laura Riccardi Sacchi, *National tax measures adopted in response to COVID-19 crisis: Uruguay* (2021) OJC. Special issue 2020 – Covid 19, § II.3) as examples of this approach.

[10] M. von Jähnichen, *Fiscal measures to counteract the economic consequences of the COVID-19 pandemic in Germany* (2021) OJC. Special issue 2020 – Covid 19, § IV.2.

[11] J.F. Pinto Nogueira, *Tax reactions to the SARS-CoV-2/COVID-19 pandemic in Portugal* (2021), OJC. Special issue 2020 – Covid 19, § IV.6.

[12] J.F. Pinto Nogueira, *Tax reactions to the SARS-CoV-2/COVID-19 pandemic in Portugal* (2021), OJC. Special issue 2020 – Covid 19, § IV.2.

[13] The best examples of this approach are found in Germany (M. von Jähnichen, *Fiscal measures to counteract the economic consequences of the COVID-19 pandemic in Germany* (2021) OJC. Special issue 2020 – Covid 19, § II.3.1) and Canada (K. Haghgouyan, *Canada and Covid-19: Canadian tax measures adopted in response to the COVID-19 crisis* (2021) OJC. Special issue 2020 – Covid 19, §§ I-II).

[14] This is the case of Argentina (M. Solange Screpante and N. Rubiolo, *Tax measures and COVID-19: Argentina* (2021) OJC. Special issue 2020 – Covid 19, § III.3) or Brazil (M. Seabra de Godoi and F. de Oliveira Silveira, *National tax measures adopted in Brazil in response to the COVID-19 pandemic crisis* (2021) OJC. Special issue 2020 – Covid 19, § II.2).

by the pandemic[15]. Nonetheless, some countries have adopted specific tax measures aimed at providing specific support for small and medium sized enterprises in the context of corporate taxation. Most countries provided for a deferral or fractioning of advance payments by enterprises in economic difficulties due to the pandemic[16].

Nonetheless, some countries have implemented specific tax measures for enterprises to overcome the crisis. In Portugal, Brazil, and Spain, for instance, donations to public or private health institutions and the public treasury were promoted via an increased deduction of the donation on the donor's corporate income tax[17]. Similarly, investment in research activities was promoted through an extraordinary tax credit in Portugal[18]. In the case of Argentina, a subjective exemption for the Argentinean Red Cross on its payments aimed at promoting development in the context of the pandemic was adopted[19]. Some countries set out some benefits for specific economic activities that were especially affected by lockdowns. This is the case of the aeronautical sector in Colombia that benefited from a specific investment regime when making large investments[20]. Again, Germany has implemented some extraordinary measures in this field, such as incrementing the limit of deductible financial expenses or widening the scope of loss carryback and carryforward rules[21].

III.2. Personal income taxes

As in the case of corporate income taxes, personal income taxation has not been significantly modified because of the pandemic. Most measures adopted due to the pandemic imply deferral or fragmentation of advance payments or other prepayments. Some examples of extraordinary measures imply the exemption of some salary payments, as in the

[15] M. von Jähnichen, *Fiscal measures to counteract the economic consequences of the COVID-19 pandemic in Germany* (2021) OJC. Special issue 2020 – Covid 19, § II.2.1; M. Solange Screpante and N. Rubiolo, *Tax measures and COVID-19: Argentina* (2021) OJC Special issue 2020 – Covid 19, § III.4.

[16] Colombia and Spain have implemented interesting (temporary) rules in this respect. C.C. Rodríguez Peña and O.S. Cabrera Cabrera, *Tax measures implemented in Colombia during the health and economic emergency triggered by COVID-19* (2021) OJC. Special issue 2020 – Covid 19, § I.1; F.D. Martínez Laguna, *Taxation and COVID-19: Spanish Report* (2021) OJC. Special issue 2020 – Covid 19, § II.

[17] See M. Seabra de Godoi and F. de Oliveira Silveira, *National tax measures adopted in Brazil in response to the COVID-19 pandemic crisis* (2021) OJC. Special issue 2020 – Covid 19, § II.3; J.F. Pinto Nogueira, *Tax reactions to the SARS-CoV-2/COVID-19 pandemic in Portugal* (2021), OJC. Special issue 2020 – Covid 19, §II.3; or F.D. Martínez Laguna, *Taxation and COVID-19: Spanish Report* (2021) OJC. Special issue 2020 – Covid 19, § II.

[18] J.F. Pinto Nogueira, *Tax reactions to the SARS-CoV-2/COVID-19 pandemic in Portugal* (2021), OJC. Special issue 2020 – Covid 19, § II.3.

[19] M. Solange Screpante and N. Rubiolo, *Tax measures and COVID-19: Argentina* (2021) OJC. Special issue 2020 – Covid 19, § III.3.

[20] C.C. Rodríguez Peña and O.S. Cabrera Cabrera, *Tax measures implemented in Colombia during the health and economic emergency triggered by COVID-19* (2021) OJC. Special issue 2020 – Covid 19, § I.1.

[21] M. von Jähnichen, *Fiscal measures to counteract the economic consequences of the COVID-19 pandemic in Germany* (2021) OJC. Special issue 2020 – Covid 19, §§ II.3.2-II.3.3.

case of Germany or Brazil[22]. In both cases, a limited salary payment is exempted from the personal income tax of the employees but remain deductible at an enterprise level. A specific measure to exempt income earned by healthcare and other essential workers on extraordinary shifts was approved in Argentina[23]. Some subsidy payments as in the case of Canada are also exempt from income tax[24]. The Portuguese Government made pension plan withdrawals that were justified by needs derived from the pandemic exempt from tax. These withdrawals would otherwise be taxed ordinarily[25].

In the case of Colombia, a specific tax on public servants and other public employees' salaries was created to contribute to the fight against COVID-19. This tax, however, was considered contrary to the equality principle by the Colombian Constitutional Court and the payments made by public servants and public employees were considered as advance payments of their personal income tax[26]. On the other hand, a similar tax was imposed on Uruguayan public employees and public servants as well as on pension holders in order to contribute to a specific fund to fight against COVID-19[27]. Finally, the Spanish Government also approved some measures to adapt taxation on self-employed individuals and entrepreneurs to the halt on economic activities derived from the lockdown[28]. Interestingly, Spanish tax authorities have issued some rulings on the effects of lockdowns on current tax rules[29].

III.3. Other direct taxes

Only a few countries have wealth taxes. This is the case in Colombia, Argentina, and Spain. Only Argentina has issued specific rules in the context of this tax due to the pandemic. In this case, the Argentinean Government decided to postpone the application of a specific

[22] M. Seabra de Godoi and F. de Oliveira Silveira, *National tax measures adopted in Brazil in response to the COVID-19 pandemic crisis* (2021) OJC. Special issue 2020 – Covid 19, § II.1; M. von Jähnichen, *Fiscal measures to counteract the economic consequences of the COVID-19 pandemic in Germany* (2021), OJC. Special issue 2020 – Covid 19, § II.2.1.

[23] M. Solange Screpante and N. Rubiolo, *Tax measures and COVID-19: Argentina* (2021) OJC. Special issue 2020 – Covid 19, § III.3.

[24] K. Haghgouyan, *Canada and Covid-19: Canadian tax measures adopted in response to the COVID-19 crisis* (2021) OJC. Special issue 2020 – Covid 19, § I.

[25] J.F. Pinto Nogueira, *Tax reactions to the SARS-CoV-2/COVID-19 pandemic in Portugal* (2021), OJC. Special issue 2020 – Covid 19, § II.2.

[26] C.C. Rodríguez Peña and Omar Sebastián Cabrera Cabrera, *Tax measures implemented in Colombia during the health and economic emergency triggered by COVID-19* (2021) OJC. Special issue 2020 – Covid 19, § I.2.

[27] A. Laura Riccardi Sacchi, *National tax measures adopted in response to COVID-19 crisis: Uruguay* (2021) OJC. Special issue 2020 – Covid 19, § II.1.

[28] F.D. Martínez Laguna, *Taxation and COVID-19: Spanish Report* (2021) OJC. Special issue 2020 – Covid 19, § II.

[29] F.D. Martínez Laguna, *Taxation and COVID-19: Spanish Report* (2021) OJC. Special issue 2020 – Covid 19, § II.

regime to the repatriation of foreign assets held abroad[30]. Other countries, such as Colombia, only postposed the deadline for the submission of wealth tax returns[31].

IV. Value added taxes and other indirect taxes

Measures in the field of indirect taxation have also been diverse among countries. Some countries have reduced or exempted the purchase of some goods related to the healthcare and medical sector. In addition to this, other countries have also adopted specific measures to facilitate the importation of some medical equipment and goods exempting them from custom duties. Nonetheless, there is no clear pattern in this field aside from the postponement of tax return submissions and the eventual extension of payment periods[32], except for Argentina[33], Only Germany adopted a general rule in the case of VAT, reducing the VAT rate for a limited period with the objective of reducing costs for final clients or customers in the purchase of goods and services[34].

For instance, Spain and Portugal reduced the VAT rate for some individual protection masks and lowered this tax rate to zero for some medical equipment purchases made by public and private hospitals, as well as other sectors in the case of Portugal. This measure reduced the costs of purchasing these pieces of equipment while it maintained the deductibility of output VAT[35]. Brazilian and Uruguayan Governments also reduced the VAT and other import tax rates on medical and healthcare goods. This reduction also applied, in the case of Brazil, to the Tax on Financial Transactions that was lowered to zero in some cases to facilitate the access to credit[36]. In the case of Uruguay, the Government approved the extension of the suspension regime on duties to support the export sector[37]. Other sectors

[30] M. Solange Screpante and N. Rubiolo, *Tax measures and COVID-19: Argentina* (2021) OJC. Special issue 2020 – Covid 19, § III.2.

[31] C.C. Rodríguez Peña and O.S. Cabrera Cabrera, *Tax measures implemented in Colombia during the health and economic emergency triggered by COVID-19* (2021) OJC. Special issue 2020 – Covid 19, § VI.1.

[32] See, for instance, the cases of Colombia (C.C. Rodríguez Peña and O.S. Cabrera Cabrera, *Tax measures implemented in Colombia during the health and economic emergency triggered by COVID-19* (2021) OJC. Special issue 2020 – Covid 19, § II.1) or Uruguay (A. Laura Riccardi Sacchi, *National tax measures adopted in response to COVID-19 crisis: Uruguay* (2021) OJC. Special issue 2020 – Covid 19, § II.2).

[33] M. Solange Screpante and N. Rubiolo, *Tax measures and COVID-19: Argentina* (2021) OJC. Special issue 2020 – Covid 19, § IV.

[34] M. von Jähnichen, *Fiscal measures to counteract the economic consequences of the COVID-19 pandemic in Germany* (2021) OJC. Special issue 2020 – Covid 19, § III.1.

[35] F.D. Martínez Laguna, *Taxation and COVID-19: Spanish Report* (2021) OJC. Special issue 2020 – Covid 19, § III; J.F. Pinto Nogueira, *Tax reactions to the SARS-CoV-2/COVID-19 pandemic in Portugal* (2021), OJC. Special issue 2020 – Covid 19, § III.2.

[36] M. Seabra de Godoi and F. de Oliveira Silveira, *National tax measures adopted in Brazil in response to the COVID-19 pandemic crisis* (2021) OJC. Special issue 2020 – Covid 19, § III.

[37] A. Laura Riccardi Sacchi, *National tax measures adopted in response to COVID-19 crisis: Uruguay* (2021) OJC. Special issue 2020 – Covid 19, § II.2.

affected by the COVID-19 emergency were also supported through the reduction of VAT, such as tourism in the case of Portugal[38].

A special case was Colombia, whose Government adopted measures to reduce the impact of COVID-19, including the reduction or exemption of VAT on the purchases of medical supplies and equipment[39], and measures aimed at restarting the economy. Among these measures, there are exemptions on VAT for internet and other communication services, donations of clothing and other products for people in need, as well as the exemptions on the electrical surcharge applicable to some businesses related to tourism and the banking tax on some withdrawals[40].

V. International taxation

The international tax consequences of measures adopted in the fight against COVID-19 have not been specifically addressed by most countries, even though the OECD has issued some guidance on the implications of lockdowns and restrictions on tax treaties based on the OECD Model Tax Convention[41]. In this respect, from the national reports, there are three main aspects that might be primarily affected by lockdowns: the computation of presence in a country for the purposes of tax residence, whether the presence of workers in a country due to the lockdown might create a permanent establishment and the taxation of cross-border workers confined due to the lockdown.

The main trend among OECD member states, such as Canada, Germany, and Portugal, is to accept OECD's guidance[42]. Non-OECD members, such as Argentina, would seemingly accept the OECD's view when applying tax treaties[43]. Nevertheless, Spanish tax authorities, for the purposes of the domestic concept of residence, departed from the OECD's view and paid attention to the physical presence of individuals in Spanish territory irrespective

[38] J.F. Pinto Nogueira, *Tax reactions to the SARS-CoV-2/COVID-19 pandemic in Portugal* (2021), OJC. Special issue 2020 – Covid 19, § III.2.

[39] C.C. Rodríguez Peña and O.S. Cabrera Cabrera, *Tax measures implemented in Colombia during the health and economic emergency triggered by COVID-19* (2021) OJC. Special issue 2020 – Covid 19, § II.1.

[40] C.C. Rodríguez Peña and O.S. Cabrera Cabrera, *Tax measures implemented in Colombia during the health and economic emergency triggered by COVID-19* (2021) OJC. Special issue 2020 – Covid 19, §§ II.2-III.

[41] OECD, *OECD Policy Responses to Coronavirus (COVID-19). OECD Secretariat analysis of tax treaties and the impact of the COVID-19 crisis* (updated 3 April 2020) (2020) <https://www.oecd.org/coronavirus/policy-responses/oecd-secretariat-analysis-of-tax-treaties-and-the-impact-of-the-covid-19-crisis-947dcb01/> accessed 25 February 2021.

[42] K. Haghgouyan, *Canada and Covid-19: Canadian tax measures adopted in response to the COVID-19 crisis* (2021) OJC. Special issue 2020 – Covid 19, § III; M. von Jähnichen, *Fiscal measures to counteract the economic consequences of the COVID-19 pandemic in Germany* (2021) OJC. Special issue 2020 – Covid 19, § V.2; J.F. Pinto Nogueira, *Tax reactions to the SARS-CoV-2/COVID-19 pandemic in Portugal* (2021), OJC. Special issue 2020 – Covid 19, § V.

[43] M. Solange Screpante and N. Rubiolo, *Tax measures and COVID-19: Argentina* (2021) OJC. Special issue 2020 – Covid 19, § VI.

of their intention to be in Spain due to the lockdown[44]. Although not necessarily linked to the COVID-19 crisis, Uruguay adopted a new concept of tax residence and a specific tax regime for inpatriate workers[45].

On the other hand, domiciles of workers of a nonresident company who are confined and, therefore, working from there, will not likely constitute a permanent establishment of their enterprises in Canada, Argentina, or Germany[46]. Finally, taxation of cross-border workers has only been addressed specifically in the case of Germany, which has signed specific temporary agreement with neighboring countries to address the tax consequences of lockdowns and restrictions on cross-border workers[47].

VI. Prospective taxes and proposed tax measures in the post-COVID-19 age

Adoption of new taxes due to the COVID-19 crisis is a reality in some countries. The best examples of this approach are found in Spain and Portugal whose Governments have recently adopted new taxes after the pandemic. Nonetheless, it should be noted that these taxes might have been adopted in absence of the pandemic, specifically in the case of Spain as the new taxes have their origin in European Commission proposals[48]. In the case of Portugal, the new tax is a surcharge on banks justified by solidarity[49]. On the other hand, Spain has approved two new taxes after the pandemic started: a Financial transaction tax and a digital services tax[50]. The adoption of these taxes was debated before the pandemic started, but it might have been the decisive point for their adoption.

Other countries are currently debating the adoption of new taxes, such as a tax on large fortunes in Argentina and a financial transaction tax in the case of Brazil[51]. It is worth not-

[44] F.D. Martínez Laguna, *Taxation and COVID-19: Spanish Report* (2021) OJC. Special issue 2020 – Covid 19, § V.

[45] A. Laura Riccardi Sacchi, *National tax measures adopted in response to COVID-19 crisis: Uruguay* (2021) OJC. Special issue 2020 – Covid 19, § II.4.

[46] M. von Jähnichen, *Fiscal measures to counteract the economic consequences of the COVID-19 pandemic in Germany* (2021) OJC. Special issue 2020 – Covid 19, § V.2; K. Haghgouyan, *Canada and Covid-19: Canadian tax measures adopted in response to the COVID-19 crisis* (2021) OJC. Special issue 2020 – Covid 19, § III.1; M. Solange Screpante and N. Rubiolo, *Tax measures and COVID-19: Argentina* (2021) OJC. Special issue 2020 – Covid 19, § VI.2.

[47] M. von Jähnichen, *Fiscal measures to counteract the economic consequences of the COVID-19 pandemic in Germany* (2021) OJC. Special issue 2020 – Covid 19, § V.3.

[48] European Commission, *Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax (COM (2013) 71 final)* (2013); European Commission, *Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services (COM (2018) 148 final)* (2018).

[49] J.F. Pinto Nogueira, *Tax reactions to the SARS-CoV-2/COVID-19 pandemic in Portugal* (2021), OJC. Special issue 2020 – Covid 19, § III.4.

[50] F.D. Martínez Laguna, *Taxation and COVID-19: Spanish Report* (2021) OJC. Special issue 2020 – Covid 19, § VI.

[51] M. Solange Screpante and N. Rubiolo, *Tax measures and COVID-19: Argentina* (2021) OJC. Special issue 2020 – Covid 19, § VII; M. Seabra de Godoi and F. de Oliveira Silveira, *National tax measures adopted in Brazil in response to the*

ing that in Canada there is a debate on the adoption of new taxes and modifying existing taxes to raise revenue to face the increased public expenses derived from the COVID-19 crisis. In this regard, there is an open debate on the adoption of a wealth tax or modifying tax rates and the tax treatment of some items of income[52]. Nonetheless, as the Canadian reporter points out, in this scenario this might be the opportunity to go further into the OECD proposals on the fight against international tax avoidance and international tax planning[53].

VII. Concluding remarks

Tax systems have not been extensively modified by the pandemic, at least in the first wave. The main tax measures adopted by countries after the outbreak of the pandemic were related to the postponement of tax returns and payments due to lockdowns and restrictions. Also, tax procedures and other timing issues, such as the computation for the statute of limitations, were suspended during lockdowns.

From a material perspective, there is no clear trend in the adoption of tax measures in the context of the fight against COVID-19 or the restarting of economies. Although some countries have implemented some limited tax benefits for specially affected sectors, such as tourism or the healthcare sector, there is no clear pattern in the adoption of direct or indirect tax measures. Neither are examples of general tax measures, apart from the temporary reduction of the VAT rate in Germany.

The international tax consequences of lockdowns and restrictions have not sparked the attention of Governments, at least in the present situation. Nonetheless, the OECD guidance in this field might provide a more homogeneous approach to these issues.

Finally, the COVID-19 crisis has also created the opportunity for legislators and Governments to approve new taxes and to modify their approaches and interpretation of some rules. However, this has been done in the context of specific powers granted to Governments and, in some cases, the approval of specific rules in the context of the emergency might have led to a violation of our basic principles of tax legislation[54].

COVID-19 pandemic crisis (2021) OJC. Special issue 2020 – Covid 19, § V.

[52] K. Haghgouyan, *Canada and Covid-19: Canadian tax measures adopted in response to the COVID-19 crisis* (2021) OJC. Special issue 2020 – Covid 19, § V.

[53] K. Haghgouyan, *Canada and Covid-19: Canadian tax measures adopted in response to the COVID-19 crisis* (2021) OJC. Special issue 2020 – Covid 19, § V.

[54] See the critical approach to some of the measures adopted in the context of the emergency by the Portuguese Government in J.F. Pinto Nogueira, *Tax reactions to the SARS-CoV-2/COVID-19 pandemic in Portugal* (2021), OJC. Special issue 2020 – Covid 19, § VII.

Articles

Canada and Covid-19: Canadian tax measures adopted in response to the COVID-19 crisis

Khashayar Haghgouyan*

Abstract

The following report summarizes the most salient tax measures adopted by the government of Canada in response to the COVID-19 crisis. These measures target both individuals and businesses in an effort to alleviate the dire economic consequences of the COVID-19 pandemic on the lives of Canadians. The last section of the report briefly considers some of the prospective fiscal avenues available to help the Canadian economy recover from this unprecedented worldwide crisis.

Keywords

COVID-19 – Canadian tax measures – The Canada Emergency Response Benefit – The Canada Emergency Wage Subsidy, international income tax issues relating to COVID-19 – Canadian economy

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* Adjunct professor, Faculty of Law, Université Laval.

Introduction

Much like elsewhere on the planet, the COVID-19 pandemic has had a profound impact on the Canadian economy, leading it into a recession.

Since the initial outbreak, Canada has announced numerous financial and tax measures in an effort to alleviate the dire economic consequences of the COVID-19 pandemic. In addition to extending certain tax filing and payment deadlines, Canada has provided a variety of financial measures for Canadian individuals and businesses affected by the COVID-19 outbreak.

While these measures, first announced on March 18, 2020 as part of an initial $82-billion aid package and further reinforced and improved over time, were by definition temporary, many of them remain in force as of today.

The purpose of this report is to depict a panoramic overview of the tax measures adopted by Canada in response to the COVID-19 crisis, as well as to provide some insights on the

prospective tax measures intended to help Canadian economy recover from this world-wide crisis[1].

I. Measures with respect to individuals

I.1. Canada Emergency Student Benefit (CESB)

• Available between May 10th and August 29th, 2020

The Canada Emergency Student Benefit (CESB) provided financial support to post-secondary students, and recent post-secondary and high school graduates who were unable to find work due to COVID-19.

Applicants received $1,250 for a 4-week period for a maximum of 16 weeks, between May 10 and August 29, 2020.

Applicants could also get an extra $750 (total benefit amount of $2,000) for each 4-week period, if they had a disability or dependants.

I.2. The Canada Emergency Response Benefit (CERB)

• Available between March 15th and September 26th, 2020.

The Canada Emergency Response Benefit (CERB) gives financial support to employed and self-employed Canadians who are directly affected by COVID-19.

For CERB purposes, a worker is any person aged 15 or more, who is a resident of Canada and who, for the 2019 calendar year or in the twelve (12) months preceding the date on which the worker files the CERB claim, earned at least $5,000 in income. The income must have come from one or several of the following sources:

- employment;
- self-employment;
- benefits paid under the Employment Insurance Act;
- allowances, money or other benefits paid to the person under a provincial plan because of pregnancy or in respect of the care by the person of one or more of their newborn children or one or more children placed with them for the purpose of adoption.

To be eligible, applicants must attest they: did not quit their job voluntarily, have stopped working or are working reduced hours due to COVID-19, and are earning less than $1,000 in employment or self-employment income.

An eligible worker can receive $2,000 for a 4-week period (the same as $500 a week).

[1] Since Canada is a federation, all Canadian provinces also initiated emergency measures in response to the virus outbreak. This report focuses solely on tax measures initiated at the federal level. Furthermore, it does not claim to be exhaustive.

An applicant may can apply for a maximum of 7 periods (28 weeks).

I.3. Modifications to the Employment Insurance (EI) program

• Available between September 27th, 2020 and September 25th, 2021.

Temporary changes to the Employment Insurance (EI) program to broaden the coverage of the program.

Under these new rules, an individual may be eligible for EI if she/he:

- was employed for at least 120 insurable hours in the past 52 weeks;
- received the CERB, the 52 weeks period to accumulate insured hours will be extended;
- stopped working through no fault of her/his own;
- has not quit the job voluntarily;
- is ready, willing and capable of working each day (EI regular benefits);
- is temporarily unable to work while caring for someone else or herself/himself (EI maternity, parental, sickness, compassionate care, and family caregiver benefits).

An eligible person for EI benefits, will receive a minimum taxable benefit at a rate of $500 per week, or $300 per week for extended parental benefits.

Individuals not eligible for EI benefits, may be eligible for the following benefits, discussed below:

- Canada Recovery Benefit (CRB);
- Canada Recovery Sickness Benefit (CRSB);
- Canada Recovery Caregiving Benefit (CRCB).

I.4. Canada Recovery Benefit (CRB)

• Available between September 27th, 2020 and September 25th, 2021.

The Canada Recovery Benefit (CRB) gives income support to employed and self-employed individuals who are directly affected by COVID-19 and are not entitled to Employment Insurance (EI) benefits.

To be eligible for the CRB, the individual must either not be employed or self-employed for reasons related to COVID-19, or she/he has had a 50% reduction in the average weekly income compared to the previous year due to COVID-19.

The applicant did not apply for or receive any of the following for the same period:

- Canada Recovery Sickness Benefit (CRSB);
- Canada Recovery Caregiving Benefit (CRCB);
- short-term disability benefits;
- workers' compensation benefits;
- Employment Insurance (EI) benefits;
- Québec Parental Insurance Plan (QPIP) benefits.

An eligible worker can receive $1,000 ($900 after taxes withheld) for a 2-week period.

An applicant may can apply for a maximum of 13 periods (26 weeks).

I.5. Canada Recovery Caregiving Benefit (CRCB)

• Available between September 27th, 2020 and September 25th, 2021

The Canada Recovery Caregiving Benefit (CRCB) gives income support to employed and self-employed individuals who are unable to work because they must care for their child under 12 years old or a family member who needs supervised care. This applies if their school, regular program or facility is closed or unavailable to them due to COVID-19, or because they are sick, self-isolating, or at risk of serious health complications due to COVID-19.

To be eligible for the CRCB, the applicant must meet all the following conditions for the 1-week period:

a) The applicant is unable to work at least 50% of the scheduled work week because she/he is caring for a family member;

b) The person cared for is a child under 12 years old or a family member who needs supervised care because they are at home for **one of the following reasons**:
   - Their school, daycare, day program, or care facility is closed or unavailable to them due to COVID-19;
   - Their regular care services are unavailable due to COVID-19;
   - The person under the care is:
     - sick with COVID-19 or has symptoms of COVID-19;
     - at risk of serious health complications if they get COVID-19, as advised by a medical professional;
- self-isolating due to COVID-19.

c) The applicant did not apply for or receive any of the following for the same period:
   - Canada Recovery Benefit (CRB);
   - Canada Recovery Sickness Benefit (CRSB);
   - short-term disability benefits;
   - workers' compensation benefits;
   - Employment Insurance (EI) benefits;
   - Québec Parental Insurance Plan (QPIP) benefits.

An eligible applicant can receive $500 ($450 after taxes withheld) for a 1-week period.

An applicant may can apply for a maximum of 26 weeks.

I.6. Canada Recovery Sickness Benefit (CRSB)

• Available between September 27th, 2020 and September 25th, 2021

The Canada Recovery Sickness Benefit (CRSB) gives income support to employed and self-employed individuals who are unable to work because they are sick or need to self-isolate due to COVID-19, or have an underlying health condition that puts them at greater risk of getting COVID-19.

To be eligible for the CRSB, the applicant must meet all the following conditions for the 1-week period:

a) The applicant is unable to work at least 50% of your scheduled work week because she/he is self-isolating for one of the following reasons:
   - Is sick with COVID-19 or may have COVID-19;
   - Is advised to self-isolate due to COVID-19;

- Has underlying health condition that puts you at greater risk of getting COVID-19.

b) The applicant did not apply for or receive any of the following for the same period:
   - Canada Recovery Benefit (CRB);
   - Canada Recovery Caregiving Benefit (CRCB);
   - short-term disability benefits;
   - workers' compensation benefits;
   - Employment Insurance (EI) benefits;
   - Québec Parental Insurance Plan (QPIP) benefits.

An eligible applicant can receive $500 ($450 after taxes withheld) for a 1-week period. An applicant may can apply for a maximum of 26 weeks.

I.7. Other measures targeting individuals

Many other measures were put in place by the Canadian government to help individuals face the economic challenges caused by the COVID-19; the salient measures are the following:

a. A mortgage payment deferral program of up to six months for helping homeowners facing financial hardship;
b. A one-time, tax-free, non-reportable payment of $600 to help Canadians with disabilities who are recipients of any of the following programs or benefits:
   - holders of a valid Disability Tax Credit certificate,
   - beneficiaries as at July 1, 2020 of:
     - Canada Pension Plan Disability;
     - Quebec Pension Plan Disability Pension;
     - Disability supports provided by Veterans Affairs Canada.
c. An increase in the Canada Child Benefit: Payments for the 2019–20-year were increased by $300 per child;
d. Changes to the Canada Student Loans Program to allow more students to qualify for support and be eligible for greater amounts.
e. Temporarily extending the Guaranteed Income Supplement and Allowance payments to ensure that the most vulnerable seniors continue to receive their benefits when they need them the most.

In summary, the Canadian tax measures targeting individuals have been broad, swift and generous, dictated by the goal to help households overcome the harsh financial burden caused by the virus outbreak. Since these measures were promulgated in an expedite manner, it would be both facile and unfair to overly criticize them for their lack of technical perfection.

Nonetheless, the government's decision not withhold tax at source for the payments made pursuant to CERB program has been a source of unnecessary stress on recipients of such amounts, and could have been avoided. Indeed, since the CERB payments are taxable under the Canadian tax law, such recipients may have to reimburse a portion of the gross amounts received depending on their marginal tax rate.

It would have been judicious to withhold at source a portion of the CERB payments as is the case with amounts received through the CRB, the CRSB and the CRCB. Indeed, as explained above, these three programs provide for a 10% withholding tax.

II. Measures with respect to businesses

II.1. The Canada Emergency Wage Subsidy (CEWS)

The Canada Emergency Wage Subsidy (CEWS) is a subsidy that was initially available for a period of twelve weeks, from March 15, 2020 to June 6, 2020, that provides a subsidy of 75% of eligible remuneration, paid by an eligible entity (eligible employer) that qualifies, to each eligible employee – up to a maximum of $847 per week.

For the purposes of the CEWS, an eligible employer means:

- a corporation or a trust, other than a corporation or a trust that is exempt from tax under Part I of the Income Tax Act or is a public institution (see Q3-01);
- an individual other than a trust;
- a registered charity (other than a public institution);
- a person that is exempt from tax under Part I of the Act (other than a public institution), that is:
  - an agricultural organization;
  - a board of trade or a chamber of commerce;
  - a non-profit corporation for scientific research and experimental development;
  - a labour organization or society;
  - a benevolent or fraternal benefit society or order; and
  - a non-profit organization;
- a partnership, each member of which is a person or partnership described in this list;
- a prescribed organization, including certain Indigenous businesses.

For the first sixteen weeks (from March 15, 2020 to July 4, 2020), eligible employers, such as business owners, that see a drop of at least 15% of their qualifying revenue in March 2020 and 30% for the following months of April, May and June, when compared to their qualifying revenue for the same period in 2019 (or the average of January and February 2020, in some circumstances), qualify for the wage subsidy.

For the following twenty weeks (i.e., from July 5, 2020 to November 21, 2020), the CEWS has been modified to be available for all eligible employers that experience a decline in revenue for a claim period, with a base wage subsidy amount, and an additional top-up wage subsidy amount (for those employers that have been most adversely affected by the COVID-19 crisis. Further, for the fifth and sixth periods, an eligible employer can calculate their wage subsidy in certain circumstances, under the rules that apply to the first four periods if the result is more favourable (safe harbour rule).

On September 23th, 2020, the Canadian government confirmed its intention to extend the CEWS until June 2021. Details as to the computation of the CEWS for periods after November 21, 2020 are yet to come.
The CEWS constitutes the principal Canadian program designed to provide support to businesses suffering from revenue losses and help them keep their employees on the payroll. Due to the many modifications made throughout its existence and its technical intricacies, Canada Revenue Agency has already began carrying out audits to ensure that the businesses having claimed CEWS were legally entitled to the amounts received.

II.2. Canada Emergency Business Account (CEBA) interest-free loans

The Canada Emergency Business Account (CEBA) provides interest-free loans of up to $40,000 to small businesses and not-for-profits, to help cover their operating costs during a period where their revenues have been temporarily reduced.
All applicants have until December 31, 2020, to apply for CEBA.
On October 9th, 2020 the Canadian government announced that the 40,000$ will be expanded a further 60,000$.

III. Some international income tax issues[2]

III.1. Residency for individuals for Canadian income tax purposes

In general, an individual's residence for Canadian tax purposes is a common-law factual determination based on the individual's residential ties to Canada. In addition, an individual who temporarily stays (is physically present) in Canada for a period of, or periods that total 183 days or more in a tax year will be deemed to be resident in Canada throughout the year.
If an individual stayed in Canada only because of the travel restrictions, that factor alone will not cause the Canada Revenue Agency to consider the common-law factual test of residency is met. Also, the CRA will not consider the days during which an individual is present in Canada and is unable to return to their country of residence solely as a result of the travel restrictions to count towards the 183-day limit for deemed residency.

III.2. Carrying on business in Canada

Pursuant to the Canadian income tax system, non-residents of Canada are liable to pay tax on their income from "carrying on business in Canada". In general, where Canada has

[2] See Canada Revenue Agency, *International Income Tax Issue* (2020), section *Disposition of taxable Canadian property by non-residents of Canada* <https://www.canada.ca/en/revenue-agency/campaigns/covid-19-update/guidance-international-income-tax-issues.html#h_v> accessed 18 February 2021.

entered into an income tax treaty with another country, a resident of that country will only have to pay tax in Canada on that income if their activities in Canada meet the threshold of a "permanent establishment" under the relevant income tax treaty.
Non-resident entities that are resident in a jurisdiction with which Canada has an income tax treaty and that are carrying on business in Canada, but whose activities in Canada do not meet the threshold of permanent establishment, have to file a return for that year in order to claim an exemption from Canadian income tax. This filing obligation continues to apply for the tax years of non-resident entities that overlap with the period while the travel restrictions are in place. However, as an administrative matter, the CRA will not consider a non-resident entity to have a permanent establishment in Canada because its employees perform their employment duties in Canada solely because of the travel restrictions imposed in the context of the COVID-19 pandemic.

IV. Extension of Income tax filing, payment deadlines and judicial deadlines

IV.1. Deadlines applicable to taxpayers

The deadline for filing tax returns for individuals for the 2019 taxation year was extended from April 30, 2020 to June 1, 2020.
The deadline for filing tax returns for corporations that would otherwise have a filing deadline after March 18 and before May 31, 2020 was extended to June 1, 2020.
The deadline for filing tax returns for corporations that would otherwise have a filing deadline on May 31, or June, July, or August 2020 was extended to September 1, 2020.
Penalties and interest will not be charged if payments are made by the extended deadlines of September 30, 2020. This includes the late-filing penalty as long as the return is filed by September 30, 2020 (related to the 2019 tax return for individuals and the tax returns for trusts and corporations that would otherwise be due on or after March 18, 2020, and before September 30, 2020).

IV.2. Deadlines applicable to the tax authority

In the context of the COVID-19 pandemic, the Canadian government suspended its collection and compliance (audit) activities.
Starting in September 2020, the CRA resumed its audits and collections activities.

IV.3. Deadlines applicable to judicial tax appeals

On July 27, 2020, the federal Time Limits and Other Periods Act (COVID-19) (the "Act") came into force. The Act suspends time limits relating to Tax Court of Canada proceedings that are contained in the Income Tax Act, Excise Tax Act, Tax Court of Canada Act, Tax Court of Canada Rules (General Procedure), Tax Court of Canada Rules (Informal Procedure), and other statutes and regulations from March 13, 2020 to September 13, 2020.

V. Burden of the COVID-19 pandemic on Canadian economy: Looking Towards the future

On July 8th, 2020, Canada's Minister of Finance indicated that the temporary measures implemented through the government's economic response plan will have a significant impact on the federal deficit for the 2020-2001 fiscal year. Combined with the severe deterioration in the economic outlook, these result in a projected deficit of $343.2 billion. Net federal debt will hit $1.2 trillion[3].

Through Canada's COVID-19 Economic Response Plan, the government has committed:

- Over $212 billion in direct support to Canadians and businesses;
- $85 billion in tax and customs duty payment deferrals to meet liquidity needs of businesses and households;
- 5.8 billion in support for coordinated federal, provincial and territorial action to strengthen critical health care systems, purchase personal protective equipment and supplies and support critical medical research and vaccine developments; and,
- Approximately $14 billion to support provinces and territories in the safe reopening of the country's economies over the next 6-8 months.

It is worth asking, how Canada will succeed in balancing its budget in the upcoming years and decrease the amount of its fiscal debt. Granted, the obvious answer is by increasing its tax base. But how will Canada succeed in achieving this goal. One avenue would be to install a wealth tax. That's the thesis brought forth by the eminent intellectual Thomas Piketty in his 2014 book, *Capital in the Twenty-First Century*, who has his fair share proponents in Canada.

In addition, a new paper from the Broadbent Institute pleads for the elimination of tax breaks for capital gains and dividends, a higher top tax bracket, changes to corporate taxes and an increase in consumption taxes[4].

Both those suggestions (a wealth tax and a major modifications of the Canadian tax rates) may seem appealing at first, but do not constitute in my view the path Canada should chose going forward.

Without delving too deeply into the merits of a wealth tax, which I have always found unjust (on philosophical grounds) and impractical (on inevitable valuation impediments), or an overhaul of the existing tax rates and inclusions, which would undoubtedly alienate many taxpayers (most of whom believe they are already paying too much tax), I believe that a less controversial solution for Canada lies elsewhere: the fight against international tax avoidance.

[3] See Department of Finance of Canada, *The Economic and Fiscal Snapshot 2020* (Report 2020) <https://www.canada.ca/en/department-finance/services/publications/economic-fiscal-snapshot.html> accessed 18 February 2021.

[4] Broadbent Institute, *Paying for the recovery we want* (2020) <https://www.broadbentinstitute.ca/paying_for_the_recovery_we_want> accessed 18 February 2021.

Indeed, if there is an event that has highlighted the immutability of our human condition and the brittleness of our institutions, it is the COVID-19 pandemic. One positive facet of this global struggle against the disease has been the strengthening of international collaboration, which should extend to the sphere of global concertation on the fight against the international tax avoidance. The OECD's recently published blueprints for Pillar One and Pillar Two on digital tax reform[5] is a step into the right direction, which would hopefully benefit Canada. ation, proportional and necessary measures for a "recovery" legislation should simplify administrative procedures, at least to allow the Italian renewable energy sector to reach the emissions reduction targets required by the European Union[6].

[5] OECD, *Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint* (Report, 14 October 2020) <http://www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-report-on-pillar-two-blueprint-abb4c3d1-en.htm> accessed 18 February 2021.

[6] Under the 'Clean Energy For All Europeans' Package (Regulations and Directives), the European Commission required all Member States to meet international emissions targets by increasing the share of energy produced from renewable sources (+32% by 2030) and improve energy efficiency (+32.5% by 2030).

Tax measures and - COVID-19: Argentina

Mirna Solange Screpante* and Nicolas Rubiolo**

Abstract

The article gives an overview of the key fiscal measures, i.e. direct and indirect taxation, procedural and international tax aspects and post COVID tax measures, undertaken in Argentina to counteract the economic damages caused by the lockdown due to the worldwide coronavirus pandemic. The study also provides a high-level analysis of the macroeconomic effects of the COVID crisis based on different criteria as public debt, currency issues and economic growth.

Keywords

Argentina – Tax – COVID-19

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* LLM, Lecturer and Research Fellow at the Institute for Austrian and International Tax Law at WU Vienna (Vienna University of Economics and Business); Tax Advisor at Deloitte Vienna.

** Partner at Rubiolo & Associates and Member of the Tax Law Department at Universidad Austral, Buenos Aires, Argentina.

I. Introduction

The unexpected global economic crisis caused by the coronavirus (COVID-19) has generated unprecedented measures around the world, which have had an impact not only on health, transport, supply, labour law, contractual relations, judicial activity, and, moreover, tax law. The Argentinian Government took, through the Ministry of Social Development, in the face of the Coronavirus emergency, a series of measures based on the decision of the World Health Organization (WHO) to declare the pandemic worldwide, which will be discussed below[1].

This article addresses at a high level the Argentinian key fiscal and tax administrative response to COVID-19 at national level as of September 2020. Section II gives a general overview of the impact of the pandemic in terms of economic and social measures for industries and population, the effects on unemployment and fiscal revenues due the general lockdown, and the system of subsidies for families and enterprises. Section III examines the measures taken in connection with direct taxation for individuals and corporations and special sectors of the economy directly affected by the COVID-19 emergency, i.e. the health system. Section IV explores the indirect tax measures introduced with the aim of supporting mainly the public sector and hospitals. Section V analyses the procedural tax aspects that could contribute to facilitate tax compliance in general. Section VI further scrutinizes the impact of the pandemic in certain international key tax aspects that could trigger unintended results as regards the jurisdiction to tax mainly due to the border closures. Section VII describes whether there are post-COVID-19 tax measures in the agenda. Section VIII draws some conclusions.

II. General overview

COVID-19 from a critical point of view and against the panic spread in the media did not have a great impact in Argentina in terms of casualties considering a death rate of 0.005%[2] in relation to the total country´s population and of 2.6% in relation to the infected people. Moreover, approximately 97% of the COVID-19 cases successfully recovered[3]. In addition

[1] <https://www.argentina.gob.ar/economia/medidas-economicas-COVID19>; /(last access on 11.12.2020).

[2] At the time of writing this article Argentina had circa 24,000 casualties over almost 45,000,000 inhabitants, see <https://www.worldometers.info/coronavirus/country/argentina/> (last access 21.09.2020).

[3] 488,231 out of 501,284 people see <https://www.worldometers.info/coronavirus/country/argentina/> (last access 21.09.2020).

to that, when comparing the number of casualties caused by respiratory diseases in past years, it can be concluded that the virulence of COVID-19 is scarce[4].

As a consequence of the pandemic declared by the WHO, the Argentinian Government decided to set up the so-called Programa de Aislamiento Social, Preventivo y Obligatorio (Social, Preventive and Compulsory Isolation Program) as an exceptional measure with the enactment of a decree of the Executive Power vested in the President of Argentina[5]. With the aim to protect public health against the spread of the coronavirus, it was established that all people who live or are temporarily in the Argentinian territory must remain in their homes, exclusively allowed to make minimal movements for essentials, e.g. cleaning supplies, medicine and food. Even tough at the beginning of the pandemic, people mostly agreed with the extremely restrictive movement measures[6], over time people began to be less tolerant due to the effects of confinement from a social and economic point of view[7].

Based on official information from the Instituto Nacional de Estadísticas y Censos (National Institute of Statistics and Censuses, INDEC) and from the Argentine Integrated Pension System (SIPA), it was estimated that as a result of the crisis caused by the coronavirus pandemic, the unemployment rate would rise to 10.4% in the first quarter of the year to values close to 15,5% in the second quarter (April, May and June)[8]. This raise from 10,4% to 15,5% would have generated an increase in the absolute number of unemployment from 2,2 million to 3,3 million. The figures are projected for a total economically active population of 19 million people. This coincides with a study from the Observatory of Social Debt Argentina from the Universidad Católica Argentina (Argentine Catholic University, UCA) that signalizes that the coronavirus crisis generated one million of new unemployed with an unemployment rate of 15,5%[9]. As highlighted by the UCA, approximately 950,000

[4] In 2017 64,869 people died out of a population of circa 45,376,763 of respiratory diseases what means a death rate of 0,014 % higher than the death rate of COVID-19 see <https://www.argentina.gob.ar/salud/instituto-nacional-del-cancer/estadisticas/mortalidad> (last access 21.09.2020).

[5] National Decree 297/2020 published in the Official Gazette on 20/03/2020. The full text (in Spanish) is available at https://www.boletinoficial.gob.ar/suplementos/2020031201NS.pdf; see also <https://www.argentina.gob.ar/sites/default/files/207.pdf> (last access 21.09.2020).

[6] See <http://wadmin.uca.edu.ar/public/ckeditor/Observatorio%20Deuda%20Social/Presentaciones/2020/2020_OBSERVATORIO_EDSA%20COVID19_ADHESION%20CIUDADANA-I.pdf >(last access 21.09.2020).

[7] <http://wadmin.uca.edu.ar/public/ckeditor/Observatorio%20Deuda%20Social/Documentos/2020/2020_OBSERVATORIO_ODSACOVID19_PRESENTACION-I.pdf > (on the SOCIAL IMPACT OF THE MANDATORY ISOLATION MEASURES DUE TO COVIDCOVID 19 IN THE metropolitan area of the city of Buenos Aires); <http://wadmin.uca.edu.ar/public/ckeditor/Observatorio%20Deuda%20Social/Presentaciones/2020/2020_OBSERVATORIO_EDSA%20COVID19_EMPOBRECIMIENTO-II.pdf>(on impoverishment and social inequalities in times of pandemic); <http://wadmin.uca.edu.ar/public/ckeditor/Observatorio%20Deuda%20Social/Presentaciones/2020/2020_OBSERVATORIO_EDSA_COVID19_TRABAJO_III.pdf >(on the crisis on employment and fall on the labor income) (last access 21.09.2020).

[8] <https://www.indec.gob.ar/uploads/informesdeprensa/mercado_trabajo_eph_1trim20AF03C1677F.pdf> (last access 21.09.2020).

[9] <http://wadmin.uca.edu.ar/public/ckeditor/Observatorio%20Deuda%20Social/Presentaciones/2020/2020_OBSERVATORIO_EDSA_COVID19_TRABAJO_III.pdf;https://www.infobae.com/economia/2020/08/11/segun-la-uca-la-crisis-del-coronavirus-genero-1-millon-de-nuevos-desempleados-con-una-tasa-de-desocupacion-del-155/> (last access 21.09.2020)

workers lost their jobs during the coronavirus crisis. The UCA Social Debt Observatory also estimated that about a third of these workers (300,000) had a formal, e.g., salaried, or self-employed jobs, whereas the majority of those unemployed workers (more than 650,000) were informal workers, e.g., self-employed, non-professionals, casual workers, and unregistered salaried jobs in small and mid-size enterprises.

With the aim to diminish the negative economic effects of the crisis, the national Government launched an exceptional non-contributory monetary benefit called Ingreso Familia de Emergencia (Emergency Family Benefit, IFE)[10]. The IFE has been created to compensate the loss or decrease of income of people affected by the coronavirus pandemic[11]. Moreover, the National Government created a program with two large groups of beneficiaries to support job positions in companies which were facing huge falls in turnover and self-employed people who recorded a significant cut in their income. The focus was on companies (SMEs and large companies) which had been confronted with major losses in turnover as a result of the corona crisis, and sectors which had been particularly affected by measures such as entry bans, travel restrictions and bans on meetings. In the first case, the state pays the worker's part of the salary; in the second, it is committed as a guarantor of credits at zero rate that will have a grace period of six months and may be paid in at least twelve fixed instalments without interests[12]. It has been announced that these subsidies could be available until October 2020[13].

A recovery plan from a macroeconomic point of view seems not to be on the agenda despite the precarious economic situation of the country. However, the Ministry of Social Development provides a plan for the social response after the COVID-19, based on five pillars: construction, food production, textile industry, care economy and recycling and a "universal income"[14].

As regards fiscal revenues, a recent report from the Centro Interamericano de Administraciones Tributarias (Inter-American Centre of Tax Administrations, CIAT) -COVID-19 Collection Report[15]- reveals the behaviour of national collection in real terms (net of inflation) of 16 countries, mainly American and European, showing that Argentina, in April 2020, had a decline of 23,3% of its tax revenues (against 27.7% of the average for countries), it was the

[10] Decree 310/2020 published on the Official Gazette on 24/03/2020. The full text (in Spanish) is available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000-339999/335820/norma.htm>.

[11] Decree 309/2020 published on the Official Gazette on 24/03/2020. The full text (in Spanish) is available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000-339999/335821/norma.htm>; see also <https://www.argentina.gob.ar/justicia/derechofacil/leysimple/emergencia-sanitaria-COVID-19-ingreso-familiar-de-emergencia> (last access 21.09.2020). The IFE amounts $10,000 Argentinian pesos.

[12] <https://www.argentina.gob.ar/atp>; <https://www.argentina.gob.ar/justicia/derechofacil/leysimple/COVID-19-asistencia-de-emergencia-al-trabajo-y-la-produccion-atp> (last access 21.09.2020).

[13] <https://argentina.as.com/argentina/2020/09/15/actualidad/1600180932_466243.html>; <https://argentina.as.com/argentina/2020/09/15/actualidad/1600174230_997608.html?omnil=resrelart> (last access 21.09.2020).

[14] <https://www.argentina.gob.ar/salud/coronavirus-COVID-19/plan-operativo> (last access 21.09.2020).

[15] <https://www.ciat.org/reporte-de-recaudacion-CoViD-19-rrc-julio-2020-2/> (last access 21.09.2020).

fifth country with the lowest drop among these countries with data for that month. In May 2020, tax collection in Argentina fell by 20,1% (versus 24,8 % of the average for countries surveyed), similar to the values of Peru and Uruguay and much less than the collapse in Ecuador (35,3%), Spain (26,9%) and the United States (25,1%). According to most recent information from August 2020, tax revenues declined 24.6% with respect to August 2019[16]. It is of utmost importance to consider that Argentina has a persistent high inflation rate and therefore a fiscal imbalance over the last past years what leads to a negative impact on the effective fiscal revenues and a more drastic fall in tax revenue in real terms[17].

III. Direct tax measures

III.1. Taxation of Cross-Border Workers

For employees working abroad, the measures related to the corona crisis can cause a shift in the taxation of (or part of) their income from the country of employment to the country of residence. This is the case, for example, if they work from home (out of necessity) on days that they would normally be in the other country. In the case of Argentina, cross-border work is not that common as it is in Europe, for example. Therefore, there is no special tax regime for this type of situation in place. However, tax issues could potentially arise due to the permanence of individuals within the territory for the exceptional circumstances of COVID-19 and the subsequent border closure what will be analysed in section VI.

III.2. Repatriation of Foreign Assets within the Framework of the Personal Assets Tax

Among the several measures taken in connection with direct taxation, one of them considered the postponement of the deadline for the repatriation of foreign assets. Within the framework of the personal assets tax or wealth tax, Argentina's Government approved Law 27,541 which introduces modifications to the Argentinian wealth tax, among other things at the end of 2019[18]. The changes to the wealth tax include an increase of the tax rates;

[16] <https://www.afip.gob.ar/institucional/estudios/comparativo-mensual-y-acumulado/2020.asp> (last access 21.09.2020).

[17] Due to the effect of the quarantine and the fall in activity, the collection has been crumbling. Until April, national tax revenues have grown only 10% in nominal terms. This implies that when discounting the effect of inflation on taxes, collection falls 25% in real terms compared to the same month of 2019 see <https://www.clarin.com/economia/economia/recaudacion-mueve-debajo-inflacion-abril-cae-25-terminos-reales_0_crayntpaE.html>; <https://www.lanacion.com.ar/economia/coronavirus-la-recaudacion-nacional-impuestos-cae-25-nid2359306>; for a comparative study on nominal value see the statistics released by the tax authorities available at <http://www.afip.gob.ar/institucional/estudios/> (last access 21.09.2020).

[18] Law N° 27.541 ("Ley de Solidaridad Social y Reactivación en el Marco de la Emergencia Pública"). The full text (in Spanish) is available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/330000-334999/333564/norma.htm>; Decree

application of different tax rates for assets in the country or abroad; and it introduces new criteria for taxation under wealth tax rules[19]. In case of assets abroad, they will be subject to a higher tax rate, i.e. 5%, unless they are converted into cash and repatriated before 31 March 2020[20]. Due to COVID-19, the federal Government of Argentina issued a decree which postponed the deadline for the repatriation by Argentine residents of assets held abroad from 1 April 2020 to 1 May 2020[21].

III.3. Taxation of Health Workers

Regarding the possibility of facilitating the taxation of health personnel and related entities, the National Congress passed the Law 27,547[22] which determined that the Argentine Red Cross is exempted from the tax on bank credits and debits[23] and other operations with the aim of promoting development under the emergency circumstances. In the same vein, the income tax has been exempted from 1 March 2020 until 30 September 2020 in relation with the remuneration of compulsory shifts, overtime and any other concept that is settled specifically and by virtue of the health emergency caused by COVID-19[24]. The beneficiaries of the exemption will be professionals, technicians, assistants and operational personnel of the public and private health systems, armed forces, security forces, immigration and customs services, firefighters and waste collectors[25]. Furthermore, it has been created an *ex gratia* and life pension for all those relatives of related employees who died in the

58/2019 published in the Official Gazette on 21/12/2019. The full text (in Spanish) is available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/330000-334999/333565/norma.htm> ; see also related Decree 99/2019 published in the Official Gazette on ; General Resolution No. 4659/2020 published on 06/01/2020. The full text (in Spanish) is available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/330000-334999/333777/norma.htm> (last access 21.09.2020).

[19] The criterion of the taxpayer's domicile was abandoned and the applicable principle to determine the scope of the tax has been assimilated it to the income tax, i.e., the acquisition of permanent residence in a foreign state or absence from the country for more than 12 months, whichever has happened first, will be required in order to stop paying on worldwide assets. Henceforth, the criteria for income tax and Wealth Tax are aligned.

[20] Please note that the repatriated funds need to be deposited in certain financial institutions maintained in the country prior to December 31 of the year of repatriation.

[21] Decree 330/2220 published on 1 April 2020. The full text (in Spanish) is available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000-339999/335979/norma.htm> (last access 21.09.2020).

[22] Law 27.547 published in the Official Gazette on 08/06/2020. The full text (in Spanish) is available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000-339999/338402/norma.htm> (last access 21.09.2020).

[23] Law No. 25,413 (Official Bulletin March 26, 2001) has created a tax on credits and debits in bank checking accounts opened in financial institutions

[24] Law 27,549 published in the Official Gazette on 06/08/2020. The full text (in Spanish) is available at <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=338404> (last access 21.09.2020); see J.L. Sirena, Exención Especial Y Transitoria En El Impuesto A Las Ganancias Para Trabajadores Que Presten Servicios Relacionados Con La Emergencia Sanitaria por COVID-19, Práctica y Actualidad Laboral (PAL) XVIII (August 2020).

[25] On a detailed analyis of the special measures for the sectors see C.M. Cavalli, Beneficios Especiales A Personal De Salud, Fuerzas Armadas, De Seguridad Y Otros Ante La Pandemia de COVID-19, Consultor Tributario (July 2020).

aforementioned period due toCOVID-19. Moreover, a tax relief has been provided for companies that are employers and that provide healthcare-related services[26]:

- a reduction of 95% of employer contributions to the social security system was granted for 150 days after 20 March 2020; and
- a reduction of 59% of the bank credit tax; and a reduction of17% of the bank debt tax.

III.4. Tax Benefits for Corporations and Small-Medium Size Companies

As a consequence of the general lockdown of the economy, businesses were forced to close down, especially those categorized as non-essential. Therefore, job positions of non-essential activities were gravely threatened. Within this context, several financial and social security initiatives to reduce the financial burden on businesses have been announced. Among the initiatives taken by the Argentine Government in response to the crisis, the Programa de Asistencia de Emergencia al Trabajo y la Producción (Emergency Assistance Program for Employment and Production, ATP)[27] was launched. This program mitigate the tax burden for corporations through extraordinary and temporary reductions in social security contributions for employers that are engaged in certain business activities (in general, employers that are not considered to be "essential" and therefore have been affected by the quarantine). Moreover, employer contributions were postponed for a three-month period[28]. However, access to these benefits is not automatic and depend on certain conditions that corporate taxpayers must meet to demonstrate their eligibility[29]. The following key points can be highlighted:

- a carry-over of due payments relate to the Sistema Integrado de Jubilaciones y Pensiones (Argentine Integrated Pension System) contributions;

[26] Decree 545/2020. Published in the Official Gazette on 19/06/2020 The full text (in Spanish) is available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000-339999/338953/norma.htm> (last access 21.09.2020).

[27] Decree 332/2020 published in the Official Gazette on 04/01/2020 and its successive modifications. The full text (in Spanish) is available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000- 339999/336003/texact.htm> (last access 21.09.2020).

[28] An important exception to the eligibility for the new programme is set out in article 4 of Decree 332/2020. Specifically, the benefits do not apply to taxpayers that undertake essential activities or provide essential services as established by the relevant regulations, and, therefore, whose staff are exempt from compliance with quarantine and social isolation orders.

[29] The conditions to be met are: (i)evidence the taxpayer belongs to a segment of the economy that has been affected adversely by the pandemic (the exact text of Decree 332/2020 uses the phrase "[a]ctividades económicas afectadas en forma crítica en las zonas geográficas donde se desarrollan" (economic activities critically affected in the geographical areas where they take place); (ii) evidence that the taxpayer in question employs a "significant number" of workers who have had to be furloughed due to the quarantine and social isolation measures enacted by the Argentine Government; and (iii) evidence that the taxpayer suffered a "substantial reduction" in income after 12 March 2020 – the start of quarantine and social isolation measures in Argentina.

- a reduction of employer contributions to SIPA of 95% for those companies not considered carrying out essential activities[30]; and
- a partial salary payment for employees from the private sector taken over by the Administración Nacional de la Seguridad Social (National Administration of Social Security, ANSeS). The employer deducts the partial payment from the total salary and the State transfers the allowance to the employee directly on its bank account[31].

It is important to mention that employers who apply for the salary subsidy cannot make dividend distributions, engage in certain financial transactions, make payments to beneficiaries located in low-tax or non-cooperative jurisdictions. These restrictions apply for 12 months for companies with 800 or less employees and 24 months for the rest. In addition, companies with more than 800 employees cannot increase wages or fees of their Board of Directors or similar collegiate bodies.

Regarding micro, small and medium-sized companies enrolled in a special program which was on place since before the COVID-19 crisis, it suspended the embargo and other precautionary measures until 30 June 2020[32]. In line with these measures, the extension of terms for the fulfilment of the formal and material duties related to income tax was determined for legal entities with business closing in December 2019 in income tax until 26 and 27 May 2020[33]. Likewise, a special term was granted to legal entities that act as withholding agents of the income tax of their beneficiaries to make the annual declaration corresponding to the fiscal period 2019[34].

The Government has also implemented successive extensions to the filing of tax returns determining the income tax for individuals, as well as in specific cases, it has extended this benefit to the informative tax returns (see section 5). It is worth mentioning that, the postponement of tax liabilities had no penalties and interests.

[30] That is, they have been able to continue working during the period of "preventive and mandatory social isolation" period since March 2020.

[31] The value of the allowance is related to the minimum living wage and mobile ($16,875 Argentinian Peso).

[32] General Resolution No. 4684/2020 published in the Official Gazette on 20/3/2020. The full text (in Spanish) is available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000-339999/335773/norma.htm>; General Resolution No. 4705 published in the Official Gazette on 29/4/2020. The full text (in Spanish) is available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000-339999/336876/norma.htm> (last access 21.09.2020).

[33] General Resolution No 4714/2020 published in the Official Gazette on 13/5/2020. The full text (in Spanish) is available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000-339999/337439/norma.htm> (last access 21.09.2020).

[34] General Resolution No 4721/2020 published in the Official Gazette on 21/05/2020. The full text (in Spanish) is available at <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=337829>;General Resolution No 4725/2020 published in the Official Gazette on 28/5/2020. The full text (in Spanish) is available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000-339999/338063/norma.htm> (last access 21.09.2020).

IV. Indirect taxes

Within the framework of the health emergency and the advance of the coronavirus pandemic, the Government decided to remove the tariff for the importation of medical products. The Decree 333/2020 set an Extra-zone Import Right (DIE) of 0% for entering products from countries with which there is no bilateral trade agreement, as for example with the members of the Mercosur. Moreover, the statistical rate for import operations, currently of 2,5%, has also been exempted. The main products covered were alcohol, disinfectants, surgical gloves, cloth masks, ultrasound scanners, tomographs, endoscopes and respiratory devices, among several others[35].

There were no special measures taken to postpone VAT payments during COVID-19 for companies or individuals facing financial difficulties. However, it is important to mention that before the pandemic small-medium size companies (Pequeñas y Medinas Empresas, PyMEs) had the opportunity of deferring the VAT payment for 90 days[36]. The companies covered by the regulation have more time to comply with the applicable tax law and thus to avoid the financial mismatches that occur when invoicing with VAT.

V. Procedural tax aspects

Several measures were implemented in connection with procedural tax aspects due to the COVID-19 crisis. First, administrative deadlines for the duration of the Preventive and Mandatory Social Isolation[37] were suspended. Second, further relevant actions were taken such as:

[35] Decree 333/2020 published in the Official Gazette on 02/04/2020. The full text (in Spanish) is available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000-339999/336009/norma.htm>; General Resolution No. 4696 published in the Official Gazette on 15/04/2020. The full text (in Spanish) is available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000-339999/336336/norma.htm> (last access 21.09.2020).

[36] Law 27.264 published in the Official Gazette on 01/08/2016. The full text (in Spanish) is available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/260000-264999/263953/norma.htm>; related Decree 1101/2016 published in the Official Gazette on 18/10/2016. The full text (in Spanish) is available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/265000-269999/266553/norma.htm> (last access 21.09.2020).

[37] Social, preventive and compulsory isolation is an exceptional measure that the national Government adopts in a critical context. In order to protect public health against the spread of the new coronavirus, it was established that all people who live, or are temporarily, in the jurisdictions where this regulation governs must remain in their usual homes, only being able to make minimal movements and Essential to stock up on cleaning supplies, medicines and food. Considering that the epidemiological situation is not homogeneous within the national territory, the isolation administration will adopt a modality that takes into account the reality of the different jurisdictions of the country. Provincial and local authorities may request exceptions to isolation from personnel affected by certain activities and services, or from people who live in specific and delimited geographic areas based on compliance with a series of requirements, as well as the strict application of health protocols. corresponding. The exceptions granted may be totally or partially rendered ineffective in accordance with the provisions of the health authorities. Declared for the first time through Decree 297/2020, Official Gazette 03/19/2020.

- determination of an Extraordinary Tax Fair[38].In this regard, deadlines provided in the different procedures in force related to the application, collection and inspection of taxes will not be counted except for the inspection procedures related to the information provided by the OECD, as well as the examination, summary and ex officio determination procedures related to the transfer pricing rules. Also, the processing of electronic examination procedures is enabled as of 23September 2020[39];
- the transitory term corresponding to the number of admissible payment facility plans, as well as the number of instalments and the financing interest rate applicable in the permanent payment facility regime, is extended until 31 October 2020[40];
- lock on embargoes and other precautionary measures for micro, small and medium-sized companies is suspended until 30 September 2020[41];
- digital presentations were implemented for the interaction between taxpayers and the treasury, replacing a large number of procedures that were previously carried out in person at the agency's offices[42];
- deadlines for the presentation and payments of the income tax and personal assets returns for corporations and individuals were extended for fiscal year 2019 until 31 August 2020[43]. This also reaches the deadlines for the financial income tax return. This measure was accompanied by the increase from 1,500,000 to 2,000,000 Argentinean pesos income threshold from which taxpayers must fill an informative tax return. To

[38] General Resolution 4682/2020 published in the Official Gazette om 03/18/2020, amendments and supplements. The full text (in Spanish) is available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000-339999/335646/norma.htm http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000-339999/335646/norma.htm >(last access 21.09.2020).

[39] Those that are governed by General Resolution of the Federal Administration of Public Revenue 3416/2012.

[40] General Resolution No. 4683/2020; Official Gazette 03/20/2020, amendments and complementary. The full text (in Spanish) available at http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000-339999/335772/norma.htm (last access 21.09.2020).

[41] General Resolution No. 4684/2020; Official Gazette 03/20/2020, amendments and complementary. The full text (in Spanish) available at http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000-339999/335773/norma.htm (last access 21.09.2020).

[42] General Resolution No. 4503/2020 published in the Official Gazette on 12/06/2019. The full text (in Spanish) available at http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do;jsessionid=E2BE94162A8B41AFC89BE1F5BBB07001?id=324241; General Resolution No. 4685 /2020 published in the Official Gazette on 20/03//2020, amended and supplemented. The full text (in Spanish) available at http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000-339999/335797/norma.htm (last access 21.09.2020).

[43] General Resolution No. 4686/2020 published in the Official Gazette on 03/20/2020, amendments and complementary. The full text (in Spanish) available at http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000-339999/335801/norma.htm (last access 21.09.2020); see also General Resolution No. 4714 /2020 Official Gazette 15/05/2020. The full text (in Spanish) available at http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000-339999/337439/norma.htm (last access 21.09.2020)

the same extent, deadlines for filling transfer pricing documentation[44] and filling return of company reorganizations have been extended[45]; and

- Suspension of exclusions and ex officio cancellations of small taxpayers' regime (Monotributo)[46].

With the aim of alleviating the burden of payments, which has been severely worsened by the catastrophic economic effects of the pandemic on businesses, corporate and individuals, the Administración Federal de Ingresos Públicos, Argentinian tax authorities (AFIP) launched an extension of benefits of instalment programs. First, it extended the benefits of an instalment programme established in 2018[47] for the settling of tax and social security obligations, together with interest or fines assessed because of the pending obligations[48]. One of the elements of the instalment programme was the implementation of a special collection of more generous instalment limitations and interest rates for a limited period. Second, the AFIP also extended the deadline to enrol in the special instalment programme established at the end of January 2020[49]. This special programme permits small and medium-sized businesses and not-for-profit entities as recognized under Argentinian law to regularize their tax situation concerning outstanding debts in respect of a number of taxes and social security contributions. Large corporate taxpayers are not eligible for enrolment in the programme. Under the new deadline, taxpayers may apply for enrolment in the programme until 30 June 2020 – but with less generous benefits, including a reduction of the maximum number of instalments and an increase in the initial payment. The deadline for payments of the first instalment was postponed to 16 July 2020.

In addition to the measures above-mentioned, it shall also be considered that before the COVID-19 crisis, the national Government implemented a regime (instalment payments) for the regularization of debts with important reductions of interests and up to 10 years cancellation-plan with the objective that companies can regularize their tax debts, given the complex economic context of our country. Due to the pandemic, the application deadline was postponed until 31st July 2020. However, considering that the economic situa-

[44] General Resolution No. 4689/2020, Official Gazette 03/31/2020 The full text (in Spanish) available at http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000-339999/335968/norma.htm (last access 21.09.2020).

[45] General Resolution No. 4700/2020, Boletin Official 17/04/2020 The full text (in Spanish) available at http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000-339999/336435/norma.htm (last access 21.09.2020).

[46] General Resolution No. 4687/2000 published in the Official Gazette on 03/28/2020, amendments and supplements. The full text (in Spanish) is available at http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000-339999/335935/norma.htm (last access 21.09.2020).

[47] General Resolution No. 4268, published on 28/06/2018. The full text (in Spanish) is available at http://servicios.infoleg.gob.ar/infolegInternet/anexos/310000-314999/311960/norma.htm (last access 21.09.2020).

[48] General Resolution No. 4683/2020, published on 20/03/2020. The full text (in Spanish) is available at http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000-339999/335772/norma.htm (last access 21.09.2020).

[49] General Resolution No. 4690/2020, published on 20 March 2020. The full text (in Spanish) is available at http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000-339999/335998/norma.htm. The instalment programme has been originally launched by the General Resolution No. 4667/2020, published on 30/01/2020. The full text (in Spanish) is available at http://servicios.infoleg.gob.ar/infolegInternet/anexos/330000-334999/334168/norma.htm (last access 21.09.2020).

tion continued to get worse, the scope of the regime has been expanded, and therefore new tax debts were included with the opportunity of regularizing overdue debts already included in the regime[50]. It is important to mention that interests were not excluded from the instalment payments.

VI. International tax aspects

Argentina has not taken any specific measures from an international tax perspective. However, it is worth considering the implications of certain tax issues that might trigger international tax consequences even if they were not addressed by tax authorities. One of the main topics that deserved special attention is the effect of permanence of individuals in a country different from the habitual country of residence, i.e. employees or key personal of companies' boards. These issues might have an impact on the potential right to tax between the country where the individual is staying due to unforeseen circumstances and the habitual country of residence. Accordingly, the key aspects under concern are: (i) time spent within a country due to the lockdown for the purposes of resolving conflicts that can arise regarding an individual's residence due to border closures; (ii) the possibility of considering the existence of permanent establishments (PE) of foreign enterprises due to employees working from their homes within the country; and (iii) the possibility that the place of effective management of a foreign corporation has changed due to key personnel being locked down in Argentina. On the matter, the OECD provided some clarifications on some of these cross-border issues triggered by the worldwide extraordinary situation that might have an impact on the right to tax between countries, which will be considered in the discussion[51].

VI.1. Concerns Related to the Residence Status of Individuals

For the income tax purposes, an individual is resident in Argentina when[52]: (i) he is of Argentine nationality (or naturalized), or (ii) a foreigner who has obtained his permanent residence status in Argentina or has legally been living in the country for at least twelve months or more[53]. Argentine citizens will lose the resident status when they become per-

[50] Law 27,562 published in the Official Gazette on 26/08/2020. The full text (in Spanish) is available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/340000-344999/341458/norma.htm> (last access 21.09.2020).

[51] OECD, Secretariat Analysis of Tax Treaties and the Impact of the *COVID-19* Crisis (3 Apr. 2020), available at <https://read.oecd-ilibrary.org/view/?ref=127_127237-vsdagpp2t3&title=OECD-Secretariat-analysis-of-tax-treaties-and-the-impact-of-the-COVID-19-Crisis> (last access 21.09.2020).

[52] Law 27,430, art. 119 published in the Official Gazette 29/12/2017 (Argentina Income Tax Law). The full text (in Spanish) available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/40000-44999/44911/texact.htm> (last access 21.09.2020).

[53] There are some exceptions to the general rule. On the one hand, are also considered residents in Argentina: (i) Persons of visible existence who are abroad and act as official representatives within the National State or in the performance

manent residents in a foreign state, or when they stay uninterruptedly in a foreign country for at least twelve months. However, an individual is considered a resident in Argentina, even if he/she has obtained the permanent residence in a foreign country, or has lost its residence status in the Argentine Republic (the person is regarded as resident of another country for tax purposes), when he/she actually lives in the national territory or re-enters the country in order to stay. To that end, Argentinian income tax law stipulates that such status is verified when the following conditions take place in the sequential or preference order described below: (i) if the individual has its permanent dwelling in the Argentine Republic (a suitable facility currently used for living or available for the main end of housing); (ii) if its centre of vital interest is located within the national territory (in which he/she has his/herclosest personal and economic relationships, mainly the personal ones); (iii) if the individual permanently resides in the Argentine Republic, a condition that will be considered fulfilled if the person remains there more time than spent in the foreign State which granted the permanent residence, or which considers them as residents for tax purposes during the calendar year); (iv) if they are of Argentine nationality.

Consequently, according to Argentinian law, factual circumstances (i.e. actual stay within the territory) might prevail over formal legal requirements (i.e. formal tax residence in another country or nationality). Within this context, the fact that an individual has to stay within the Argentinean territory, even due to extraordinary circumstances like COVID-19, he/she could potentially be considered as a resident. However, if the person has remained in Argentina solely because of COVID-19 travel restrictions, that factor alone will not cause the factual test of residency to be met, considering that the individual is usually a resident of another country and intends to return to his or her country of residence as soon as it is permitted.

From an international point of view, conflicts might arise with respect to taxation of income from employment, i.e. art. 15 (1) (2) OECD Model Tax Convention on Income and on Capital (OECD MC)[54], and mainly the consideration of the 183-days rule to determine taxation at source considering that it was the policy of Argentina to include that article in its double tax treaties. Article 15 OECD MC establishes the general principle that the remuneration obtained by a resident of a state by virtue of employment can only be taxed in that state. However, the exception to the rule is that the employment is exercised

of the duties entrusted by the National State, the Provinces or Municipalities or the Autonomous City of Buenos Aires; (ii) Civil servants of Argentine nationality who perform their duties at international agencies of which the Argentine Republic is a member state. On the other hand, the following are considered non-residents: (i) the persons who remain permanently in the country because they are part of diplomatic or consular missions of foreign countries in our country, as well as the technical and administrative staff; (ii) the representatives and agents working at international agencies, of which the Argentine Republic is a member, and who perform their duties in the country, provided they are foreigners and not residents at the moment of hiring them; (iii) foreign persons hired to perform their duties in the country for a period no longer than 5 years and foreign students or researchers with temporary residence permit in the country.

[54] OECD (2017), Model Tax Convention on Income and on Capital: Condensed Version 2017, OECD Publishing, Paris.

"physically" in the other contracting state, so that the other State may have the right to tax the income therein obtained. Notwithstanding that, if the employee physically performs the activities in the source State, the State of residence will "only" have the right to tax if certain conditions are met: (i) the recipient is present in the other State for a period or periods not exceeding the aggregated 183 days; (ii) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State; and (iii) the remuneration is not borne by a permanent establishment of the employer in the other State. For example, an employee who came to perform its activity in Argentina for a short period (less than 183 days) and due to the isolation measures could not return to its country of residence; could be considered tax resident in Argentina if he/she has to stay more than 183 days and he/she was performing his/her activity remotely receiving his remuneration paid by the resident abroad. This situation could technically trigger the right to tax the employment income in Argentina, the source State. However, it is expected that due to the extraordinary and temporary circumstances any prolonged stay of more than 183 days within the country will trigger source taxation. The OECD for home-office cases as explained later reflected its position. However, the OECD has not a clear-cut opinion with regard to taxation of income from employment leaving the room open to coordination among states to mitigate potential compliance and administrative burden for employers and employees due to involuntary permanence in a jurisdiction different form its residence State. It is worth mentioning that the OECD states that in those cases when the employee continued to receive the salary but in form of subsidy as a consequence of a stimulus package proposed by the residence state Government to keep workers on the payroll during the crisis; those payments resemble termination payments taxable in the residence state[55]. The OECD establishes that the present exceptional circumstances warrant an exceptional level of coordination to mitigate administrative and compliance costs for employees and employers associated with voluntary and temporary changes regarding the place where employment is exercised.

VI.2. Concerns Related to Permanent Establishments

As regards PE risks, the lockdown could potentially create a PE (Art. 5 (1) OCDE MC) by the performance of the working activities by employees in home offices in foreign countries. While constituting a PE would give rise to source taxation on the profits attributed to the PE, a change in the company's tax residence would entail worldwide taxation. A head office could technically create a fixed PE for a foreign company in Argentina for those employees stranded in the country performing their work remotely; therefore, Argentina would have the right to tax at source the income generated therein. Regarding this issue,

[55] OECD, supra n. 53, para. 24 available at <https://read.oecd-ilibrary.org/view/?ref=127_127237-vsdagpp2t3&title=OECD-Secretariat-analysis-of-tax-treaties-and-the-impact-of-the-COVID-19-Crisis para. 24> (last access 21.09.2020); para. 2.6 of the Commentaries on Article 15 of the OECD MC.

the Commentary on Article 5 of the OECD Model Convention (OECD MC) clarifies that a home office generally does not meet the test of "at the disposal of" the foreign enterprise. An employee who carries out work at home does not automatically result in the conclusion that the home office is at the disposal of the employer, even though a legal right is not required, a mere presence is insufficient. Even more when employees would work from his home office "intermittently or incidentally"[56]. In fact, the disposal of the employer depends on the facts and circumstances but if the employee uses the home office on a "continuous and regular basis" fashion (for example, not providing office space), the home-office could be considered as "at the disposal" of the employer, and therefore, constitute a PE[57]. However, considering the COVID-19 situation in which the employee had no choice where to perform the activity due to 'force majeure' circumstances, a PE should not be triggered[58].

It is worth mentioning that Argentina has recently introduced (2018) a PE definition in its income tax law[59] in line with Art. 5 of the OECD Model Tax Convention (including BEPS Action 7)[60] which also adds a "service PE"[61] definition in line with the United Nations Model Tax Convention (Art. 5(3)(b) UN Model)[62]. In this regard, if a person provides, for example, consultancy services in Argentina for more than 6 months because he could not return to its country of residence due to the travel restrictions, such a situation could give

[56] Para. 18 Commentaries on Article 5 OECD MC.

[57] J.J.P. de Goede et al., Interpretation and Application of Article 5 (Permanent Establishment) of the OECD Model Tax Convention: Response from IBFD Research Staff, 66 Bull. Intl. Taxn. 6 (2012), Journal Articles & Papers IBFD, sec. 3.3.

[58] See OECD, *supra* n. 53; also in this regard for example, Australia, Ireland and Greece have announced that they will not consider employees of foreign companies stranded in their countries due to COVID-19 restrictions see <https://www.ato.gov.au/General/COVID-19/Support-for-individuals-and-employees/Employees-working-from-home/ >(last access 21.09.2020); <https://www.dilloneustace.com/legal-updates/the-impact-of-COVID-19-on-tax-residence-and-permanent-establishments> (last access 21.09.2020); Greece – COVID-19 Pandemic: Clarifications on PEs and Frontier Workers for Domestic and Tax Treaty Purposes Published (29 July 2020), News IBFD.

[59] Law 27,430, art. 16, 1° Paragraph (Income tax Law).

[60] OECD/G20, Preventing the Artificial Avoidance of Permanent Establishment Status – Action 7: 2015 Final Report (OECD 2015), International Organizations' Documentation IBFD [hereinafter Action 7 Final Report (2015)].

[61] Law 27,430, art. 16 cont. paragraph 3 (Income tax Law). There is a service PE in Argentina by the provision of services by an entity from abroad, including consultant services, directly or through its employees or personnel hired by the company for that purpose, but only in the event that such activities continue in the territory of the country during a period or periods that in total exceed six (6) months, within any period of twelve (12) months.

[62] On the modifications to income tax law in connection with Action 7 BEPS see L.M. Mendez, M.S. Screpante, Argentina National Report in Lang/Owens/Pistone/Rust/Schuch/Staringer/Storck (eds.), Implementing Key BEPS Actions: Where do we stand? IBFD (2019), p. 56-58; see also M.I. Brandt; S. D. Vergara, El Concepto de establecimiento permanente La Ley Del Impuesto A Las Ganancias Y Su Reglamentación Establecimiento, Doctrina Tributaria Errepar, Tomo XL (2013), p. 613; A.L. Ferreyra, Atribución de Beneficios a Establecimientos permanentes ¿Qué es lo que la reforma intento reformar?, in M.F. Braccia, (Ed.) La Reforma Tributaria y Tributación Internacional, La Ley-Thomson Reuters, Buenos Aires (2018).

rise to a PE; however the home-office criteria should apply, and therefore, not consider the extended involuntary permanence a driver for a PE[63].

It is also worth mentioning that according to Argentinian income tax law, services which do not qualify as a PE, could still be subject to tax at source. For example, by the performance of acts or activities generating benefits in Argentine territory[64]. Even though, income derived from services provided from abroad are considered foreign sources and, therefore, excluded from the object of income tax, if services provided from abroad qualify as "technical assistance" or "other assistance"[65] they might be subject to tax based on the principle of "economic use" within the territory of Argentina[66]. Therefore, in the latter case, even though there is no PE risk, it could potentially trigger taxation at source in the case of services provided from abroad but economically used in Argentina.

VI.3. Concerns Related to the Residence Status of Corporations

The residence of a corporation for Argentinian income tax purposes and for purposes of Argentina's tax treaties is important because a corporation that is resident in Argentina for Argentinian income tax purposes is subject to Argentinian income tax on its worldwide income, whereas a corporation that is not resident in Argentina is taxed only on Argentinian-source income[67].

Legal persons, partnerships and other types of business entities (such as sole proprietorships, non-profit civil associations, foundations, trusts, mutual investment funds, etc.) are considered residents in Argentina if they are incorporated in accordance with current Argentine Republic laws[68]. Commercial, industrial, agricultural, mining or any other type of business organized as permanent company and owned by associations, partnerships or companies, whatever its nature, registered abroad or by natural persons living abroad, are also considered residents. In general, they correspond to branches of companies incorporated abroad but operating in the source country.

[63] Once again, we emphasize that in the event that the subject residing abroad is a resident of a country that signed a CDI with Argentina, the definition of in article 5 of that DTT should be sought, which may present differential nuances with respect to the definition provided by the LIG and its regulatory decree, in whose analysis we will focus on this work. Additionally, it is important to bear in mind that in June 2017, the Argentine Republic signed the OECD Multilateral Agreement which, once in force and certain conditions have been verified, could lead to the modification of article 5 of some of the CDIs signed by our country permanent establishment. On the contrary, if Argentina and the country of residence of the foreign subject did not sign a CDI, the definition of permanent establishment contained in the LIG must be followed, with the clarifications of its regulatory decree.

[64] Law 27,430 art. 5 (Income tax Law).

[65] Law 27,430, art. 12 (Argentina Income Tax Law).

[66] See M.S. Screpante, La importación de software frente al impuesto a las ganancias, Consultor Tributario Errepar 43 (2011).

[67] Law 27,430, art. 5 (Argentina Income Tax Law).

[68] Law 27,430, art. 199 (Argentina Income Tax Law).

Other jurisdictions consider that a legal entity or corporation, including a foreign-domiciled corporation, is resident where its "place of effective management" is located and exercised. Having that principle in place in the domestic law in times of COVID-19 and travel restrictions, this could lead to a potential change of residency due to the relocation or inability to travel of members of the management or other executives[69]. In this regard, the OECD stated that – considering that the change in the location of directors and other executives is an extraordinary and temporary situation – the place of effective management should not change[70].

VI.4. Transfer Pricing Considerations and the Performance of Functions

The COVID-19 travel restrictions could have an impact on the attribution of profits for transfer pricing purposes based on the place of performance of people functions. BEPS actions 8-10 established new guidelines regarding the ownership of intangibles and their remuneration[71]. This is directly related to the emphasis on substance of the new guidelines through the incorporation of the notion of value creation as a jurisdictional nexus[72]. Accordingly, legal ownership alone does not guarantee the allocation of profits from an intangible unless the legal owner performs any of the DEMPE (i.e. development, enhancement, maintenance, protection and exploitation) functions; otherwise, it should remunerate all entities performing the corresponding functions[73]. In this sense, it is convenient to analyse considerations similar to those related to the impact of the COVID-19 pandemic on the creation of PEs in particular with respect to a fixed PE (see section 2)[74]. It is necessary to see if any function was relocated from the geographic point of view, either by location of the people who carry out the functions or if related risks were relocated, both at the level of the legal owner and the entities that perform other functions. A situation may arise, for example, where a key employee responsible for the development of a certain intangi-

[69] OECD (2020) "Tax and Fiscal Policy in Response to the Coronavirus Crisis: Strengthening Confidence and Resilience", at sec. 15 (hereafter OECD Report in Response to the Coronavirus crisis) available at <https://read.oecd-ilibrary.org/view/?ref=128_128575-o6raktc0aa&title=Tax-and-Fiscal-Policy-in-Response- to-the-Coronavirus-Crisis>, para. 14 (last access 21.09.2020).

[70] Ibidem, para. 15.

[71] OECD/G20, Aligning Transfer Pricing Outcomes with Value Creation – Actions 8-10: 2015 Final Report (OECD 2015), Paris Publishing, Chapter VI.

[72] On an analysis on the notion and role of value creation in the new (2017) OECD Transfer Pricing Guidelines see M.S. Screpante, The Arm's Length Principle Evolves Towards a "Value creation Functional (i.e. DEMPE) Formula Standard": A Barrier or a Gateway to Locational Business Planning? Intertax, Vol. 48 Issue 10 (2020).

[73] On the role and effects of DEMPE functions in intangibles structures see M.S. Screpante, Rethinking the Arm's Length Principle and Its Impact on the IP Licence Model after OECD/G20 BEPS Actions 8-10: Nothing Changed but the Change? 11 World Tax Journal 3, (2019).

[74] S. Prasanna & G. Capristano Cardoso, Developing a Transfer Pricing Policy Framework for the Current Economic Crisis and Beyond, 27 Intl. Transfer Pricing J. 5 (2020), Journal Articles & Papers IBFD, sec. 5.2.

ble was exercising such a role at the entity's premises in Europe, but due to the COVID-19 outbreak, the employee now works remotely at home in Argentina.
While employees performing DEMPE functions may do so in different parts of the world, the performance of the activity continues to be on behalf of the entity for which the DEMPE function is performed, regardless of the remote location of the employees. Therefore, there should be no tax implications as long as the permanence in a country other than where habitually performs the functions is temporary due to COVID-19 travel restrictions mainly.

VII. Post-COVID-19 tax measures

It can be anticipated that the crisis caused by the COVID-19 pandemic will have a strong impact on the labour market in Argentina, which was already in a very weak situation before the outbreak of the pandemic that aggravated and accelerated the current situation. Likewise, it must be understood that with an unemployment rate of 10.6% registered during 2019, a poverty rate of 35, 7% that was registered during the same period, and 1, 5% corresponding to the Manufacturing Industrial Production Index. In addition to the annual inflationary index of 50% and a general fall in industry, the Argentine peso was losing its value during 2019, accumulating a 65% depreciation since April 2018. Moreover, after a 2, 5% drop in the Gross Domestic Product (GDP) in 2018, the economy contracted an additional 2,5% in the first half of 2019. All this placed the country as the third economy in the region with the greatest slowdown, second only to Venezuela and Nicaragua (ILO, 2020) what has led the country to a strong pressure on public accounts[75].
Within that burdensome context, the need of revenues increases in order to finance the social and economic measures implemented by the Government. Paradoxically, instead of incentivizing investments of the private sector to increase tax collection, the Executive Power finances the fiscal debt with monetary issue, which directly affects the inflation rate. Furthermore, in contrary to general expectations, the Argentine Congress intends to initiate a debate on taxing large fortunes seeking to increase the tax burden on those individuals with greater wealth[76]. The tax will reach those who have declared a wealth of over USD 2.5 billion by the end of 2019 and it will have an aliquot of between 2% and 3,5% with an aggravating factor if the taxpayer has assets abroad[77]. Arguably, the doctrine

[75] OIT (2020), Informe técnico "La COVID-19 y el mundo del trabajo en Argentina: impacto y respuestas de política", at sec. 5 available at <https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/---ilo-buenos_aires/documents/publication/wcms_740742.pdf> (last access 21.09.2020).

[76] <https://www.telesurenglish.net/news/argentinas-congress-considers-taxing-large-fortunes-20200829-0004.html> (last access 21.09.2020).

[77] On the project bill see <https://www.infobae.com/economia/2020/08/28/impuesto-a-las-grandes-fortunas-todos-los-detalles-del-proyecto-que-el-gobierno-pretende-aprobar-en-el-congreso/>.

claims that the tax could be declared unconstitutional for violating the principle of non-confiscation[78]. Argentina's Government looks forward to raise around 300 billion pesos ($ 4 billion) through this one-off tax on the super-rich, in order to help pay for the coronavirus response, support small businesses and bolster energy production[79].

The opportunity to move towards a green economy or explore new environmental incentives or special tax regimes could generate thousands of new job opportunities considering the natural resources that Argentina owns, i.e. energy, petroleum, gas, and mining. However, it is a discussion that to date has not been pondered yet.

As regards the possibility of creating new digital taxes, Argentina has not created a digital services tax as such but it has added to the VAT Law in the tax bill passed in 2017, as a taxable activity, the supply of digital services by non-residents to final consumers or non-taxable persons[80]. According to the law, the services "provided by a resident or domiciled abroad whose use or effective exploitation is carried out in the country" will pay the tax on purchases. The services included are the download of movies and other audio-visual content on internet-connected devices, the download of online games, broadcasting music, movies, bets or similar digital content, obtaining jingles, mobile tones and music, watching online news, traffic information and weather forecasts, weblogs and website statistics.

VIII. In a nutshell

As corollary, it can be said that the measures adopted by the tax administration and the Government were sought to alleviate the burden of taxes that falls on taxpayers. Among the main measures taken, there were the postponement of tax due dates, suspension of lawsuits and tax executions, granting of payment plans even to expired plans, reduction of financing interests and social security contributions, suspension of withholdings taxes on export duties and import of medical equipment, flexibility of controls in certain procedural aspects, in particular with focus on the sectors most affected by the emergency.

Yet, it must also be said that due to the crash of the economy tax collection severely falls, and, conversely, public expenses remarkably increased to attend the crisis what leads to

[78] The principle of non-confiscation is the result of a praetorian creation of the Argentinean Supreme Court of Justice, in view of the guarantee of the inviolability of private property enshrined in art. 14 of the National Constitution (CN): "All the inhabitants of the Nation have the following rights ... to use and dispose of their property ..." and 17 of the CN :"Property is inviolable, and no inhabitant of the Nation may be deprived of it "(unofficial translation made by the authors); on an detailed analysis on the issue see M. Gonzales, El Principio De No Confiscatoriedad En Impuestos Con Fines Extrafiscales. A Propósito Del Proyecto De Creación Del "Impuesto A La Riqueza", DTE XLI, Octubre 2020; R.A. Fuster, Apuntes Constitucionales Sobre El Proyecto De Aporte Solidario Y Extraordinario A Los Patrimonios De Las Personas Humanas, DTE XLI (Octubre 2020).

[79] <https://www.reuters.com/article/us-argentina-tax-rich-idUSKBN25O2V8> (last access 21.09.2020).

[80] VAT Law, Art. 1 sec. e) in accordance with the modifications introduced by Law 27,432 in the Official Gazette on 27/12/2017.

higher indebtedness and additional monetary emission, therefore triggering an exponential primary deficit of the public accounts. In fact, the GDP fell 19, 1% in June compared to the same month of 2019 and tax revenues fell almost 25%.

Articles

National tax measures adopted in Brazil in response to the COVID-19 pandemic crisis

Marciano Seabra de Godoi*, Fernanda de Oliveira Silveira**

Abstract

The purpose of this report is to provide a general overview of the economic and social impacts of the COVID-19 pandemic in Brazil, and the main fiscal and tax measures which have been adopted by the Brazilian Government during the crisis. Furthermore, the study provides some insights on the prospective tax measures that have been discussed by Brazilian authorities and scholars about the recovery from the pandemic crisis.

Keywords

COVID-19 Pandemic – Brazil – Fiscal and Tax Measures

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* LProfessor and Director of PhD Law Program – Catholic Pontifical University of Minas Gerais – Brazil. Tax Law PhD Complutense University of Madrid – Spain.

** Master in Public Law - Catholic Pontifical University of Minas Gerais - Brazil. PhD student - Federal University of Minas Gerais - Brazil. Lawyer and Tax Consultant.

1. General Overview

The COVID-19 pandemic impacts on the Brazilian population have been severe and enduring. Brazil has the world's 2nd biggest number of total deaths (142,000 on 28 September 2020)[1] and the world's 3rd biggest number of deaths per 100,000 inhabitants (68)[2]. Yet the President of the Republic said on 11 September that "Brazil was one of the countries who suffered less"[3] with the pandemic in the whole world.

In terms of affected population, Brazil has the 10th biggest rate per 100,000 inhabitants. Brazil is one of the countries who tests less for COVID-19 in the world[4], so the numbers of cases and deaths are probably much higher than the official ones.

Being a complex federation of 27 states and more than 5,550 municipalities, the implementation of social distancing and lockdown measures throughout the huge country varied significantly from place to place. As regards central government, it has acted since the outbreak of the pandemic to minimize the malignancy of the virus and to pressure against social distancing measures. The President of the Republic said on 18 September that stay-

[1] United States is first (205.000).

[2] Peru is first and Belgium is second in number of deaths per 100.000 inhabitants, without considering the case of San Marino. See https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html, accessed on 27 September 2020.

[3] See https://www.cnnbrasil.com.br/politica/2020/09/11/brasil-e-um-dos-paises-que-menos-sofreu-com-a-pandemia-diz-bolsonaro, accessed 27 September 2020.

[4] See https://www.theguardian.pe.ca/news/world/brazil-uses-less-than-a-third-of-available-coronavirus-tests-newspaper-says-493122/, accessed 27 September 2020.

ing home in social distancing was "bullshit for weak people" and that the strong and brave people did not fear to come face to face and to win the virus[5].

The unemployment rate in Brazil was already going up since January 2020. With the pandemic outbreak in March 2020, the unemployment rate rose from 11.2 to 13.3% of the economically active population[6], the biggest rate over the last 3 years. From March to June 2020, 9 million jobs were lost in Brazil due to the pandemic crisis.

Brazil has been in a deep economic crisis for the last 6 years. The 2019 Gross Domestic Product (GDP) per capita adjusted by purchasing power parity is 8% lower than the 2014 figure[7].

The 2020 pandemic hit Brazilian's economic activity hard. The International Monetary Fund (IMF) and Economic Commission for Latin America and the Caribbean (ECLAC) estimate that in 2020 Brazilian GDP will decrease around 9% in relation to the already depressed 2019 GDP[8].

In Latin America and the Caribbean, the COVID-19 crisis is causing even more inequality and poverty, which are chronic problems in the region. ECLAC estimates that unemployment will increase by 50% compared to the end of 2019 figures. As a result, by the end of 2020, people in poverty should account for 37.3% of the Latin America and the Caribbean population (26.9% in the case of Brazil) and people in extreme poverty must reach 15.5% of the population (9.8% in the case of Brazil)[9].

Federal revenue accrued from January to July 2020 was 15% lower than in the same period of 2019[10]. States revenue dropped 6% in average in the first semester of 2020[11].

The main fiscal measures related to combating the economic effects of COVID-19 pandemic were the institution of an emergency aid of approximately 90 euros monthly for informal workers, small businesses and unemployed who do not receive welfare or social security benefits (Law N.º 13.982) and the institution of an emergency benefit for the preservation of employment and income, applicable to cases of temporary suspension of employment contracts and cases of temporary reduction of working hour and wages (Law N.º 14.020).

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[5] See https://www.poder360.com.br/governo/bolsonaro-diz-que-ficar-em-casa-e-conversinha-mole-para-os-fracos/, accessed 27 September 2020.

[6] See https://g1.globo.com/economia/noticia/2020/08/06/desemprego-sobe-para-133percent-em-junho-diz-ibge.ghtml, accessed 27 September 2020.

[7] See https://tradingeconomics.com/brazil/gdp-per-capita-ppp, accessed 27 September 2020.

[8] See IMF, 'A Crisis Like No Other, An Uncertain Recovery' (IMF, June 2020) <https://www.imf.org/en/Publications/WEO/Issues/2020/06/24/WEOUpdateJune2020> accessed 28 September 2020 and CEPAL, 'Enfrentar los efectos cada vez mayores del COVID-19 para una reactivación con igualdad: nuevas proyecciones' (CEPAL, 15 July 2020) <https://repositorio.cepal.org/bitstream/handle/11362/45782/4/S2000471_es.pdf> accessed 28 September 2020.

[9] CEPAL, 'Enfrentar los efectos cada vez mayores del COVID-19 para una reactivación con igualdad: nuevas proyecciones' (CEPAL, 15 July 2020) <https://repositorio.cepal.org/bitstream/handle/11362/45782/4/S2000471_es.pdf> accessed 28 September 2020.

[10] See https://receita.economia.gov.br/dados/receitadata/arrecadacao/relatorios-do-resultado-da-arrecadacao/arrecadacao-2020/julho2020/analisemensal-jul-2020.pdf, accessed 27 September 2020.

[11] See https://economia.estadao.com.br/noticias/geral,arrecadacao-do-icms-cresce-em-seis-estados-do-norte-e-do-centro-oeste,70003396166, accessed 27 September 2020.

In the case of the 90 euros emergency aid, it was initially granted for three months (April to June), with a subsequent extension at the end of June for another two months. The amount initially proposed by the Executive Power for the aid was only 30 euros per month, a value substantially increased after pressure from the National Congress. In September, the Executive Power decided to extend the payments of the emergency aid until December, but the amount was reduced to approximately 45 euros per month.
The total number of beneficiaries of the emergency aid exceeded 67 million people (roughly one third of Brazilian population). By the end of fiscal year of 2020, the total amount of federal spending on this emergency aid will reach almost 50 billion euros, the most significant item of federal spending related to COVID-19 crisis[12].
The other most relevant federal expenditures with the pandemic include transfers to States, Federal Districts and Municipalities (Complementary Law N.º 173, with approximately 12 billion euros being transferred in 2020 from central to regional and local governments), and additional expenses from ministries, especially the ministry of health (approximately 8 billion euros).

2. Direct Taxes' Measures

Due to the COVID-19 pandemic, the Brazilian Government (in all its spheres) adopted some timid and limited tax measures to assist Brazilian taxpayers during the crisis.
No direct measure of significant change in the rules regarding income taxation was adopted, as the Government preferred to reduce other taxes on financial operations, companies' payroll and donations aimed at combating the COVID-19 pandemic.
On the other hand, there were several instrumental measures adopted by the Government[13] to intervene in private relations and guarantee the capacity of investment and jobs maintenance by most Brazilian companies – which will also be addressed in the following Parts III and IV.

2.1. Labor Rulings and their tax impact on Federal Taxes

Through Provisional Measure no. 927/2020[14], the Federal Government deferred the payment by employers of the contribution to the Guarantee Fund for Length of Service from which their employees are beneficiaries.

[12] Marciano Seabra de Godoi et. al., 'A doença, o auxílio e as alternativas', In Carlos Palao Taboada et. al. (eds), Finanças Públicas, Direito Financeiro e Direito Tributário em Tempos de Pandemia – Diálogos Ibero-americanos (1st edn, D´Plácido, 2020).

[13] The Federal Government compiled all the standards issued during the COVID-19 pandemic, available at: http://www.planalto.gov.br/CCIVIL_03/Portaria/quadro_portaria.htm. accessed 27 September 2020.

[14] Available at http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/mpv/mpv927.htm. accessed 27 September 2020.

According to the new rules, employers would be able to postpone the payment of the contributions due in March, April and May 2020, which could later be paid in six instalments, without monetary restatement and without any fines, as of 7 July 2020, whereas these instalments suspended would only be advanced if the employer opted to terminate the employment contract during the period.

Brazilian tax law places greater responsibilities and burdens on employers whose employees are repeatedly affected by occupational diseases. For this reason, the Federal Government has also determined that only cases in which the contamination has been proven to have resulted from work will be considered occupational.

On 7 July 2020, the Government published Law no. 14.020/2020[15] to institute the 'Emergency Employment and Income Maintenance Program', through which employers were able (i) to reduce working hours and wages through negotiations between employers and employees and (ii) to temporarily suspend employment contracts, provided that certain requirements are met.

The Government also allowed that any possible monthly compensatory aid paid by employers (due to reduced hours and wages): would not be subject to income tax withheld at source, nor be considered taxable in the employee's income statements; would not suffer the incidence of the taxes commonly demanded on the payroll; and would be considered as deductible operating expenses for the calculation of income tax and social contributions on net income due by the employer.

2.2. Reduction of Federal Social Contributions

Through Provisional Measure no. 932/2020[16], later converted into Law no. 14,025/2020[17], the Federal Government reduced by 50%, from April to June 2020, the rates on the social contributions owed by companies to entities that provide autonomous social services. These taxes are levied on the companies' payroll or on the revenue obtained by producers (including agro-industries) in the marketing of rural products.

2.3 Exemptions for State Donation Tax

According to the constitutional division of tax jurisdiction among the federated entities, the Brazilian Tax System encompasses various taxes simultaneously due to the Federal Union, to the States and the Federal District (in total 27) and to the Municipalities (currently, there are 5,570 municipalities in Brazil). Because of this division, taxes on donations are due to the States and the Federal District.

[15] Available at http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2020/Lei/L14020.htm. accessed 27 September 2020.

[16] Available at http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2020/Mpv/mpv932.htm. accessed 27 September 2020.

[17] Available at http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2020/Lei/L14025.htm. accessed 27 September 2020.

Some of these States have chosen to exempt donations made to combat the COVID-19 pandemic to some extent, but there was no uniform and coordinated policy, so each State opted for a different exemption model.

The State of Minas Gerais, for example, through Law no. 23,637/2020[18], exempted until December 31, 2020 (or until the cancelation of the state of public calamity decreed in the State), donations of goods or money destined to private hospitals or to private institutions that maintain or sponsor field hospitals.

The State of Ceará, through Law no. 17,193/2020[19], exempted donations of goods, rights or money, in order to face the COVID-19 pandemic, provided they were destined for its territory.

The State of Rio de Janeiro, on the other hand, published Law no. 8,804/2020[20], through which it exempted donations (i) directed to the State Health Fund to combat the COVID-19 pandemic, (ii) directed to the Scientific, Technological and Innovation Institution, based in its territory, when destined to finance research at the combating of the pandemic; and (iii) some of the equipment necessary to fight the pandemic, according to a list published by the State itself.

3. Indirect Tax Measures

According to the constitutional division of tax jurisdiction among the federated entities, the Brazilian Tax System encompasses various VATs and other indirect taxes simultaneously due to the Federal Union, the 27 States and the 5,570 Municipalities[21].

Through Decree no. 10,285/2020[22], the Federal Government reduced to zero, until September 30, 2020, the rates of the Tax on Industrialized Products (a federal VAT) on various products intended to combat the COVID-19 pandemic, such as ethyl alcohol with a concentration equal to or more than 70%, disinfectants, masks and protective clothing.

[18] Available at http://jornal.iof.mg.gov.br/xmlui/handle/123456789/233766. accessed 27 September 2020.

[19] Available at https://www.cge.ce.gov.br/wp-content/uploads/sites/20/2020/04/LEI-N%C2%BA17.193-27-de-mar%C3%A7o-de-2020.pdf. accessed 27 September 2020.

[20] Available at http://www.fazenda.rj.gov.br/sefaz/faces/menu_structure/servicos?_afrLoop=18945129424864254&datasource=UCMServer%23dDocName%3AWCC42000008150&_adf.ctrl-state=xubum0u40_59. accessed 27 September 2020.

[21] Marciano Seabra de Godoi, 'Recent Developments in Brazil Regarding the Indirect Taxation of Services in the Digital Economy' (2018) 72 IBFD Bulletin for International Taxation, 1.

[22] Available at https://www2.camara.leg.br/legin/fed/decret/2020/decreto-10285-20-marco-2020-789866-publicacaooriginal-160169-pe.html#:~:text=Reduz%20temporariamente%20as%20al%C3%ADquotas%20do,vista%20o%20disposto%20no%20art. accessed 27 September 2020.

This same reduction was later extended by Decrees no. 10.302/2020[23] and 10.352/2020[24], for other products, such as laboratory or pharmacy articles, gloves, and clinical and digital thermometers.

On April 16, 2020, in turn, the Federal Government published Ordinance no. 158/2020[25], through which it reduced to zero, until September 30, 2020, the rates of the Import Tax, the Tax on Industrialized Products and the PIS and Cofins contributions (two other federal VATs) on the same products mentioned by the Decree no. 10,258/2020.

This same reduction for the Import Tax was corroborated by Resolutions no. 17/2020[26], 22/2020[27] and 32/2020[28], with the extension of its effects to other products, such as respiratory resuscitation devices, hospital supplies, COVID-19 test kits, medical equipment and devices, and some drugs such as chloroquine and dipyrone.

PIS and Cofins contributions, however, continued to be normally required in internal operations involving these same products. The only exception was the temporary reduction of their rates until September 30, 2020, by Decree no. 10,318/2020[29], on revenue from sales on the domestic market and from import operations involving certain inputs used in parenteral nutrition.

Regarding the Tax on Circulation of Goods and Services (a state VAT), once again, there was no coordinated and unanimous policy by States.

Some States have chosen only to reduce the rates for the Tax on Circulation of Goods and Services on necessary products to combat the COVID-19 pandemic, such as the Federal District (through Law no. 6,521/2020[30]). Others totally exempted these products, such as the State of Santa Catarina (until September 2020, through Law no. 17,930/2020[31]).

[23] Available at https://www2.camara.leg.br/legin/fed/decret/2020/decreto-10302-1-abril-2020-789921-publicacaooriginal-160237-pe.html. accessed 27 September 2020.

[24] Available at http://www.planalto.gov.br/CCIVIL_03/_Ato2019-2022/2020/Decreto/D10352.htm. accessed 27 September 2020.

[25] Available at https://www.in.gov.br/en/web/dou/-/portaria-n-158-de-15-de-abril-de-2020-252723605. accessed 27 September 2020.

[26] Available at https://www.in.gov.br/en/web/dou/-/resolucao-n-17-de-17-de-marco-de-2020-248564246. accessed 27 September 2020.

[27] Available at http://www.camex.gov.br/resolucoes-camex-e-outros-normativos/58-resolucoes-da-camex/2675-resolucao-n-22-de-25-de-marco-de-2020#:~:text=Concede%20redu%C3%A7%C3%A3o%20tempor%C3%A1ria%2C%20para%20zero,Corona%20V%C3%ADrus%20%2F%20Covid%2D19. accessed 27 September 2020.

[28] Available at http://www.camex.gov.br/resolucoes-camex-e-outros-normativos/58-resolucoes-da-camex/2675-resolucao-n-22-de-25-de-marco-de-2020#:~:text=Concede%20redu%C3%A7%C3%A3o%20tempor%C3%A1ria%2C%20para%20zero,Corona%20V%C3%ADrus%20%2F%20Covid%2D19. accessed 27 September 2020.

[29] Available at http://www.planalto.gov.br/CCIVIL_03/_Ato2019-2022/2020/Decreto/D10318.htm. accessed 27 September 2020.

[30] Available at http://www.buriti.df.gov.br/ftp/diariooficial/2020/03_Mar%C3%A7o/DODF%20054%2020-03-2020/DODF%20054%2020-03-2020%20INTEGRA.pdf. accessed 27 September 2020.

[31] Available at http://leis.alesc.sc.gov.br/html/2020/17930_2020_lei.html. accessed 27 September 2020.

With the publication of Decree no. 10,305 / 2020[32], the Federal Government reduced the tax rate on Financial Transactions to zero for operations involving: (i) loans, under any type, including credit opening; (ii) discounts, including the sale of credit rights (from credit sales) to factoring companies resulting; (iii) advance to depositor; (iv) loans, including in the form of financing; (v) limit excesses; (vi) credit at an additional rate of 0.38%; and (vii) new incidence of such tax in cases of extension, renewal, novation, composition, consolidation, debt confession and similar cases, without replacing the debtor.
This reduction was initially planned for the period from 3 April to 3 July 2020, but was extended until 2 October 2020, by Decree no. 10,414 / 2020[33].

4. Procedural Tax Aspects

As said before, the Federal Government[34] adopted several instrumental measures trying to guarantee the capacity of investment and jobs maintenance by most Brazilian companies.

4.1. Extensions in the payment of current taxes

Through Ordinances 139/2020[35] and 150/2020[36], the Federal Government extended the deadline for the payment of social security contributions due by companies and domestic employers, as well as PIS and Cofins contributions, so that their payments related to the months of March and April 2020 (originally due in April and May 2020, respectively) were deferred to August and October 2020.
For Brazilian exporting companies, the Federal Government makes it possible to obtain special tax regimes, known as Drawback, through which one can obtain the temporary suspension of taxes that would be required in the acquisition in the domestic market and/or in the import of inputs to be applied or consumed in the industrialization of the product that shall be exported. Due to the COVID-19 crisis' impacts on international markets and transactions, the Federal Government issued Provisional Measure no. 960/2020[37] extending for a year the deadline

[32] Available at http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/decreto/d10305.htm. accessed 27 September 2020.

[33] Available at http://www.planalto.gov.br/CCIVIL_03/_Ato2019-2022/2020/Decreto/D10414.htm. accessed 27 September 2020.

[34] Some of these measures (such as extensions in the payment of tax installments and in the delivery of tax returns and suspension on collection actions and deadlines for tax defenses) were mirrored by some of the 27 Brazilian States and 5,570 Municipalities.

[35] Available at https://www.in.gov.br/en/web/dou/-/portaria-n-139-de-3-de-abril-de-2020-251138204. accessed 27 September 2020.

[36] Available at https://www.in.gov.br/en/web/dou/-/portaria-n-150-de-7-de-abril-de-2020-251705942. accessed 27 September 2020.

[37] Available at http://www.planalto.gov.br/CCIVIL_03/_Ato2019-2022/2020/Mpv/mpv960.htm. accessed 27 September 2020.

for companies that obtained Drawback Concession Acts due in 2020, to prove the export of products whose inputs had not yet been taxed because of this special regime.
For Small and Medium-sized Enterprises, the Brazilian Constitution allowed the establishment of a simplified taxation regime, known as 'Simples Nacional', which allows these companies the unified payment of federal, state and municipal taxes.
As it involves taxes from different competencies, Simples Nacional is managed by a Management Committee that encompasses representatives of all the federated entities in Brazil. Through Resolution no. 154/2020[38], the Management Committee extended the original deadlines for payment of the taxes included in Simples Nacional, as follows: (i) for federal taxes (income tax, tax on industrialized products, social contribution on profit, PIS and Cofins contributions and employers' social security contribution), the original payments related to March, April and May 2020 were extended to October, November and December 2020, respectively; (ii) for state (tax on the circulation of goods and services) and municipal (service tax) taxes, the original payments related to March, April and May 2020 were postponed to July, August and September 2020, respectively.

4.2. Extensions in the payment of previous tax instalments

Through Ordinance 201/2020[39], the Federal Government extended the payment deadlines related to federal tax instalment programs, so that the instalments due in May, June and July 2020 could be paid in August, October and December of 2020, respectively, with interests until its effective payment.
Through Resolution 155/2020[40], the Management Committee also extended the deadlines for payment of instalments made under 'Simples Nacional', so that the instalments due in May, June and July 2020 could be paid in August, October and December 2020, with interests until its effective payment.

4.3. Extensions in the submission of tax returns

Regarding the filing of declarations with tax impacts, the Federal Government promoted different measures for individuals and for legal entities.
For individuals, the deadline for submitting the declaration of Brazilian Capitals Abroad was extended from April to June 2020 (through Circular DC/BACEN no. 3,995/2020[41]), and from March to June 2020, the deadline for the submission of the Annual Adjustment

[38] Available at http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?visao=anotado&idAto=108368#2114637. accessed 27 September 2020.

[39] Available at https://www.in.gov.br/en/web/dou/-/portaria-n-201-de-11-de-maio-de-2020-256310621. accessed 27 September 2020.

[40] Available at http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?visao=anotado&idAto=109446. accessed 27 September 2020.

[41] Available at https://www.bcb.gov.br/pre/normativos/busca/downloadnormativo.asp?arquivo=/lists/normativos/attachments/50954/circ_3995_v1_o.pdf. accessed 27 September 2020.

Declaration for Individuals, referring to the 2019 calendar year income taxation (through Normative Instruction 1,930/2020[42]).

For legal entities in general, the deadlines (i) for the transmission of Federal Tax Debt and Credit Declarations (DCTF) and the Digital Tax Deed of PIS/Pasep, Cofins and the Social Security Contribution on Revenue (EFD), which would have previously been delivered in April, May and June 2020, were postponed to July 2020 (through Normative Instruction no. 1,932/2020[43])); and (ii) for the transmission of the Tax Accounting Bookkeeping (ECF), referring to the 2019 calendar year, was postponed from July 2020 to September 2020 (through Normative Instruction no. 1,965/2020[44]).

For Small and Medium-sized Enterprises under Simples Nacional, the Management Committee published the Resolution no. 153/2020[45] extending to June 2020 the deadline for submitting the Declaration of Socioeconomic and Tax Information (DEFIS) and the Simplified Annual Declaration for the Individual Microentrepreneur (DASN-Simei), referring to the 2019 calendar year.

4.4. Suspension of collection actions and deadlines for tax defenses

Through Ordinance no. 7,821/2020[46], the Federal Government suspended, for 90 days, the deadlines for the presentation of defenses in tax matters as well as for the collection measures and initiation of procedures for the exclusion of taxpayers from federal installments.

The suspension of the deadlines for the presentation of defenses involving federal taxes was further extended until 31 August 2020, through Ordinances no. 543/2020[47], 936/2020[48], 1,087/2020[49] and 4,105/2020[50].

The Federal Government also enacted Law no. 13,988/2020[51] to establish the general guidelines for tax transactions within the scope of the Federal Government whose regu-

[42] Available at http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?visao=anotado&idAto=108340. accessed 27 September 2020.

[43] Available at https://www.in.gov.br/en/web/dou/-/instrucao-normativa-n-1.932-de-3-de-abril-de-2020-251138205. accessed 27 September 2020.

[44] Available at http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?visao=anotado&idAto=111014. accessed 27 September 2020.

[45] Available at http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?visao=anotado&idAto=108098. accessed 27 September 2020.

[46] Available at https://www.in.gov.br/en/web/dou/-/portaria-n-7.821-de-18-de-marco-de-2020-248644106. accessed 27 September 2020.

[47] Available at http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?idAto=107927&visao=anotado. accessed 27 September 2020.

[48] Available at http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?visao=anotado&idAto=109891. accessed 27 September 2020.

[49] Available at http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?visao=anotado&idAto=110754. accessed 27 September 2020.

[50] Available at http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?visao=anotado&idAto=111406. accessed 27 September 2020.

[51] Available at http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/lei/l13988.htm. accessed 27 September 2020.

lation was given by Ordinances no. 9,924/2020[52] and 18,176/2020[53] in order to allow all Brazilian taxpayers to transact their outstanding debts until 31 August 2020.

However, the Federal Government made it possible, through Ordinance no. 14,402/2020[54], that taxpayers who have been affected by COVID-19 pandemic could join, from July 2020 to 29 December 2020, an Exceptional Transaction modality whose benefits and reductions were even more advantageous compared to that regulated by the aforementioned Ordinances.

The Federal Government also extended, through Provisional Measure no. 927/2020[55], regulated by Ordinance no. 555/2020[56], the term of validity of certificates (attesting the fiscal regularity of Brazilian taxpayers) which would expire during most of the first semester of 2020. Similar measures were adopted by some Brazilian States, such as the State of Minas Gerais (through Decree n. 47,898/2020[57], which also suspended collection actions).

4.5. Measures to expedite Customs Clearance

The Federal Government also adopted measures to expedite the customs clearance of products or inputs necessary to combat the COVID-19 pandemic, both to (i) enable such products to be the subject of a Special Export License (under the terms of Ordinance no. 16/2020[58]) and (ii) allow the delivery of these goods before the conclusion of the customs conference (Normative Instruction n. 1,927/2020[59]) as well as (iii) guarantee their priority dispatch (Normative Instruction RFB no. 1,929/2020[60]) and (iii) allow their Certificate of Origin to be presented within 60 days of the registration of the Import Declaration, without requiring any guarantee (Normative Instruction 1,936/2020[61]).

Regarding the international taxation of income (corporate and personal income), Brazilian government took no legislative measures in response to COVID-19 crisis.

[52] Available at https://www.in.gov.br/en/web/dou/-/portaria-n-9.924-de-14-de-abril-de-2020-252722641. accessed 27 September 2020.

[53] Available at https://www.in.gov.br/en/web/dou/-/portaria-n-18.176-de-30-de-julho-de-2020-269665327. accessed 27 September 2020.

[54] Available at https://www.in.gov.br/en/web/dou/-/portaria-n-14.402-de-16-de-junho-de-2020-261920569. accessed 27 September 2020.

[55] Available at http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/mpv/mpv927.htm. accessed 27 September 2020.

[56] Available at https://www.in.gov.br/en/web/dou/-/portaria-conjunta-n-555-de-23-de-marco-de-2020-249439539. accessed 27 September 2020.

[57] Available at http://www.fazenda.mg.gov.br/empresas/legislacao_tributaria/decretos/2020/d47898_2020.html#:~:text=Disp%C3%B5e%20sobre%20a%20suspens%C3%A3o%20de,2002%2C%20e%20d%C3%A1%20outras%20provid%C3%AAncias. accessed 27 September 2020.

[58] Available at http://www.mdic.gov.br/images/REPOSITORIO/secex/gab/portarias_secex_2020/Portaria_SECEX_016_2020.pdf. accessed 27 September 2020.

[59] Available at http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?visao=anotado&idAto=107785. accessed 27 September 2020.

[60] Available at http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?visao=anotado&idAto=108156. accessed 27 September 2020.

[61] Available at https://www.in.gov.br/en/web/dou/-/instrucao-normativa-n-1.936-de-15-de-abril-de-2020-252573865. accessed 27 September 2020.

5. Post-COVID-19 Tax Measures

In 2019, an ambitious constitutional reform of Brazilian indirect taxation was proposed to National Congress, but consensus on this subject was far from being reached.

In July 2020, Federal Government proposed to National Congress a more limited reform of indirect taxation with no necessity of constitutional amendments. Once more, consensus is far from being reached. Federal Government says this proposal would not raise the tax burden, but several economic sectors – specially the services sector – say the opposite.

The Minister of the Economy has been obsessed since 2019 about reintroducing the federal tax on financial transactions. His proposal is to reintroduce this tax abolished in 2007 and, in return, reduce the payroll taxes to a minimum. But the presidents of the two legislative branches are contrary to reintroducing the federal tax on financial transactions.

Regarding the personal income tax, the Minister of the Economy states from time to time that the government weighs to reduce or even to abolish the major allowances related to education and wealth personal expenses. In return, he offers the opportunity of doubling the current threshold of minimum exempted income.

Another offer loosely proposed by the Ministry of Economy is to revoke the 1995 income tax exemption of distributed dividends in exchange for reducing the statutory rates of corporate income tax. None of these Minister's offers are concretely put on a bill to be sent to the Congress.

Several economists[62] and international organizations[63] have made clear calls for post-COVID-19 medium- and long-term tax policies which could strengthen high income and high wealth taxation. However, there is no indication from the Brazilian government that, after this first moment of emergency assistance spending and tax relief/postponement measures, some type of tax reform will be able to change the endemic inequity of our regressive tax system, excessively dependent on a very high indirect taxation on goods and services.

[62] See ICRICT, The global pandemic, sustainable economic recovery and international taxation (2020) <https://static1.squarespace.com/static/5a0c602bf43b5594845abb81/t/5ee79779c63e0b7d057437f8/1592235907012/ICRICT+Global+pandemic+and+international+taxation.pdf> accessed 9 August 2020.

[63] CEPAL, 'Enfrentar los efectos cada vez mayores del COVID-19 para una reactivación con igualdad: nuevas proyecciones' (CEPAL, 15 July 2020) <https://repositorio.cepal.org/bitstream/handle/11362/45782/4/S2000471_es.pdf> accessed 28 September 2020 and OECD, Tax and Fiscal Policy in Response to the Coronavirus Crisis: Strengthening Confidence and Resilience (2020). <https://read.oecd-ilibrary.org/view/?ref=128_128575-o6raktc0aa&title=Tax-and-Fiscal-Policy-in-Response-to-the-Coronavirus-Crisis> accessed 9 August 2020.

Articles

Tax measures implemented in Colombia during the health and economic emergency triggered by COVID-19

Cristian Camilo Rodríguez Peña*,
Omar Sebastián Cabrera Cabrera**

Abstract

After the outbreak of the COVID-19 pandemic, several Colombian entities enacted legislation intended to cope with negative effects triggered by this situation. The Colombian Ministry of Public Finance, the Colombian Tax Office, and local tax authorities issued different tax dispositions concerning income tax, value-added tax, compliance matters, and local taxes, among others, based on special powers arising from the state of economic, health, and social emergency.

Keywords

Colombian tax measures COVID-19

* Teaching and Research Associate at the Institute for Austrian and International Tax Law, Vienna University of.
** Economics and Business. Teaching and Research Associate at Centre for Tax Studies Externado University.

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Introduction

By Resolution 385, dated March 12, 2020, the Colombian Ministry of Health declared a health emergency within Colombian territory until May 30, 2020, due to the outbreak of COVID-19. However, Resolution 844, dated May 16, 2020, extended the emergency until August 31, 2020, and Resolution 1462, dated August 25, 2020, further extended this emergency until November 30, 2020. This is significant, as several measures adopted during the health emergency remain in effect until the period defined by Resolution 1462 ends.
On the other hand, the Colombian National Government enacted Executive Order 417, dated March 17, 2020, which declared a state of economic and social emergency in Colombia for one month, based on the powers granted by sections 212 and 213 of the Colombian Constitution. Nevertheless, Executive Order 637, dated May 6, 2020, then extended this state of emergency for a further month. Thus, the state of economic and social emergency was lifted on June 6, 2020.
Bearing in mind the above, Section 47 of Law 134, dated June 2, 1994, establishes that, during a state of economic and social emergency, the national executive branch is vested with exceptional powers, including those to create taxes or modify previous taxes, provided that these measures are needed to overcome the crisis. However, the legal effects of those tax measures cease in the following taxable year unless Congress adopts them permanently by law. Likewise, several local entities also declared a state of emergency in their territories to implement tax legislation intended to provide relief to taxpayers.
This paper provides a general description of the main and most relevant tax measures adopted in Colombia during the health crisis, considering national and local taxes, compliance, and procedural issues.

I. Income tax

The following lines provide a general insight into the main income tax measures implemented in Colombia during the health and economic emergency for both Colombian companies and individuals.

I.1. Companies

I.1.a. *Executive Order 575, dated April 15, 2020*

Executive Order 575 of 2020 adopted tax measures intended to grant relief to airline companies that were affected by the crisis as follows:

• **Large investment regime:** Section 235-3 of the Colombian Tax Code (CTC) was modified to include the provision that airlines can apply to the large investment regime if they make investments of at least 2 million Colombian tax units (COP 71,214.000,000 or USD 18,789,974[1]) in the Colombian aeronautical sector before December 31, 2021. For completeness, local companies that qualify under the large investment regime are entitled to a 27% income tax rate rather than the ordinary 32% applicable for the fiscal year 2020[2] are not subject to either dividend tax or wealth taxes and can apply for the accelerated depreciation of fixed assets, among others.

I.1.b. *Executive Order 766 dated May 29, 2020*

The 2020 income tax prepayment was reduced by between 25% and 0% for certain taxpayers, depending on the activities they carry out according to their ISIC code (International Standard Industrial Classification). For completeness, this 2020 income tax prepayment should be settled when filing the 2019 income tax return.

- The 25% reduction was applicable to companies engaged in activities such as the extraction of crude oil and natural gas; the manufacture of tobacco products; the manufacture of fabricated metal products (except machinery and equipment); the manufacture of motor vehicles, trailers, and semi-trailers; the manufacture of furniture, mattresses, and box springs; building construction; manufacture of electric motors, generators, and transformers; and electrical energy distribution and control;
- The 0% reduction was applicable to companies engaged in activities such as air transportation; accommodation; food and beverage services; travel agency services, tour operation, reservation services, and related activities; libraries, archives, museums, and other cultural activities; and sports and recreational activities.

[1] Exchange rate of 1 USD = COP 3.790.

[2] The general income tax rate is going to be reduced to 31% for fiscal year 2021 and to 30% for fiscal year 2022 onwards.

I.2. Individuals

I.2.a. *Executive Order 568 dated April 15, 2020*

Executive Order 568 created a new tax called the "COVID-19 solidarity tax"[3], funds from which were intended for use in social investment. Accordingly, starting on May 1, 2020, and until July 31, 2020, public servants and individuals hired by governmental and public entities and pensioners were liable for tax on any salary, wage, or pension exceeding COP 10,000,000 (USD 2,638[4]), although the first COP 1,800,000 (USD 475[5]) was excluded from the taxable base.

Furthermore, the executive order created, during the above-mentioned period, a voluntary solidarity contribution by which public servants and individuals hired by governmental entities were encouraged to make voluntary contributions to raise funds intended to address situations caused by COVID-19 in Colombia.

However, the Colombian Constitutional Court, in Judgement C-293, dated August 5, 2020, struck down this tax on the grounds that it violated the principle of equality in tax matters established in section 363 of the Colombian Constitution because it mainly targeted public servants and, therefore, private employees were not covered. According to the Constitutional Court, any previous payment made in consideration of the solidarity tax should be deemed as a prepayment of income tax liability for 2020.

II. Indirect Taxation

The Colombian government has taken various actions regarding indirect taxation in response to the COVID-19 pandemic. Chiefly, these actions concerned the Value Added Tax (VAT) and National Consumption Tax (NTC)[6], both of which are taxes applicable at a national level.

II.1. Zero VAT rate and exemptions on medical equipment and services to secure food production

II.1.a. *Executive Orders 438 dated March 19, 2020, and 551, dated April 15, 2020*

Executive Order 438 established a zero VAT rate on the import and sale of 24 items that encompass medical equipment and devices (such as nebulizers, vital-sign monitors, ven-

[3] In Spanish "*Impuesto solidario por el COVID-19*".

[4] Exchange rate of 1 USD = COP 3.790.

[5] Exchange rate of 1 USD = COP 3.790.

[6] In Spanish "*Impuesto Nacional al Consumo*".

tilators, defibrillators, and hospital beds). This list was further extended by section 1 of Executive Order 551 to include 211 medical supplies and personal care products (including alcohol, sanitizing gel, soaps, laundry detergent, and alcohol wipes). Additionally, this measure permits the person liable for paying the VAT to deduct the input VAT but not to request the refund of or compensation for any credit balance.

The requirements to qualify for this measure, according to section 2 of the Executive Order, are as follows:

- The taxpayer must include the following notice on their invoices: "Exempted goods – Executive Order 417 of 2020";
- According to Executive Order 438, to qualify for the zero VAT rate, the import, sale, and delivery of qualifying medical devices must have been performed within the time limit of the emergency period established by Executive Order 417 of 2020. However, Executive Order 551 further extended this limit for the term of the health emergency decreed by the Colombian Ministry of Health (currently extended until November 30, 2020);
- The taxpayer must submit a report by the last day of each month of the sales and returns of imported equipment that qualify for the zero VAT rate.

II.1.b. *Executive Order 573 dated April 15, 2020*

Executive Order 573 introduced a VAT exemption for commissions on financial guarantees granted by the National Financial Agrarian Guarantee Fund[7]. According to this measure, VAT constitutes an additional cost for the members of the agricultural sector to accessing the funds needed to maintain the normal food supply chain during the pandemic. Therefore, this exemption applies only to guarantees granted to face the adverse circumstances occasioned by the COVID-19 pandemic and until December 31, 2020.

II.1.c. *Executive Order 789 dated June 4, 2020*

This measure established a transitory VAT exemption for the acquisition of raw materials needed to produce medicines. These commodities are specified by the customs codes 29.36, 29.41, 30.01, 30.02, 30.03, 30.04, and 30.06, which include vitamins, antibiotics, organic chemicals, and pharmaceuticals. This measure is applicable for the duration of the health emergency decreed by the Colombian Ministry of Health.

[7] In Spanish, *Fondo Agropecuario de Garantías*.

II.2. Measures to restart the economy and other kinds of measures involving indirect taxation

II.2.a. *Executive Order 540 dated April 13, 2020*

With Executive Order 540, the government established a zero VAT rate for mobile voice and Internet plans with monthly costs lower than COP 71,214, or approximately USD 18, for a period of four months from April 13, 2020. This measure was intended to lower the costs of communication services and help people and communities remain connected during the COVID-19 pandemic.

II.2.b. *Executive Order 530 dated April 8, 2020*

Executive Order 530 grants a VAT exemption for in-kind donations of goods for human or animal consumption, clothing, cleaning goods, human and veterinary medicines, construction materials, and medical devices. The benefit is granted exclusively for donations used to meet the effects of the COVID-19 crisis. Therefore, these donations are not considered sales for VAT purposes and are not subject to VAT unless the donation is concluded, directly or indirectly, between related parties. This measure will continue to apply as long as the conditions that motivated the state of emergency persist.

II.2.c. *Executive Order 682 dated May 21, 2020*

Executive Order 682 provided for several actions to restart the economy through indirect tax measures. First, it established a zero VAT rate on sales taking place within Colombian national territory on June 19, July 3, and July 19 of the following types of goods: (a) clothing for which the price per unit is equal to or less than 20 UVT (COP 712,000 or USD 188); (b) household appliances, computers, and communication equipment for which the price per unit is equal to or less than 80 UVT (COP 2,849,000 or USD 752); (c) clothing accessories for which the price per unit is equal to or less than 20 UVT (COP 712,000 or USD 188); (d) sporting goods for which the price per unit is equal to or less than 80 UVT (COP 2,849,000 or USD 752); (e) toys and games for which the price per unit is equal to or less than 10 UVT (COP 356,000 or USD 94); (f) agricultural goods and supplies for which the price per unit is equal to or less than 80 UVT (COP 2,849,000 or USD 752); and (g) school supplies for which the price per unit is equal to or less than 5 UVT (COP 178,000 or USD 47).

The requirements for this benefit to apply are as follows:

- The aforementioned goods must be located in Colombia for retail sale directly to a natural person who is the final consumer;
- The person liable for paying the VAT must issue an invoice with all the requirements established by the tax law and identifying the final customer;
- The payments cannot be made in cash; only debit or credit cards or other electronic means of payment are accepted;

- The final customer can purchase a maximum of 3 units of the same category of goods from a single seller. If the goods are sold in pairs (such as shoes), this is deemed a single purchase.

Second, Executive Order 682 adopted a zero rate for the National Consumption Tax on bars and restaurants until December 31, 2020.

Lastly, Executive Order 682 exempted from VAT the leasing for business purposes of commercial premises, although this measure was lifted on July 31, 2020.

II.2.d. *Executive Order 789 dated June 4, 2020*

In addition to the VAT exemption on the purchase of chemical commodities for the production of medicines, Executive Order 789 included other kinds of measures for restarting the economy. These measures remain in force until December 31, 2020, and are as follows:

- VAT exemption for franchise agreements[8];
- Zero VAT rate on the import of new or used passenger or cargo transport vehicles for public or private use;
- VAT exemption for services in hotels and tourism.

II.2.e. *Executive Order 575 dated April 15, 2020*

On top of the income tax measures adopted by Executive Order 575, this ruling also introduced an indirect tax provision which consisted in the reduction of the VAT rate applicable for air-fuel (Jet A1) and airfare from 19% to 5% until December 31, 2020.

III. Banking tax

Executive Order 530, dated April 8, 2020, established that withdrawals from current and savings accounts made by non-profit entities belonging to the special tax regime would be exempted from the banking tax (known as "GMF"[9]), provided that the following requirements were met: (a) the non-profit entity requested that the financial institution mark the current or savings account, (b) the non-profit entity affirmed that the withdrawals were to be used exclusively to benefit the most vulnerable Colombian populations, (c) the non-profit entity submitted the relevant documents to the Colombian Tax Office (DIAN) within 15 days after marking the accounts, and (d) at the end of the health emergency, all information related to the total withdrawals made and the destinations and identifications of the beneficiaries of these financial movements were submitted to the relevant authorities.

[8] According to the grounds of this measure, food and drink services will decrease in 37% on average due to the pandemic COVID-19 in 2020.

[9] In Spanish "*Gravamen a los Movimientos Financieros*".

IV. Electrical surcharge

Executive Order 799 of 2020, dated June 4, 2020, temporarily suspended (until December 31, 2020) the surcharge applicable to electric public utilities established in section 211 of the CTC for tourism companies registered with the Colombian Tourism Registry and engaged in the following activities: hotels, holiday centers, country hotels, other hotels, amusement parks, and other recreational activities.

V. Local taxes

Some local tax authorities in Colombia have implemented tax measures to alleviate the negative impacts of the health emergency. These measures generally entail the suspension of the terms of administrative tax procedures and the extensions of deadlines for filing local tax returns, such as the Industry and Trade Tax (ITT)[10] or the Real Estate Tax (RET). For example, in the case of Bogotá, Resolution SDH-000177, dated March 24, 2020, suspended the terms for administrative tax procedures in Bogotá between March 20 and May 4, 2020. This measure was further extended on various occasions and, according to Resolution SDH-000314, dated July 31, 2020, it would apply until August 31, 2020, or until the end of the health emergency declared by the National Government.

Furthermore, the Colombian National Government has issued Executive Orders 461, dated March 22, 2020, and 678, dated May 20, 2020, which are intended to provide local authorities with normative tools to address the negative effects of the health emergency. Executive Order 461 permits mayors and governors to implement tax-rate reductions for local taxes within the threshold established by the law, a measure deemed to be in accordance with the Colombian Constitution as determined by the Constitutional Court in Judgement C-169, dated June 10, 2020.

On the other hand, Executive Order 678 provides for measures concerning subnational taxation in sections 6 and 7. In section 6, it provides the option for local authorities to defer up to 12 monthly installments of local taxes, the last installment not being due for payment until June 2021. Additionally, section 7 orders a tax and penalty amnesty for local taxes as follows:

- The taxpayer would pay 80% of the principal without interest if the payment were made before October 31, 2020;
- The taxpayer would pay 90% of the principal without interest if the payment were made between November 1, 2020, and December 31, 2020;

[10] In Spanish *"Impuesto de Industria y Comercio"* (ICA)

- The taxpayer would pay 100% of the principal without interest if the payment is made between January 1, 2021, and May 31, 2021.

These specific measures provided by section 7 of Executive Order 678 have been explicitly implemented and regulated by some local tax authorities, for example, those of Bogotá, Medellin, and Rionegro.

VI. Tax compliance

Below is a brief description of the most important tax compliance measures adopted in Colombia concerning national taxes during the health and social emergency. It is worth pointing out that several Colombian local tax authorities also provided deadline extensions for filing local tax returns (such as the industry and trade tax or the real estate tax) and submitting local magnetic media.

VI.1. Executive Order 401 dated March 13, 2020

VI.1.a. *Income tax return and VAT – Commercial airlines, hotels, and entertainment activities*

The deadline for filing the 2019 income tax return was extended until July 31, 2020, for commercial airlines, hotels, and taxpayers, whether deemed as large or small taxpayers, engaged in the following economic activities: "theatrical activities", "activities of live music shows", and "other live entertainment activities".

Furthermore, large taxpayers engaged in the aforementioned activities had until July 31, 2020, to pay the second installment and until August 31, 2020, to pay the third installment, whereas regular companies had until July 31, 2020, to pay the first installment and until August 31, 2020, to pay the second installment.

Likewise, the VAT deadline for bi-monthly returns due during the first semester of the year was also extended for such taxpayers until June 30, 2020.

VI.1.b. *Income tax return – Works for taxes*

The deadline for filing the 2019 income tax return for taxpayers within the "works for taxes"[11] mechanism in accordance with section 238 of Law 1819 of 2016, which had been March 31, 2020, was extended as follows: regular companies and companies deemed as large taxpayers were permitted until May 29, 2020, to file their income tax return and pay the first installment. However, such taxpayers were obliged to contribute the funds to the trust no later than May 29, 2020.

[11] A mechanism by which taxpayers can pay up to 50% of their income tax by building local infrastructure in the most vulnerable Colombian municipalities.

VI.1.c. *Wealth tax return*

The deadline for filing the 2020 wealth-tax return was extended to between September 29, 2020, and October 9, 2020. Liable taxpayers were obliged to pay the tax in two equal installments (in May and in September-October).

VI.2. Resolution 23 dated March 18, 2020, issued by the DIAN

The deadline for filing the 2019 tax conciliation report for individuals deemed as large taxpayers was extended until August 9, 2020.

VI.3. Executive Order 434 dated March 19, 2020

VI.3.a. *Income tax return*

The deadline for filing the 2019 income tax return for large taxpayers was extended until between April 21, 2020, and May 5, 2020, and for regular companies until between April 21, 2020, and May 19, 2020. For financial institutions deemed as large taxpayers, the deadline for the payment of the first 50% installment of the income tax surcharge for the banking sector for the taxable year 2019 was also extended until between April 21 and May 5, 2020.

VI.3.b. *Assets held abroad tax return*

The assets-held-abroad tax return deadline for 2020 was extended only for large taxpayers and companies but not for liable individuals. For large taxpayers, the deadline was extended until between April 21 and May 5, and for regular companies until between April 21 and May 5.

VI.3.c. *VAT and National Consumption Tax (NCT)*

The deadline for filing VAT and NCT tax returns due during the first semester of the year 2020 was extended until June 30, 2020, for taxpayers engaged in activities listed in Resolution 139 of 2012 (sale of prepared meals, sale of alcoholic beverages within an establishment, travel agencies, tour operators).

VI.4. Resolution 27 dated March 25, 2020, issued by the DIAN

The deadline for submitting the 2019 national magnetic media for any kind of taxpayer liable to submit this type of report to the DIAN was extended. For large taxpayers, the deadline was extended until between May 15, 2020, and May 29, 2020, and for other taxpayers (regular companies and individuals), until between June 1, 2020, and July 1, 2020.

VI.5. Executive Order 520 dated April 3, 2020

VI.5.a. *Income tax*

The deadline for filing and paying the second and third installment of the 2019 income tax return for large taxpayers was extended again until between June 9, 2020, and June 24, 2020. Likewise, the deadline for filing and paying the first and second installments of the

2019 income tax return for regular companies was extended again until between April 21, 2020, and July 1, 2020.

VI.5.b. *Assets held abroad tax return*

The deadline for filing the 2020 assets-held-abroad tax return was again extended only for large taxpayers until between June 9, 2020, and June 24, 2020, and for regular companies until between June 1, 2020, and July 1, 2020.

VI.6. Resolution 46 dated May 7, 2020, issued by the DIAN

Again, the deadline for submitting the national magnetic media was extended by the DIAN between June 9, 2020, and June 24, 2020.

VI.7. Executive Order 655 dated May 13, 2020

The deadline for the payment of the second installment of the 2019 income tax for taxpayers deemed as micro, small, and medium businesses is extended until between November 9, 2020, and December 7, 2020.

VII. Procedural measures

Below is a brief description of the most important procedural measures adopted in Colombia concerning national taxes during the COVID-19 crisis, which aimed at halting some tax procedures and reinforcing the use of digital tools for tax purposes.

VII.1. Suspension of judicial deadlines and home-based work in the judicial branch

The Superior Council of the Judiciary[12] (SCJ) issued agreements PCSJA20-11517, PCSJA20-11521, and PCSJA-11526, whereby it suspended judicial deadlines from March 16 to April 12, 2020. This suspension was further extended by the SCJ on various occasions, and agreement PCSJA20-11567 extended the aforementioned suspension for a final time up to June 30, 2020 and provided for this measure to be lifted starting on July 1, 2020.

The suspension of judicial deadlines applied to all the judiciary authorities in Colombia[13], including courts that hear tax cases in the first and second tiers and the Supreme Administrative Court. Furthermore, the staff of the judiciary branch was encouraged to work from

[12] In Spanish "*Consejo Superior de la Judicatura*".

[13] This measure did not apply in the case of criminal matters, protection of fundamental rights, and functions of the Constitutional Court related to the control of constitutionality over executive orders issued by the Government under the state of emergency. Neither it applied in respect of functions of the second-tier Administrative Court and Supreme Administrative Court related to the legality control over administrative measures issued by the government and based on the executive orders.

home whenever possible and, given that their physical presence is needed in courthouses, to limit their presence to 20% of the total of judicial employees for each office.

VII.2. Suspension of administrative terms for tax, customs, and foreign exchange audits

Through Resolution 22, dated March 18, 2020, the Colombian Tax Office suspended the administrative terms for ongoing tax, customs, and foreign exchange audits between March 19 and April 3, 2020. This measure was further extended by Resolution 30, dated March 29, 2020, until the day after the end of the health emergency decreed by the Colombian Ministry of Health. This suspension does not encompass (i) filing and payment of tax returns, (ii) tax refunds and compensation requests submitted through the Computer Service Electronic (SIE) and/or authorized electronic mailboxes, (iii) payment facilities requested through authorized electronic mailboxes, (iv) management of judicial deposit securities, or (v) lifting of attachments requested through authorized electronic mailboxes.

Although section 8 of Resolution 30, dated March 29, 2020, had established that the suspension would apply until the end of the health emergency declared by the Ministry of Health, Resolution 55, dated May 29, 2020, order the lifting of the suspension from June 2, 2020, with the exception of some administrative terms that would continue to be suspended until the day after the end of the declared emergency.

VII.3. Use of electronic means and home-based work for public sector employees

Executive Order 491, dated March 28, 2020, adopted several measures to ensure continuity of the provision of services in charge of governmental authorities during the health emergency. Accordingly, it is established in section 3 that public servants should work from home whenever possible unless their work is essential for the adequate operation of the State. Furthermore, the executive order also established the notification of administrative proceedings through electronic means. To this end, taxpayers must provide their e-mail addresses in their interactions with governmental authorities. Although this system of notification was already foreseen by the CTC, its implementation took place through Resolution 38, dated April 30, 2020.

Furthermore, through Resolution 00058 of 2020, the DIAN adopted actions to provide services to the public during the economic emergency. Amongst other measures, the Tax Authority provided for the signing of official documents with digital or scanned signatures and the notification of tax summons by email.

Subsequently, Executive Order 807, dated June 04, 2020, established possibilities for the tax administration to carry out virtual tax and accounting inspections during the health emergency. These virtual processes, which could lead to a tax assessment, were regulated by Resolution 79, dated July 24, 2020, whereby the DIAN detailed how these virtual audits would be performed.

However, the Colombian Constitutional Court, through press release no. 141, dated September 10, 2020, following the pending Judgement C-379, struck down Executive Order

807 on the grounds that the Government did not provide an adequate justification for the measures adopted within the Executive Order. As a consequence, Resolution 79 issued by the DIAN, which had been based upon the aforementioned Executive Order, lost its validity.

VIII. Other issues

VIII.1. Tax payment facilities

Circular No. 0003, dated April 14, 2020, establishes the procedures to request a tax payment facility with the DIAN in accordance with Law 2010 of 2019 and sections 590 and 814 of the CTC. However, default interest was still accrued. Likewise, terms for termination by mutual agreement of tax audits were extended until June 30, 2020.

VIII.2. Expedite tax refunds

Executive Order 535, dated April 10, 2020, implemented an expedited tax refund mechanism for taxpayers (other than those deemed high-risk taxpayers) in which those applications were processed for refunds within 15 days after the date of submission (down from the regular 30 and 50 working days). The deadline for applying to this Covid-19 expedite mechanism was set until June 19, 2020 by Executive Order 807 of 2020, albeit this deadline was declared unconstitutional by the Colombian Constitutional Court in Judgment C-394 of 2020.

IX. Concluding remarks

This article provides a comprehensive description of the tax measures adopted by the Colombian government in response to the Covid-19 pandemic. First, it analyzed the income tax measures adopted regarding companies and individuals, in the former regarding the relief granted to airline companies and the reduction of income tax prepayment for certain taxpayers depending on the activities carry out by them, in the latter concerning the adoption of a solidarity tax which was considered as unconstitutional by the Colombian Constitutional Court as it breached the equality principle enshrined in article 365 of the Constitution. This decision reiterates the importance for respecting the constitutional principles even during a state of economic and social emergency.

The article next studied the indirect taxation measures, some of them which were specially targeted at reducing the VAT burden for goods consisting of medical equipment and medicines, and others which aimed to alleviate the negative economic consequences brought about by the Covid-19 crisis and stimulate the economy.

Then, the article examined tax reliefs regarding other fiscal obligations for certain taxpayers and under certain conditions (banking tax, electrical surcharge, local taxes, deadlines

extensions for filing tax returns, etc.), adoption of procedural measures (suspension of judicial deadlines and administrative terms for audits) and the use of electronic means by the tax administration.

The government has already declared its purpose to adopt a new tax reform in 2021, which intends to increase the tax revenue and set off the public expenditure invested as a response to the Covid-19 pandemic. Some of the measures envisioned by the government consist of making more progressive the personal income tax increasing its tax rates, the taxation of pensions exceeding a certain amount, and the broadening of the VAT base. Arguably, this crisis has triggered various changes within the Colombian tax system, which certainly will remain after overcoming the pandemic, being perhaps one of the most important of them the increase in the use of technology in the processes carried out by the tax administration.

National tax measures adopted in response to COVID-19 crisis: Uruguay

Andrea Laura Riccardi Sacchi*

ABSTRACT**

This national report provides a general overview of the tax measures that have been adopted in Uruguay in response to the health and economic crisis caused by the COVID-19 pandemic. The state of national health emergency due to the COVID-19 outbreak was declared on 13 March 2020, just a few days after a new president began his mandate. Different health, social and economic measures, including in the tax area, have been taken since then. The balance between the protection of human health, the minimization of social and economic distortions and the respect for human rights has guided the Uruguayan strategy. Measures adopted - praised for being timely - have accompanied the evolution of the pandemic. The spread of the virus has been under control from the beginning and the "engines" of the economy have been kept working, even if this meant, at their minimum level. Those sectors of the economy, where activities had been suspended, have

* PhD (Faculty of Law, University of Valencia, Spain) and tax advisor to the General Directorate of the Uruguayan Tax Administration Office. The opinions expressed in this report are the strict responsibility of the author, not compromising in any way the opinion of the institutions to which she belongs.

** The report has been prepared in October 2020, and therefore it reflects the state of play at and the measures adopted until that time. Since then, additional tax measures have been taken and, as per the summer season, some have targeted the promotion of internal tourism (a 9% VAT reduction on the provision of certain services related to the sector, the extension of the 0% VAT regime for accommodation services provided to residents, income tax exemptions for summer rental income). As of December 2020, COVID-19 cases have increased in the country – actually Uruguay is said to be experiencing its "first wave" – and a bill is being discussed to temporarily prohibit crowds and, until 10 January, the entrance of persons to the country.

gradually returned to a "new" normality, i.e. under specific health protocols. As a result, the effects of the crisis have been minimized as far as possible and the Uruguayan case has stood out in Latin America and worldwide.

Keywords

Uruguay – COVID-19 – Pandemic – Economic crisis – Economic recovery – Tax measures

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Abbreviations

BPS *Banco de Previsión Social* (Social Security Bank)
DGI *Dirección General Impositiva* (Tax General Directorate)
IASS *Impuesto de Asistencia a la Seguridad Social* (Social Security Assistance Tax)
IRNR *Impuesto a las Rentas de los No Residentes* (income tax on non-residents)
IRPF *Impuesto a las Rentas de las Personas Físicas* (income tax on resident individuals)
SSC social security contributions
UI Unidades Indexadas
UYU Uruguayan pesos

Part I Introduction: General Overview

1. Declaration of the state of national health emergency

On 11 March 2020 the World Health Organization characterized the COVID-19 outbreak as a pandemic. A couple of days later, on 13 March, the first four cases of infected persons were detected in Uruguay and the executive branch immediately declared the state of national health emergency due to the pandemic originated by the COVID-19 virus (coronavirus)[1].

It is worth mentioning that a new government took office on 1 March 2020 with the promise to recover from the fiscal deficit of 4.7 per cent of the gross domestic product registered in 2019. In this context, the unexpected COVID-19 outbreak defied even more the novel government. Despite this complex scenario, the handling of the crisis has been so far successful, its effects have been minimized as far as possible and the Uruguayan case has stood out in Latin America and worldwide. In fact, it is the only Latin American country for which travel restrictions at the EU external borders have been lifted[2].

2. Health, social and economic effects

To prevent the spread of the virus, among the first measures adopted were: the suspension of entertainment events – currently authorized if in compliance with health protocols specially established for this economic sector[3] – and the preventive temporal closure of thermal touristic centers – restriction already lifted[4]. Employers were encouraged to promote, when possible, on line work and lectures delivered at education centers were suspended[5]. What is more, during the so-called "Tourism Week"[6], vacation resorts, camping sites, etc., were specifically addressed by temporarily closing public ones and encouraging private owners to follow the same path[7]. What is more, during that week, Uruguayan citizens and residents in the country were forbidden to travel abroad for vacations[8].

Though no lockdowns have been imposed, the government has encouraged the population to stay home as much as possible and to avoid crowds. In response, the population have showed great consciousness and responsibility by complying with these recommendations. However, compulsory isolation for, at least, 7 to 14 days have been mandatory

[1] Decree No 93/020 of 13 March 2020.

[2] European Commission, 'Travel during the coronavirus pandemic' <https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/travel-during-coronavirus-pandemic_en> accessed 9 October 2020.

[3] Decree No 182/020 of 24 June 2020.

[4] Decree No 197.020 of 15 June 2020.

[5] Decree No 101/020 of 16 March 2020.

[6] The Tourism, Holy or Eastern Week started on 5 April 2020 and finished on 12 April 2020.

[7] Decree No 112/020 of 31 March 0.

[8] Decree No 105/020 of 24 March 2020.

under certain circumstances (basically, if infected with the virus, in direct contact with infected people, or arriving in the country)[9].

Furthermore, borders have been temporarily closed, except for, and in general[10], Uruguayan citizens and residents in the country. Those abroad, when the state of emergency was declared, were assisted by the government to return home and every effort possible was made to help people "trapped" in the region return to their home countries; in this regard, the assistance given to the crew and passengers of the Greg Mortimer cruise[11] clearly illustrates those humanitarian efforts. Additionally, specific measures were adopted – in consensus with the Brazilian authorities - to tackle the situation of inhabitants living in cities located at the dry border with Brazil in order to minimize the effects on their daily life[12].

"[A]ction must be taken in a consensual, transparent and responsible manner to avoid the spread of COVID-19, seeking a balance between the protection of human health, the minimization of social and economic distortions, and the respect for human rights", our translation; this phrase that belongs to the preliminary considerations of the decree declaring the state of national health emergency, reflects the guidelines followed by the government in addressing the COVID-19 crisis. In this sense, and as repeatedly mentioned by the authorities, the Uruguayans' health has been the priority but simultaneously, efforts have also been made on keeping the "engines" of the Uruguayan economy working, even if this meant, at their lowest level.

Despite being Uruguay a relatively small country of approximately 3.5 million inhabitants, its particular geographical location – between Argentina and Brazil, where the pandemic is having a great impact in terms of casualties and affected population – makes the scenario quite complex. Fortunately, and at least for now, Uruguay has been successful in controlling the spread of the virus, and the case has caught worldwide attention. Officially, since the declaration of the state of emergency, 259.772 tests have been processed of which 2.251 have been positive for COVID-19. While 1.971 of those positive cases have already recovered, unfortunately 49 deaths have been reported[13].

One of the aspects that has probably played an important role in the fight against the pandemic is the good connectivity, digital infrastructure and access to the Internet by most

[9] Decree No 93/020 of 13 March 2020, Decree No 94/020 of 13 March 2020, Decree No 102/020 of 19 March 2020, Decree No 104/020 of 24 March 2020, Decree No 159/020 of 2 June 2020, and Decree 195/020 of 15 July 2020.

[10] Some other exceptions were established, e.g. diplomats, humanitarian corridors. See Decree No 104/020 of 24 March 2020. A second decree (Decree No 159/020 of 2 June 2020) added new exceptions, such as family reunification and temporary entries for employment purposes.

[11] For further details, see the official announcements at https://www.gub.uy/ministerio-relaciones-exteriores/comunicacion/comunicados.

[12] Decree No 103/020 of 23 March 202.

[13] These numbers correspond to the official data released on 9 October 2020; Presidencia, 'Sistema Nacional de Emergencias reportó 285 personas con COVID-19' (9 October 2020) <https://www.presidencia.gub.uy/comunicacion/comunicacionnoticias/informe-sinae-covid-09-10-20> accessed 9 October 2020.

part of the population that exists in Uruguay[14]. Additionally, it is worth mentioning the positive effects derived from the 'Plan Ceibal'[15] and the 'Plan Ibirapitá'[16] that have been promoting, respectively, the digital inclusion of school children ("one laptop per child") since 2007 and of retired people since 2015[17].

The COVID-19 pandemic has also accelerated some digital phenomena, including regulation. For instance, Law No 19.869 of 2 April 2020 was enacted establishing "general guidelines" for the implementation and development of the telemedicine, and Decree No 208/020 of 23 July 2020 updated the legislation on the constitution, organization and functioning of the cooperative sector in conformity with information and communication technologies.

Part II Tax measures adopted

1. Direct tax measures

Law No 19.874 of 8 April 2020 created the "COVID-19 Solidarity Fund" to finance public activities aimed at (i) the protection of the population during the state of health emergency, (ii) supporting the Public Health Ministry and other public health suppliers, and (iii) paying health and unemployment insurances served by the Social Security Bank (BPS, as per the Spanish abbreviation, Banco de Previsión Social).

This law also created two temporary taxes, the "COVID-19 Health Emergency Tax", and an additional tax to the "Social Security Assistance Tax" (IASS, as per the Spanish abbreviation, Impuesto de Asistencia a la Seguridad Social) that is imposed on income originated in pensions and other similar remuneration[18]. Both taxes were in force in April and May[19]. The COVID-19 tax was imposed on income obtained by public employees and other state suppliers – excluding those participating, directly or indirectly, in the health care activity – when the monthly net amount received exceeded UYU 80.000[20]. Revenue from said tax was destined to the COVID-19 Solidarity Fund. Meanwhile the IASS additional tax,

[14] See CEPAL, 'Universalizar el acceso a las tecnologías digitales para enfrentar los efectos del COVID-19' (26 August 2020) <https://www.cepal.org/es/publicaciones/45938-universalizar-acceso-tecnologias-digitales-enfrentar-efectos-covid-19> accessed 9 October 2020.

[15] Plan Ceibal, 'Acerca del Plan Ceibal' < https://www.ceibal.edu.uy/es/institucional> accessed 9 October 2020.

[16] Plan Ibirapitá, 'Acerca del Programa Ibirapitá' <https://ibirapita.org.uy/acerca-del-programa-ibirapita/> accessed 9 October 2020.

[17] RFI, 'En Uruguay, les élèves confinés bénéficient d'une politique d'éducation virtuelle unique' (26 March 2020) <https://www.rfi.fr/fr/am%C3%A9riques/20200326-uruguay-%C3%A9l%C3%A8ves-confin%C3%A9s-b%C3%A9n%C3%A9ficient-politique-%C3%A9ducation-virtuelle-unique> accessed 9 October 2020.

[18] Decree No 133/020 of 24 April 2020 < and Resolution (DGI) No 741/2020 of 27 April 2020.

[19] The two-month extension foreseen by the law had finally no application.

[20] On 30 April 2020, USD 1.893.

imposed on pensions and similar retributions, applied on monthly net amounts over UYU 100.000[21] and the revenue was destined to finance the Social Security Bank.
The COVID-19 fund also received a contribution from the agriculture and livestock sector – except for family producers and small milk and cheese producers. Indeed, this sector renounced for a whole year to a quarterly tax credit that it is regularly granted, being the equivalent amount transferred to the COVID-19 fund[22].
The unemployment rate in Uruguay, which was 8.9 per cent in 2019, rose to 10.6 per cent in July 2020[23]. To fight unemployment, measures such as the exemption of social security contributions (hereinafter, SSC) were granted to more vulnerable economic agents. In March and April, a 40 per cent exemption was granted in relation to SSC corresponding to the owners of one-person-businesses and the members of partnerships or cooperatives that did not register more than 10 employees in March. An exemption of 40 per cent was also granted to taxpayers under the Monotributo and Monotributo Social MIDES, two simplified optional regimes destined to taxpayers of small economic size which unify in one contribution both SSC and national taxes. For the remaining non-exempt 60 per cent, payment facilities were established[24]. Meanwhile, based on the power given by Law No 19.893 of 19 August 2020, the executive branch exempted businesses providing school transport services from paying the employer contribution to finance the state social security system, during the period 1 April 2020 - 31 March 2021[25]. Law No 19.898 of 28 August 2020 empowers the executive branch to grant businesses proving school canteen services the same benefit; however, a decree establishing such exemption has not been issued yet[26]. A new bill[27] recently presented intends to empower the executive branch to also grant this benefit to other business activities: the organization of parties and events and the land transport of tourists and guided tours.
Meanwhile, workers in the construction sector – a sector paralyzed during the first weeks after the declaration of the state of national health emergency – received an extraordinary payment in March[28]. Population above 65 years old and still active that could not telework but, following the recommendations, stayed at home during the state of health emergency

[21] On 30 April 2020, USD 2.366.

[22] Law No 19.878 of 22 April 2020, Decree No 164.020 of 11 June 2020 and Resolution (DGI) No 1078/2020 of 17 June 2020.

[23] Instituto Nacional de Estadística, 'Boletín Técnico' (July 2020) <http://www.ine.gub.uy/documents/10181/30865/Actividad%2C+Empleo+y+Desempleo+Julio+2020/2cbfbb74-76e1-4ac0-9d20-ce33012d8975> accessed 9 October 2020.

[24] Law No 19.872 of 3 April 2020 and Law No 19.876 of 22 April 2020.

[25] Decree No 259/020 of 18 September 2020.

[26] Law No 19.898 of 28 August 2020.

[27] Bill of 30 September 2020.

[28] Decree No 108/020 of 24 March 2020.

was granted the right to benefit from the statutory health insurance until 31 August 2020[29]. Moreover, and seeking "to maintain the productive sector and the value chains, supporting most vulnerable small businesses", owners of one-person businesses and each of the members of partnerships with no employees under the Monotributo Social MIDES, were granted a monthly subsidy from April to July[30]. For businesses under the optional tax regime IVA mínimo (businesses with annual turnover up to UI 305.000[31]) it was established that monthly payments – a fixed notional amount determined annually – will be due only when income is accrued[32].

A monthly subsidy was also granted for June and July 2020 to national artists; indeed, as mentioned, the prohibition to carry out entertainment events – one of the first measures adopted – was lifted in June, subjecting the activities to a strict health protocol and, therefore, to extraordinary expenses in prevention[33].

Another measure taken[34] has been to grant unemployed private workers – with a rental contract guaranteed by the Contaduría General de la Nación[35] – a non-refundable state contribution up to 50 per cent of the rental fee. Furthermore, the executive branch encouraged public companies to suspend cuts in the provision of public services such as electric power supply and telecommunication services to residential users and small businesses in the event of non-payment[36].

To promote the maintenance and creation of employment, businesses re-hiring former employees or hiring new personnel were granted a non-refundable state contribution per worker for three months. To qualify for this benefit, the recruitment had to have occurred between 1 July and 30 September 2020[37].

Furthermore, and also to boost employment and generate positive externalities, Decree No 138/020 of 29 April 2020 promoted projects of large economic dimension – i.e. of at least UI 60 million[38] – related to the construction of offices or houses for sale or rental, and of private land development initiatives. This special regime applies to projects presented before December 2021 and comprises investment executed before April 2025. It grants

[29] Decree No 109/020 of 25 March 2020, Decree No 132/020 of 24 April 2020, Decree No 149/020 of 26 May 2020, Decree No 191/020 of 7 July 2020 and Decree No 233/020 of 17 August 2020.

[30] Law No 19.877 of 28 April 2020 and Decree No 185/020 of 29 June 2020 .

[31] Unidad Indexada. The UI is a unit of value that is adjusted according to the inflation measured by the Consumer Price Index. On 1 January 2020, UI 305.000 were equivalent to USD 35.828.

[32] Decree No 224/020 of 12 August 2020.

[33] Decree No 192/020 of 7 July 2020.

[34] Decree No 142/020 of 21 May 2020.

[35] This organism within the Ministry of Economic and Finance has among other tasks, the coordination and administration of the state guarantee in rental contracts for housing purposes.

[36] Decree No 119/020 of 6 April 2020 and Decree No 120/020 of 6 April 2020.

[37] Decree No 190/020 of 1 July 2020 and Decree No 219/020 of 7 August 2020.

[38] On 9 October 2020, equivalent to USD 6.65 million.

a corporate income tax exemption of 15 to 40 per cent of the investment amount, and a wealth tax exemption on real estate for 8 or 10 years depending on the geographical location. It also grants a VAT and custom duties exemption on imports of equipment and materials destined to the project and a VAT credit on local purchases.
Additionally, amendments to an existing special investment regime have been introduced. Under this regime companies whose investment projects are promoted by the executive branch are granted attractive tax benefits in the field of corporate income tax, wealth tax, import taxes and duties and VAT[39].

2. Indirect tax measures

To support the export sector, and recognizing the unexpected decline in the international demand, deadlines for the reshipment of stocks of goods under the temporary admission regime (i.e. tax and duty-free entry of goods for subsequent reshipment) occurring this year, i.e. 2020, have been postponed 18 months[40]. Similarly, an extraordinary extension of 12 months was granted to stocks of goods under the so-called "custom deposit regime" (i.e. duty and tax-free entry of goods for subsequent inclusion in other custom regime, reshipment or re-export)[41].
In order to equip the health system with medical inputs and equipment for a potential increase in the number of infections among the population, the Ministry of Economy and Finance issued a resolution on 24 March establishing a list of goods (e.g. sanitizing gel, masks, oxygen, ventilators, beds for intensive therapy centers) that can benefit from the "assistance and rescue shipments" special custom regime. This regime, under the Uruguayan Custom Code, allows the tax and duty-free import or export of goods destined to help victims of an emergency situation or catastrophe. Additionally, a "fast track" for administrative purposes was established.
Other legislation was introduced in order to address specific sectors which have been affected by the contraction in international demand[42].

3. Procedural tax aspects

Law No 19.879 of 30 April 2020 declared as from 14 March 2020[43], an "Extraordinary Jurisdictional Break" for all procedures at the judicial branch and the High Administrative Court (Tribunal de lo Contencioso Administrativo). During this break, all time periods related to jurisdictional procedures were suspended. The High Supreme Court (Suprema Corte de

[39] Decree No 151/020 of 26 May 2020 and Decree No 268/020 of 30 September 2020.

[40] Decree No 137/020 of 29 April 2020.

[41] Decree No 177/020 of 23 June 2020.

[42] Decree No 209/020 of 29 July 2020, Decree No 239/020 of 26 August 2020 and Decree No 269/020 of 30 September 2020.

[43] Note that the beginning of the break has not been established as from the day of declaration of the state of national health emergency, but from the following day.

Justicia) and the High Administrative Court were, respectively, commended to declare the end of said break in view of the state of health emergency, the possibilities for the normal rendering of services and the effective access to justice. The end of this break was declared from 15 May by the High Supreme Court[44] and from 1 June by the High Administrative Court[45].

As for the activities at the Tax Administration office or DGI (as per its Spanish abbreviation, Dirección General Impositiva), means of remote communication with taxpayers had already been implemented before the COVID-19 outbreak as part of the e-government agenda. Due to the pandemic, digital procedures were reinforced and taxpayers have been encouraged to resort to them[46]. However, in site assistance has not been suspended, but the time schedule reduced, and, in particular, the annual campaign to assist taxpayers in preparing their annual personal income tax returns has been carried out successfully under the health protocols established for this purpose.

The Uruguayan Tax Code establishes that DGI may grant extensions and payment facilities when tax obligations cannot be fulfilled. As the pandemic has posed difficulties on taxpayers to comply with their tax obligations, the DGI has been issuing resolutions[47] extending deadlines originally set for complying with tax obligations in relation to the presentation of tax returns and the completion of payments. Additionally, other resolutions stipulated the fractioning of tax payments without charging interests.

Among others, different facilities were given on corporate income tax and wealth tax annual payments, and monthly advance payments. These facilities were established in accordance to taxpayers' annual turnover. Extensions for complying with other requirements (e.g. the presentation of annual audit reports[48]) were granted and withholding obligations were also differed under certain circumstances[49].

Deadlines for the provision of information in relation to equity participations holders and ultimate beneficial owners were suspended from 13 March to 15 August[50]. Indeed, social distancing, limited access to public and private entities and closure of borders may have interfered in the completion of the procedures necessary to obtain and communicate the required information and non-compliance may have triggered sanctions, such as fines, the suspension of the annual certificate issued by the Tax Administration - with severe con-

[44] 7°, Resolution S.C.J. No 29/2020 of 30 April 2020.

[45] Acordada No 11 of 27 May 2020.

[46] See, e.g. DGI, 'Expedientes administrativos' <https://www.dgi.gub.uy/wdgi/page?2,principal,_Ampliacion,O,es,0,PAG;CONC;40;1;D;expedientes-administrativos;3;PAG;> accessed 9 October 2020.

[47] Resolutions (DGI) No 550/2020 of 20 March, No 707/2020 of 20 April 2020, No 718/2020 of 21 April 2020, No 898/2020 of 20 May 2020, No 1089/2020 of 18 June 2020, No 1251/2020 of 16 July 2020, No 1626/2020 of 8 September 2020, No 1785/2020 of 28 September 2020.

[48] Resolution (DGI) No 665/2020 of 3 April 2020.

[49] Decree No 128/020 of 15 April 2020 and Decree No 154/020 of 1 June 2020.

[50] Law No 19.885 of 4 June 2020 and Decree No 193/020 of 15 July 2020.

sequences for the daily operation of businesses -, the prohibition to distribute profits and the exclusion of stakeholders.
For similar reasons, other deadlines for complying with procedural obligations have also been postponed or the procedures themselves, simplified[51].

4. International tax aspects

The Uruguayan tax authority has made no statement in relation to the international effects – i.e. basically, worldwide lockdowns and restrictions on international travel – of the COVID-19 crisis on the status of resident (either for individuals or businesses), the creation of a permanent establishment, or the tax treatment of cross-border workers. Neither from a domestic nor tax treaty perspective.
However, new legislation has been issued on the configuration of the Uruguayan tax residence for individuals under the domestic legislation. Though the new legislation follows the general economic policy of promotion of inbound investment and generation of employment announced by the new government, and probably would have been enacted independently of the COVID-19 crisis, its effects will probably be potentiated by the good management of the crisis registered in Uruguay, free of imposition of severe restrictions and lockdowns and therefore, attractive to foreigners who bear severe restrictions in their home countries.
In this regard, two new hypotheses for the acquisition of the status of tax resident in the country by individuals under the already existing "economic interests" criterion[52] were introduced in June 2020. The reason: the promotion of inbound investment by offering a "country of opportunities" for "personal and economic purposes"[53]. Indeed, individuals investing, as of 1 July 2020 (i) at least, UI 3.5 million – approximately USD 345.000 – in real estate situated in Uruguay and reporting, at least, 60 days of physical presence in the country in the calendar year, or (ii) directly or indirectly, at least, UI 15 million in a local business and generating, at least, 15 new full-time jobs during the year, will be considered Uruguayan residents. In relation to this last condition, new full-time employment generated must not imply a decrease in jobs in related companies.
Furthermore, and under the same arguments, Law No 19.904 of 18 September 2020 extended the tax holidays being granted, since 2011, to those individuals acquiring the status

[51] Resolution (DGI) No 632/2020 of 30 March 2020, Resolution (DGI) No 964/2020 of 29 May 2020 and Resolution (DGI) No 1716/2020 of 21 September 2020.

[52] It is important to share the definition of fiscal residence according to the Uruguayan legislation. In this sense, it is understood that a natural person is resident in Uruguay if he/she fulfills any of the following hypotheses: (i) stays within the Uruguayan territory for more than 183 days during the calendar year, (ii) establishes within the mentioned territory the principal nucleus or the base of his/her activities or his/her economic or vital interests.

[53] Decree No 163/020 of 11 June 2020 and No 174/020 of 17 June 2020.

of resident in Uruguay[54]. The original benefit offered an individual the one-time option to pay the personal income tax on non-residents (IRNR, as per the Spanish abbreviation, Impuesto a las Rentas de los No Residentes), within a six-year period (including the year in which the change of status was verified). Therefore, within this period, individuals acquiring the Uruguayan resident-status were not taxed on, otherwise, taxable foreign-source income. The new law makes some amendments by establishing that as from the calendar year 2020, individuals acquiring the Uruguayan resident-status, can opt to either (i) pay the IRNR for an eleven-year period (including the year in which the change of status is verified)[55], or (ii) the personal income tax on resident individuals (IRPF, as per the Spanish abbreviation, Impuesto a las Rentas de las Personas Físicas) at a tax rate of 7 per cent (instead of the general 12 per cent tax rate on taxable foreign-source income).

Part III Final comments and prospective tax measures

The Government has not enacted a recovery plan; however, since the beginning of the state of national health emergency, measures have been carefully studied before being introduced and, as stated, have accompanied the evolution of the pandemic and the gradual restart of economic activities. In relation to the tourism sector, one of the main economic sectors in the country, the effects of the health crisis have been particularly severe. Indeed, restrictions to inbound travel for tourism are still in force - particularly because of the health situation in neighboring countries. Nevertheless, the Uruguayan government is particularly committed to lifting these restrictions for Europeans; indeed, as mentioned in the introduction to this contribution, Europe has lifted travel restrictions for a few countries, including Uruguay, and currently Uruguayans are allowed to travel and enter Europe for vacation purposes. The government has announced that a decision on this regard will be taken by the end of October.

It is unlikely that due to the COVID-19 new taxes are introduced; indeed, as declared by the President, the government is committed to keeping its electoral promise of not in-

[54] In general, the Uruguayan tax system adheres exclusively to the source principle, therefore, taxing Uruguayan-source income obtained by both resident and non-resident taxpayers. However, there is an exception to the application of the source principle under the personal income tax law as the worldwide principle applies to certain items of income. In effect, since 1 January 2011, under the personal income tax on residents (IRPF) resident individuals have been taxed on the worldwide income they obtain from movable capital "originated in deposits, loans, and in general in all placement of capital or of credit of any nature" at a tax rate of 12 per cent. Therefore, income such as interests and dividends, is taxable on a worldwide basis; other type of income, e.g. capital gains, pensions, rents, is taxable if Uruguayan-sourced. In this regard, domestic legislation defines "Uruguayan-source income" as income derived from activities developed, assets located or rights economically used within the Uruguayan territory.

[55] Based on the second phrase of Article 4(1) of the OECD (and the UN) model convention and its commentary, this option may have some implications on the application of double tax treaties.

creasing the tax burden, which, additionally, is considered to harm the functioning of the "engines" of the economy.

Recognizing the devastating consequences of the crisis among the most vulnerable population that may have even lost its source of income, the executive branch presented a bill[56] in July that intends to improve the so-called Programa Uruguay Trabaja by broadening its scope, funding, and beneficiaries. This programme was created by Law No 18.240 of 17 December 2007 with the objective of promoting labor as a socio-educational factor among the most socio-economic vulnerable population.

Hopefully, the negative effects of the pandemic on the inter-annual variation of tax revenues have softened as from June (-3.4%), July (-0.3%), and August (-2.6%); the severest drop (-19.2 %) was registered in May 2020[57].

Following the international trend to move towards a green economy, it should be noted that Law No 19.889 of 9 July 2020[58] created the "Environment Ministry". Environmental issues were previously handled by the Ministry in charge of housing, land planning and environment (Ministerio de Vivienda, Ordenamiento Territorial y Medio Ambiente). The creation of a new Ministry is a sign of the prioritization of the subject and it seems reasonable to expect further actions with a regulatory purpose in this matter, including tax measures.

In relation to the direct and indirect tax challenges arising from the digitalization of the economy, specific provisions within the Uruguayan income tax and VAT systems apply to certain type of digital businesses[59]. So far, no official statement has been pronounced by the authorities in relation to the taxation of the digital economy and the different alternatives that are being discussed internationally.

Finally, the COVID-19 pandemic has brought uncertainty and unpredictability worldwide and each country's situation may rapidly vary, including the Uruguayan. Therefore, governments should remain vigilant, reacting and introducing timely measures that accompany the evolution of the health and economic situation as well as the specific country's characteristics.

[56] Bill of 15 July 2020.

[57] DGI, 'Informes mensuales de recaudación' <https://www.dgi.gub.uy/wdgi/page?2,principal,dgi--datos-y-series-estadisticas--informes-mensuales-de-la-recaudacion-2020,O,es,0,> accessed 9 October 2020.

[58] Articles 291 to 304 of Law No 19.889 of 9 July 2020.

[59] For further analysis, see Riccardi Sacchi, Andrea L., 'While in the quest for the Holy Grail… Uruguay is already taxing income from Uber and Netflix' (GLOBTAXGOV, 8 March 2019) <https://globtaxgov.weblog.leidenuniv.nl/category/andrea-laura-riccardi-sacchi/> accessed 9 October 2020; 'While still in the quest for the Holy Grail… is (tax) uncertainty all we have?' (GLOBTAXGOV, 15 September 2020) <https://globtaxgov.weblog.leidenuniv.nl/2020/09/15/while-still-in-the-quest-for-the-holy-grail-is-tax-uncertainty-all-we-have/> accessed 9 October 2020.

References

Legislation
Law No 18.240 of 17 December 2007 <https://www.impo.com.uy/bases/leyes/18240-2007> accessed 9 October 2020.
Law No 19.869 of 2 April 2020 <https://www.impo.com.uy/bases/leyes/19869-2020> accessed 9 October 2020.
Law No 19.872 of 3 April 2020 < https://www.impo.com.uy/bases/leyes/19872-2020> accessed 9 October 2020.
Law No 19.874 of 8 April 2020 <https://www.impo.com.uy/bases/leyes/19874-2020> accessed 9 October 2020.
Law No 19.876 of 22 April 2020 < https://www.impo.com.uy/bases/leyes/19876-2020> accessed 9 October 2020.
Law No 19.877 of 28 April 2020 <https://www.impo.com.uy/bases/leyes/19877-2020> accessed 9 October 2020.
Law No 19.878 of 22 April 2020 <https://www.impo.com.uy/bases/leyes/19878-2020> accessed 9 October 2020.
Law Nº19.879 of 30 April 2020 <https://www.impo.com.uy/bases/leyes/19879-2020> accessed 9 October 2020.
Law No 19.885 of 4 June 2020 <https://www.impo.com.uy/bases/leyes/19885-2020?tipoServicio=11> accessed 9 October 2020.
Law No 19.889 of 9 July 2020 <https://www.impo.com.uy/bases/leyes-originales/19889-2020> accessed 9 October 2020.
Law No 19.898 of 28 August 2020 <https://www.impo.com.uy/bases/leyes/19898-2020> accessed 9 October 2020.
Law No 19.904 of 18 September 2020 <https://www.impo.com.uy/bases/leyes-originales/19904-2020> accessed 9 October 2020.

Bill of 15 July 2020 <https://medios.presidencia.gub.uy/legal/2020/proyectos/07/cons_min_288.pdf> accessed 9 October 2020.
Bill of 30 September 2020 <https://medios.presidencia.gub.uy/legal/2020/proyectos/09/mtss_101.pdf> accessed 9 October 2020.

Decree No 93/020 of 13 March 2020 <https://www.impo.com.uy/bases/decretos/93-2020> accessed 9 October 2020.
Decree No 94/020 of 13 March 2020 https://www.impo.com.uy/bases/decretos/94-2020 accessed 9 October 2020.
Decree No 101/020 of 16 March 2020 <https://www.impo.com.uy/bases/decretos/101-2020> accessed 9 October 2020.
Decree No 102/020 of 19 March 2020 <https://www.impo.com.uy/bases/decretos/102-2020> accessed 9 October 2020.

Decree No 103/020 of 23 March 202 < https://www.impo.com.uy/bases/decretos/103-2020> accessed 9 October 2020.
Decree No 104/020 of 24 March 2020< https://www.impo.com.uy/bases/decretos/104-2020> accessed 9 October 2020.
Decree No 105/020 of 24 March 2020 < https://www.impo.com.uy/bases/decretos/105-2020 > accessed 9 October 2020.
Decree No 108/020 of 24 March 2020 <https://www.impo.com.uy/bases/decretos/108-2020> accessed 9 October 2020.
Decree No 109/020 of 25 March 2020 <https://www.impo.com.uy/bases/decretos/109-2020> accessed 9 October 2020.
Decree No 112/020 of 31 March 2020 < https://www.impo.com.uy/bases/decretos/112-2020 > accessed 9 October 2020.
Decree No 119/020 of 6 April 2020 <https://www.impo.com.uy/bases/decretos/119-2020> accessed 9 October 2020.
Decree No 120/020 of 6 April 2020 <https://www.impo.com.uy/bases/decretos/120-2020> accessed 9 October 2020.
Decree No 128/020 of 15 April 2020 <https://www.impo.com.uy/bases/decretos/128-2020?tipoServicio=11> accessed 9 October 2020
Decree No 132/020 of 24 April 2020 <https://www.impo.com.uy/bases/decretos/132-2020> accessed 9 October 2020.
Decree No 133/020 of 24 April 2020 <https://www.impo.com.uy/bases/decretos/133-2020> accessed 9 October 2020.
Decree No 137/020 of 29 April 2020 <https://www.impo.com.uy/bases/decretos/137-2020> accessed 9 October 2020.
Decree No 138/020 of 29 April 2020 <https://www.impo.com.uy/bases/decretos/138-2020> accessed 9 October 2020.
Decree No 142/020 of 21 May 2020 <https://www.impo.com.uy/bases/decretos/142-2020> accessed 9 October 2020.
Decree No 149/020 of 26 May 2020 <https://www.impo.com.uy/bases/decretos/149-2020> accessed 9 October 2020.
Decree No 151/020 of 26 May 2020 <https://www.impo.com.uy/bases/decretos/151-2020> accessed 9 October 2020.
Decree No 154/020 of 1 June 2020 <https://www.impo.com.uy/bases/decretos/154-2020?tipoServicio=11> accessed 9 October 2020.
Decree No 159/020 of 2 June 2020 <https://www.impo.com.uy/bases/decretos/159-2020> accessed 9 October 2020.
Decree No 163/020 of 11 June 2020 <https://www.impo.com.uy/bases/decretos/163-2020> accessed 9 October 2020.
Decree No 164/020 of 11 June 2020 <https://www.impo.com.uy/bases/decretos/164-2020> accessed 9 October 2020.
Decree No 174/020 of 17 June 2020 <https://www.impo.com.uy/bases/decretos/174-2020> accessed 9 October 2020.

Decree No 177/020 of 23 June 2020 <https://www.impo.com.uy/bases/decretos/177-2020> accessed 9 October 2020.
Decree No 182/020 of 24 June 2020 <https://www.impo.com.uy/bases/decretos/182-2020> accessed 9 October 2020.
Decree No 185/020 of 29 June 2020 <https://www.impo.com.uy/bases/decretos/185-2020> accessed 9 October 2020.
Decree No 190/020 of 1 July 2020 <https://www.impo.com.uy/bases/decretos/190-2020> accessed 9 October 2020.
Decree No 191/020 of 7 July 2020 <https://www.impo.com.uy/bases/decretos/191-2020> accessed 9 October 2020.
Decree No 192/020 of 7 July 2020 <https://www.impo.com.uy/bases/decretos/192-2020> accessed 2020.
Decree No 193/020 of 15 July 2020 < https://www.impo.com.uy/bases/decretos/193-2020> accessed 9 October 2020.
Decree No 195/020 of 15 July 2020 < https://www.impo.com.uy/bases/decretos/195-2020> accessed 9 October 2020.
Decree No 197/020 of 15 June 2020 <https://www.impo.com.uy/bases/decretos/182-2020> accessed 9 October 2020.
Decree No 208/020 of 23 July 2020 <https://www.impo.com.uy/bases/decretos/208-2020> accessed 9 October 2020.
Decree No 209/020 of 29 July 2020 <https://www.impo.com.uy/bases/decretos/209-2020> accessed 9 October 2020
Decree No 219/020 of 7 August 2020 <https://www.impo.com.uy/bases/decretos/219-2020> accessed 9 October 2020.
Decree No 224/020 of 12 August 2020 <https://www.impo.com.uy/bases/decretos/224-2020> accessed 9 October 2020.
Decree No 233/020 of 17 August 2020 <https://www.impo.com.uy/bases/decretos/233-2020> accessed 9 October 2020.
Decree No 239/020 of 26 August 2020 <https://www.impo.com.uy/bases/decretos/239-2020/1> accessed 9 October 2020.
Decree No 259/020 of 18 September 2020 <https://www.impo.com.uy/bases/decretos/259-2020> accessed 9 October 2020.
Decree No 268/020 of 30 September 2020 <https://www.impo.com.uy/bases/decretos/268-2020> accessed 9 October 2020.
Decree No 269/020 of 30 September 2020 <https://www.impo.com.uy/bases/decretos/269-2020/2> accessed 9 October 2020.

Resolutions (DGI) No 550/2020 of 20 March <https://www.impo.com.uy/bases/resoluciones-dgi/550-2020?tipoServicio=11> accessed 9 October 2020.
Resolution (DGI) No 632/2020 of 30 March 2020 <https://www.impo.com.uy/bases/resoluciones-dgi/632-2020?tipoServicio=11> accessed 9 October 2020.

Resolution (DGI) No 665/2020 of 3 April 2020 <https://www.impo.com.uy/bases/resoluciones-dgi/665-2020?tipoServicio=11> accessed 9 October 2020.
Resolution (DGI) No 707/2020 of 20 April 2020 <https://www.impo.com.uy/bases/resoluciones-dgi/707-2020?tipoServicio=11> accessed 9 October 2020.
Resolution (DGI) No 718/2020 of 21 April 2020 <https://www.impo.com.uy/bases/resoluciones-dgi/718-2020?tipoServicio=11> accessed 9 October 2020.
Resolution (DGI) No 741/2020 of 27 April 2020 < https://www.impo.com.uy/bases/resoluciones-dgi/741-2020?tipoServicio=11> accessed 9 October 2020.
Resolution (DGI) No 898/2020 of 20 May 2020 <https://www.impo.com.uy/bases/resoluciones-dgi/898-2020?tipoServicio=11> accessed 9 October 2020.
Resolution (DGI) No 964/2020 of 29 May 2020 <https://www.impo.com.uy/bases/resoluciones-dgi/964-2020?tipoServicio=11> accessed 9 October 2020.
Resolution (DGI) No 1078/2020 of 17 June 2020 <https://www.impo.com.uy/bases/resoluciones-dgi/1078-2020?tipoServicio=11> accessed 9 October 2020.
Resolution (DGI) No 1089/2020 of 18 June 2020 <https://www.impo.com.uy/bases/resoluciones-dgi/1089-2020?tipoServicio=11> accessed 9 October 2020.
Resolution (DGI) No 1251/2020 of 16 July 2020 <https://www.impo.com.uy/bases/resoluciones-dgi/1251-2020?tipoServicio=11> accessed 9 October 2020.
Resolution (DGI) No 1626/2020 of 8 September 2020 <https://www.impo.com.uy/bases/resoluciones-dgi/1626-2020?tipoServicio=11> accessed 9 October 2020.
Resolution (DGI) No 1716/020 of 21 September 2020 <https://www.impo.com.uy/bases/resoluciones-dgi/1716-2020?tipoServicio=11> accessed 9 October 2020.
Resolution (DGI) No 1785/2020 of 28 September 2020 <https://www.impo.com.uy/bases/resoluciones-dgi/1785-2020?tipoServicio=11> accessed 9 October 2020.

Websites and blogs

CEPAL, 'Universalizar el acceso a las tecnologías digitales para enfrentar los efectos del COVID-19' (26 August 2020) <https://www.cepal.org/es/publicaciones/45938-universalizar-acceso-tecnologias-digitales-enfrentar-efectos-covid-19> accessed 9 October 2020.
DGI, 'Expedientes administrativos' <https://www.dgi.gub.uy/wdgi/page?2,principal,_Ampliacion,O,es,0,PAG;CONC;40;1;D;expedientes-administrativos;3;PAG;> accessed 9 October 2020.
DGI, 'Informes mensuales de recaudación' <https://www.dgi.gub.uy/wdgi/page?2,principal,dgi--datos-y-series-estadisticas--informes-mensuales-de-la-recaudacion-2020,O,es,0,> accessed 9 October 2020.
European Commission, 'Travel during the coronavirus pandemic' <https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/travel-during-coronavirus-pandemic_en> accessed 9 October 2020.
Instituto Nacional de Estadística, 'Boletín Técnico' (July 2020) <http://www.ine.gub.uy/documents/10181/30865/Actividad%2C+Empleo+y+Desempleo+Julio+2020/2cbfbb74-76e1-4ac0-9d20-ce33012d8975> accessed 9 October 2020.

Plan Ceibal, 'Acerca del Plan Ceibal' < https://www.ceibal.edu.uy/es/institucional> accessed 9 October 2020.
Plan Ibirapitá, 'Acerca del Programa Ibirapitá' <https://ibirapita.org.uy/acerca-del-programa-ibirapita/> accessed 9 October 2020
Presidencia, 'Sistema Nacional de Emergencias reportó 285 personas con COVID-19' (9 October 2020) <https://www.presidencia.gub.uy/comunicacion/comunicacionnoticias/informe-sinae-covid-09-10-20> accessed 9 October 2020.
RFI, 'En Uruguay, les élèves confinés bénéficient d'une politique d'éducation virtuelle unique' (26 March 2020) <https://www.rfi.fr/fr/am%C3%A9riques/20200326-uruguay-%C3%A9l%C3%A8ves-confin%C3%A9s-b%C3%A9n%C3%A9ficient-politique-%C3%A9ducation-virtuelle-unique> accessed 9 October 2020.
Riccardi Sacchi, Andrea L., 'While in the quest for the Holy Grail… Uruguay is already taxing income from Uber and Netflix' (GLOBTAXGOV, 8 March 2019) <https://globtaxgov.weblog.leidenuniv.nl/category/andrea-laura-riccardi-sacchi/> accessed 9 October 2020; 'While still in the quest for the Holy Grail… is (tax) uncertainty all we have?' (GLOBTAXGOV, 15 September 2020) <https://globtaxgov.weblog.leidenuniv.nl/2020/09/15/while-still-in-the-quest-for-the-holy-grail-is-tax-uncertainty-all-we-have/> accessed 9 October 2020.

Taxation and COVID-19: Spanish Report

F.D. Martínez Laguna*

Abstract

This country report focuses on the main tax measures adopted to tackle some of the consequences caused by the pandemic in Spain, as well as on the interpretation of different pieces of tax law in this regard. In doing so, this country report is structured according to the main sections proposed in the questionnaire. The introduction provides an overview of the main effects and figures of the pandemic in Spain from a health, economic and social perspective, as well as general measures adopted to ease their consequences (e.g. lockdown). After that, this report deals with specific direct and indirect tax measures, (sections 2 and 3, respectively), and with procedural tax measures (section 4). To a certain extent, the latter measures have probably been the most relevant from a tax perspective in terms of alleviating the economic needs for both individuals and corporations. Lastly, international tax aspects of the pandemic (section 5) and post-COVID-19 tax measures – not necessarily related to COVID-19 issues (section 6), are also under brief consideration.

Keywords

Taxation – Indirect – Taxation – Direct Taxation

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* Assistant Professor. Tax Law Department, Universidad Autónoma de Madrid.

Introduction

COVID-19 has not only brought a worldwide health crisis, unparalleled in recent times, but also economic and social ones. No country has escaped the pandemic's impact and Spain is no exception to this. Although the full consequences of this multilayered crisis remain to be seen –unfortunately, it is relevant to mention first that the number of cases and deaths in Spain were 936.560 and 33.775, respectively, at the time of drafting this country report[1]. It is no secret that the severe –and necessary– measures put in place by Governments all around the world for tackling the spread of the virus temporarily reduced its impact on the population from a health perspective, but, as already mentioned, these measures also had (and still have) consequences from a social and an economic perspective.

March 14th, 2020 was the day that the Spanish Government declared the so-called Estado de Alarma (i.e. State of Alert)[2] for the second time in the last democratic period. The State of Alert is a Constitutional remedy for extraordinary – and listed[3]–circumstances that allows the Government, under the supervision of Parliament, to adopt specific measures that may even restrict fundamental rights such as the freedom of movement or the right of assembly, under certain conditions[4]. In this regard, the first and most relevant measure adopted by the Spanish Government was a lockdown that lasted three months during which only essential services and essential businesses remained operative[5].

However, this measure implied harsh (and consequently) social and economic drawbacks. It was indeed reported that Spain was one of the countries within the Eurozone that would be hit the hardest regarding the pandemic's economic consequences taking into consid-

[1] See Ministerio de Sanidad, Gobierno de España, Actualización nº 230. Enfermedad por el coronavirus (COVID-19). 16.10.2020.

[2] See Real Decreto 463/2020, de 14 de marzo, por el que se declara el estado de alarma para la gestión de la situación de crisis sanitaria ocasionada por el COVID-19 (hereinafter, RD 463/2020). See also Art. 116 of Spanish Constitution, which governs the *Estado de Alarma* (State of Alert), *Estado de Excepción* (State of Exception) and *Estado de Sitio* (State of Siege). These three states are further developed by Ley Orgánica 4/1981, de 1 de junio, de los estados de alarma, excepción y sitio (Hereinafter, LO 4/1981).

[3] The listed circumstances relate to extraordinary situations such as natural disasters (e.g. earthquakes or floods), health crises (e.g. pandemics), halting of essential services or shortages of essential goods, etc.

[4] Under the State of Alert, the Government may adopt other measures such as temporary requisition of goods, temporary intervention and occupation of e.g. factories, industries, etc. See Art. 11 LO 4/1981.

[5] The State of Alert was extended six times under the approval of the Parliament and ended on June 21st.

eration the strict lockdown imposed by the Government and the structural characteristics of its economy[6]. Among other several figures, it is worth highlighting that there was a relevant fall in Gross Domestic Product during the lockdown[7].

Moreover, Spain experienced an increase in the unemployment rate that reached 16.26% in the third quarter of 2020[8], and projections are not at all optimistic for 2020 and 2021[9].

A large number of measures were adopted during the State of Alert in order to diminish the pandemic's consequences in Spain. However, two of the most relevant economic and social measures were (i) the amendment of the Expediente de Regulación Temporal de Empleo (hereinafter, ERTE)[10], and (ii) the Ingreso Mínimo Vital (hereinafter, IMV)[11]. Without going into detail, the amendment of the ERTE allows companies to restructure their workforce for a specific period due to a reduction in business activity because of COVID-19 without laying off employees[12]. Employees under the ERTE receive payments from the State similar to unemployment benefits, but they are not included in the unemployment figures[13]. With respect to the IMV, it is fair to say that it was already on the Government's political agenda before COVID-19, but the pandemic accelerated the approval

[6] See Banco de España, 'Proyecciones macroeconómicas de la economía española (2020-2022): contribución del Banco de España al ejercicio conjunto de proyecciones del Eurosistema de junio de 2020' (2020) <https://www.bde.es/bde/es/secciones/informes/boletines/relac/Boletin_Economic/Informes_de_proy/> accessed 12 October 2020

[7] From best to worst interannual variation scenarios, projections show a fall in 2020 GDP on average up to 10.5% and 12.6% (2019-2020), and a slight recovery on average in 2021 GDP with an increase up to 7.3% and 4.1% (2020-2021). See Banco de España, Informe Trimestral de la Economía Española¸ Boletín Económico 2/2020, (2020) p. 14 <Recuadro 1 – Escenarios macroeconómicos para la economía española (2020-2022>. <https://www.bde.es/bde/es/secciones/informes/boletines/Boletin_economic/> accessed 12 October 2020.

[8] It is worth mentioning that the unemployment rate in the third quarter of 2019 was 13.92%. See Instituto Nacional de Estadística <https://www.ine.es> accessed 27 October 2020.

[9] From best to worst interannual variation scenarios again, projections show an increase in 2020 unemployment rate on average up to 17.1% and 18.6% (2019-2020), and an additional increase in 2021 unemployment rate also on average up to 19.4% and 22.1% (2020-2021). See Banco de España, Informe Trimestral de la Economía Española¸ Boletín Económico 2/2020, (2020) p. 14. <available at: https://www.bde.es/bde/es/secciones/informes/boletines/Boletin_economic/> accesed 15 october 2020.

[10] See Arts. 22 et seq., of Real Decreto-ley 8/2020, de 17 de marzo, de medidas urgentes extraordinarias para hacer frente al impacto económico y social del COVID-19 (hereinafter, RDL 8/2020).

[11] See Real Decreto-ley 20/2020, de 29 de mayo, por el que se establece un ingreso mínimo vital (hereinafter, RDL 20/2020). See also, with respect to allowances for specific self-employed individuals, Art. 17 RDL 8/2020.

[12] This restructuring would mean cutting working hours or suspending the activity of employees or groups of employees. See, again, Arts. 22 et seq RDL 8/2020.

[13] It is relevant to highlight that companies were not allowed by statute to dismiss employees arguing a decrease in the business activity due to COVID-19 during the period that these COVID-19 measures were (and are) in force. See, in this regard, Art. 28 RDL 8/2020 and Art. 2 Real Decreto-ley 9/2020, de 27 de marzo, por el que se adoptan medidas complementarias, en el ámbito laboral, para paliar los efectos derivados del COVID-19. The unemployment rate has been partially contained in the past months because of the ERTE. The Government extended this measure twice and it might be extended again in the future. See Real Decreto-ley 18/2020, de 12 de mayo, de medidas sociales en defensa del empleo and Real Decreto-ley 30/2020, de 29 de septiembre, de medidas sociales en defensa del empleo.

of a measure that is meant to prevent the individual risk of poverty and social exclusion through a subjective right in the form of a minimum income benefit[14].

Last but not least, another consequence of the pandemic and the lockdown was a significant decline in terms of tax collection, which is still in the process of recovery. It is unquestionable that an economic downswing implies a consequent decrease in terms of tax collection. Nevertheless, strictly speaking, this decline in tax collection from March to October 2020 does not only relate to a loss in tax revenue – at least to a certain extent. In this regard, it is worth mentioning that a relevant number of the tax measures put in place due to the pandemic relate to tax deferral (e.g. postponement of tax return or payment deferments)[15].

The following sections provide an overview of the taxation in times of COVID-19 in Spain, as well as the most relevant tax measures adopted in 2020 due to the pandemic –as not all of them were related to tax deferral[16].

1. Direct taxation

There have not been many substantial amendments to the law in terms of direct taxation due to COVID-19. Nevertheless, with regards to individual taxation one of the amendments introduced related to the method for determining the taxable base by self-employed individuals as a response to the general downturn in economic activity. The individual income tax law allows self-employed individuals performing specific activities (e.g. cafeterias, pharmacies, grocery stores, etc.) to optionally determine their taxable base based on particular parameters (i.e. método de estimación objetiva - objective assessment regime) instead of taking into account the actual financial statements of their activity (i.e. método de estimación directa – direct assessment method)[17]. Self-employed individuals may always switch from the objective to the direct method fulfilling specific timing requisites and such a decision implies the continued application of the direct method to the activity for a

[14] IMV mainly focuses on individuals in a position of vulnerability because of scarce economic resources and RDL 20/2020 rules the requisites and conditions for such a benefit.

[15] Tax revenue decreased to 9.6% (7.6% corrected) during 2020 until September. See AEAT (2020), Informe Annual de Recaudación Tributaria – Septiembre 2020, p. I-1. Nevertheless, the decline in terms of tax collection was significantly high in previous months with respect to the same period in 2019. See, for further detail on the relevant figures, https://www.agenciatributaria.es/AEAT.internet/Inicio/La_Agencia_Tributaria/Memorias_y_estadisticas_tributarias/Estadisticas/Recaudacion_tributaria/Informes_mensuales_de_Recaudacion_Tributaria/2020/2020.shtml

[16] Unfortunately, this country report does not deal with regional and local tax law, nor with the tax measures adopted by regional and local Governments within their legal powers for tackling the consequences of COVID-19.

[17] See, on the objective assessment method, Art. 31 of Ley 35/2006, de 28 de noviembre, del Impuesto sobre la Renta de las Personas físicas y de modificación parcial de las leyes de los Impuestos sobre Sociedades, sobre la Renta de no Residentes y sobre el Patrimonio (hereinafter, Individual Income Tax Law or LIRPF, indistinctly).

period of three years[18]. Due to the COVID-19 situation and the consequent lack of activity (and income), the new measure allows a self-employed individual to switch method just for 2020 and not for the three-year period and therefore would only be taxed for the income actually earned and not for the income objectively considered for the determination of the taxable base in 2020[19].

Moreover, there was a measure that applied to particular self-employed individuals who were still determining the taxable base according to the objective assessment method. In line with the previous amendment for adjusting taxation to economic reality, to determine the amount of mandatory advance payments for each quarter of 2020 according to the rules of the objective assessment method the calendar days during the State of Alert would not be considered as days of activity[20]. Regarding advance payments, but this time in terms of corporate taxation, corporations fulfilling specific requisites were allowed to opt for calculating the mandatory advance payments not on the basis of previous tax returns (i.e. 2019), but considering the actual taxable base up to the third, ninth or eleventh month of the year – depending on the moment[21].

Another measure relevant to self-employed individuals and companies both with a turnover of less than 6.010.121,04€ in 2019 was the six-month postponement of specific tax debts of less than 30.000€, the tax return of which was due between March 12th and May 30th[22]. Two remarks on this amendment. This measure even allows for the postponement of tax debts that are not eligible for deferral by statute (and by nature) under normal conditions such as withheld taxes, output VAT and advance payments[23]. Moreover, this postponement does not incur deferral interest for the first four months[24]. At this point, it

[18] See, with respect to the requisites and consequences, Art. 33 of Real Decreto 439/2007, de 30 de marzo, por el que se aprueba el Reglamento del Impuesto sobre la Renta de las Personas Físicas y se modifica el Reglamento de Planes y Fondos de Pensiones, aprobado por Real Decreto 304/2004, de 30 de febrero.

[19] See Art. 10 of Real Decreto-ley 15/2020, de 21 de abril, de medidas urgentes complementarias para apoyar la economía y el empleo (hereinafter, RDL 15/2020). This switching decision in terms of income taxation also has implications on the determination of the tax debts on VAT since those taxpayers under the VAT objective and simplified estimation method will adopt the general method in order to calculate the tax debts on VAT by considering the actual output and input VAT of 2020. See Art. 10, 2º RDL 15/2020. See, for further detail on VAT, infra sec. 3.

[20] See Art. 11.1 RDL 15/2020. See also supra n. 17 and 18. See, with respect to VAT, Art. 11.2 RDL 15/2020.

[21] See Art. 9 RDL 15/2020. Without getting into too much detail, Article 40 of Ley 27/2014, de 27 de noviembre, del Impuesto sobre Sociedades (hereinafter, Corporate Income Tax Law, CITL or LIS, indistinctly) lays down these two methods for calculating the advance payments. Subject to the COVID-19-related provision already mentioned, the method referred to the actual taxable base is of mandatory application to companies exceeding 6 Million euros in the previous tax year. See Art. 40 (3) CITL.

[22] See Art. 14 of Real Decreto 7/2020, de 12 de marzo, por el que se adoptan medidas urgentes para responder al impacto económico COVID-19 (hereinafter, RDL 7/2020). See also, with respect to specific requisites such as the amount of 30.000€, Art. 82.2 a) of Ley 58/2003, de 17 de diciembre, General Tributaria (hereinafter, Ley 58/2003 or General Tax Code). See also infra n. 54 and related text.

[23] See Art. 14.2 RDL 7/2020. See also, with respect to the non-deferral of these tax debts under normal circumstances, Art. 65. 2 of the General Tax Code.

[24] See Art. 14.3 RDL 7/2020.

is relevant to highlight that there was no postponement of the general tax return for corporate income tax nor individual income tax for 2019, which were due by July 25th and June 30th, 2020, respectively[25]. Having said that, and notwithstanding the aforementioned postponement for self-employed individuals and certain corporations[26], there was a time limit extension for tax returns due between April 15th and May 20th for those taxpayers with a turnover of less than 600.000€ in 2019 until May 20th[27].

In the field of tax benefits, it is worth recalling that donations made by individuals and corporations to the public treasury for funding expenses incurred due to COVID-19 are also eligible for specific tax benefits at the corporate and individual tax level in 2020[28]. Both individuals and corporations may deduct specific amounts with respect to the donation from the gross tax debt[29]. In this regard, the general deduction –not necessarily related to COVID-19– has been amended –and increased– in terms of individual taxation[30]. Moreover, there have been amendments and improvements with respect to other tax benefits related to specific relevant sectors such as the audiovisual production industry. In this regard, specific tax benefits in the form of tax deductions for certain activities have been improved by increasing both the percentages of deduction and the quantitative thresholds for deduction[31]. Moreover, there have been also amendments to the tax law with respect to the automotive industry such as the increase of a particular deduction on innovative

[25] For the sake of completeness, a particular amendment to corporate law had implications on the tax return of corporations. Such amendment allowed companies to postpone the preparation and approval procedure of their annual accounts (usually from January to July) for specific periods depending on the type of corporation. See Arts. 40 and 41 RDL 8/2020. As the Spanish Corporate Income Tax is based on such accounts, particularly on the Profit and Loss Statement, the taxpayer had to file the tax return with the financial information at its disposal by the tax return time limit (July 25th). Nevertheless, and in short, the taxpayer also had to file an additional tax return by November 30th in order to amend potential mismatches between the tax paid (or reimbursed) by July and the actual tax that should have been paid (or reimbursed) by that time. See, with respect to this amendment and its consequences, Art. 12 of Real Decreto-ley 19/2020, de 26 de mayo, por el que se adoptan medidas complementarias en materia agraria, científica, económica, de empleo y Seguridad Social y tributarias para paliar los efectos del COVID-19.

[26] See supra n. 22 and, particularly, the related text.

[27] See Artículo único of Real Decreto-ley 14/2020, de 14 de abril, por el que se extiende el plazo para la presentación e ingreso de determinadas declaraciones y autoliquidaciones tributarias (hereinafter, RDL 14/2020). It is worth mentioning that groups of companies within the Spanish definition – see CITL – are not eligible for such an extension to the time limits. See Artículo único, 1. 3º RDL 14/2020 This has implications on e.g. the advance payment of the first quarter of the year.

[28] See Art. 47 of Real Decreto-ley 11/2020, de 31 de marzo, por el que se adoptan medidas urgentes complementarias en el ámbito social y económico para hacer frente al COVID-19 (hereinafter, RDL 11/2020).

[29] See, with respect to these tax benefits, Arts. 20-24 of Ley 49/2002, de 23 de diciembre, de regimen fiscal de las entidades sin fines lucrativos y de los incentivos fiscales al mecenazgo (hereinafter, Ley 49/2002). These tax benefits for donations are also applicable to non-residents. See also AEAT, Nota sobre Donativos al Tesoro para la financiación de los gastos ocasionados por la crisis sanitaria provocada por COVID-19, <https://www.agenciatributaria.es/AEAT.internet/Inicio/La_Agencia_Tributaria/Campanas/_Campanas_/Medidas_Tributarias_COVID_19/Informacion_sobre_donativos_COVID_19__efectos_fiscales_y_obligaciones_formales.shtml#(2).>

[30] See Disposición final segunda of Real Decreto-ley 17/2020, de 5 de mayo, por el que se aprueban medidas de apoyo al sector cultural y de carácter tributario para hacer frente al impacto económico y social del COVID-2019 (hereinafter, RDL 17/2020), which amends Art. 19 of Ley 49/2002. See supra n. 29.

[31] See Disposición final primera of RDL 17/2020, amending Art. 36 of CITL.

and technological activities initiated in 2020 and 2021 for improving the value chain of production processes in such industry[32].

Further to this selection of tax measures related to COVID-19, there have been questions from taxpayers to the *Dirección General de Tributos* (DGT) –General Directorate of Taxes– on how to interpret specific pieces of legislation due to the exceptional circumstances of the pandemic and, particularly, its consequences[33]. With respect to individual taxation, a group of tax rulings related to the taxation of income stemming from immovable property during the State of Alert[34]. Although it is quite uncontroversial, the DGT considered that the agreement on the reduction or remission of rental fees between tenant and landlord implies a consequent reduction of the assessable income in the taxable base of the latter[35]. Moreover, the DGT considered that the deferral of rental fees also implies the deferral of taxation of such income by statute[36]. In the context of taxation on income from immovable property, the DGT is also of the opinion that the lockdown (i.e. restrictions on free movement) does not alter the taxation of deemed income attributed to the owner of immovable property other than the habitual abode (i.e. permanent dwelling) according to Art. 85 LIRPF[37]. According to this Article, specific types of unused urban immovable property (e.g. apartment) other than the habitual abode will lead to the imputation of 2% – or 1.1%, depending on the cases – of the cadastral value of such properties in the owner's taxable base. In this regard, the DGT recalls that Art. 85 LIRPF is meant to tax the ability-to-pay related to the mere ownership and, particularly, the free disposal of immovable property, excluding the habitual abode, and that there would be no deemed income taxation for such concept in specific cases such as the rental of the property. In short, the lockdown is not reason enough for the DGT to alter the taxation of this deemed income according to Art. 85 LIRPF[38].

Another group of tax rulings on individual taxation related to the effects that the State of Alert has had on the application of specific tax benefits. One of the best examples is the

[32] See Art. 7 of Real Decreto 23/2020, de 23 de junio, por el que se aprueban medidas en materia de energia y en otros ámbitos para la reactivación económica, amending Art. 35 CITL.

[33] See, with respect to the tax rulings issued by the General Directorate of Taxes in general, Arts. 88 and 89 of the General Tax Code. These tax rulings are of mandatory observation in the application of the law by the tax authorities. See Art. 89 of the General Tax Code.

[34] See, on the taxation of income stemming from immovable property, arts. 22-24 LIRPF.

[35] See, among others, Contestación a consulta vinculante de la Dirección General de Tributos V0985/2020, de 21 de abril (hereinafter with respect to tax rulings, Contestación CV DGT). See also, in similar terms with respect to commercial property leases, Contestación CV DGT V1553/2020, de 22 de mayo. In this case, the DGT emphasized that it is necessary that there is an agreement between tenant and landlord on the reduction or remission of rental payments. Otherwise, the unpaid rental fees must be considered in the landlord's taxable base.

[36] See, in this regard, Art. 14.1. a) LIRPF.

[37] See Contestación CV DGT V1474/2020, de 19 de mayo and Contestación CV DGT V2497/2020, de 22 de julio.

[38] In the same line of reasoning, neither has the pandemic altered the taxation derived from the use of a vehicle by an employee as income in kind whenever the car is still at the disposal of the employee, regardless of its actual utilization. See Contestación CV DGT 1387/2020, de 13 de mayo.

non-taxation on the capital gains stemming from the sale of the habitual abode whenever the price of sale is reinvested in immovable property (i.e. habitual abode) within a period of two years[39]. Notwithstanding the further analysis carried out infra sec. 4, it is worth mentioning here that one of the measures attached to the State of Alert was the suspension of time limits concerning the prescription or limitation applicable to actions or rights in every field of law[40]. The DGT interpreted that this suspension also applies to the aforementioned tax benefit and thus, to the time limit of two years for reinvesting the proceeds of sale from the relevant immovable property[41]. In short, the two-year period for reinvestment was extended by the number of days between March 14th and May 30th for the application of the tax benefit[42].

Another interesting tax ruling issued by the DGT related to the residence of individuals. The question posed to the DGT was whether the number of days spent in Spain by individuals (a married couple in this case) during the State of Alert period counted for the purposes of applying the 183-day rule laid down in the individual income tax law[43]. It is relevant to recall in this regard that an individual's residence in Spain might be determined considering the 183-day rule or the center of vital interest, indistinctly[44]. The DGT considered in the ruling that the State of Alert period does not alter the 183-day rule laid down in domestic law for the purposes of an individual's residence. Therefore, if an individual stays more than 183 days in Spain – for whatever reason, such individual becomes a Spanish resident for tax purposes, at least in the absence of a tax treaty[45].

2. Indirect taxation

One of the few measures –if not the only one– adopted in the field of indirect taxation to tackle the consequences of COVID-19 was the reduction of the VAT rate applicable to specific purchases[46]. Notwithstanding potential issues with respect to the VAT Directive[47],

[39] See, in this regard, Art. 38 of LIRPF.

[40] See Disposición adicional cuarta of RD 463/2020.

[41] See Contestación CV DGT 1115/2020, de 28 de abril.

[42] See, in similar terms, Constestaciones CV DGT V2925/2020, de 29 de septiembre; V2594, de 30 de julio; and V2429/2020, de 15 de julio. This interpretation was also considered for the suspension of time limits with respect to other tax benefits. See, with respect to the exemption related to reinvestments in life annuities, Contestación CV DGT 1324/2020, de 5 de mayo.

[43] See Contestación CV DGT 1983/2020, de 17 de junio.

[44] See Art. 9 LIRPF. This Article also considers a rebuttable presumption of residence in Spain if the taxpayer's spouse and children habitually reside in Spain.

[45] See, with respect to further international tax aspects of this tax ruling, infra sec. 5.

[46] See Art. 8 of RDL 15/2020.

[47] This is unfortunately far beyond the purpose of this country report and the questionnaire it serves. See, with respect to import duties and VAT exemptions on imports, Commission Decision (EU) 2020/491, of 3rd April 2020, on relief from

this measure laid down a 0% tax for internal acquisitions, intra-Community supplies and import of listed healthcare material by (or to) public institutions, health centers (hospitals and clinics), and some private institutions until April 30th, 2021[48]. It is not possible to go into further detail here, but this measure might relate to a technical exemption without affecting the deductibility of output VAT. Moreover, it is pertinent to highlight that the measure states that invoices derived from relevant transactions must consider the latter as exempted in order to not modify the billing systems of taxpayers[49]. With respect to the subjective scope of the rule, and taking into consideration that this measure focuses on COVID-related issues, the DGT recalls that only those centers, no matter whether public or private, that admit people for treatment, and usually perform research and teaching activities, are eligible for 0% tax for their acquisitions[50].

Most recently, the Spanish Government has also reduced the applicable VAT rate to 4% for a specific type of facemask (i.e. mascarillas quirúrgicas – surgical masks). In this regard, it should be recalled that the maximum price for surgical masks was already fixed back in April 2020 whenever sold for public consumption[51].

In addition to these measures, taxpayers could also have benefited from the postponement and extension of time limits for certain VAT-related tax debts and tax returns under specific circumstances. In this regard, the option to postpone tax debts under certain circumstances for six months due to the RDL 7/2020 may have also applied e.g. to the mandatory VAT tax return for the first quarter of 2020 and to the mandatory VAT tax return due by February, March and April, 2020, depending on the case[52]. As already considered[53], there

import duties and VAT exemption on importation granted for goods needed to combat the effects of the COVID-19 outbreak during 2020.

[48] Indeed, this measure has been extended once again until April 30th, 2021. See Art. 6 Real Decreto-ley 34/2020, de 17 de noviembre, de medidas urgentes de apoyo a la solvencia empresarial y al sector energético, y en materia tributaria. See, with respect to the listed goods, Annex to RDL 15/2020. See also, with respect to the first extension of the relevant period until October 31st, Disposición adicional cuarta of Real Decreto-ley 27/2020, de 4 de agosto, de medidas financieras, de carácter extraordinario y urgente, aplicables a las entidades locales (not validated by the Parliament); and Disposición adicional séptima of Real Decreto-ley 28/2020, de 22 de septiembre, de trabajo a distancia. See also, for further detail on the private institutions considered in the measure, Art. 20 (3) of Ley 37/1992.

[49] See Art. 8 and Preamble RDL 15/2020.

[50] For instance, private dental clinics are not considered within the subjective scope of the rule since the services provided in these clinics do not relate to COVID. See Contestación CV DGT V2049/2020, de 23 de junio. See, for the same conclusion with respect to private podiatrists, CV DGT V2049/2020, and to speech therapies, CV DGT 2076/2020, de 23 de junio.

[51] Resolución de 22 de abril de 2020, de la Dirección General de Cartera Común de Servicios del Sistema Nacional de Salud y Farmacia, por la que se publica el Acuerdo de la Comisión Interministerial de Precios de los Medicamentos de 21 de abril de 2020, por el que se establecen importes máximos de venta al público en aplicación de lo previsto en la Orden SND/354/2020, de 19 de abril, por la que se establecen medidas excepcionales para garantizar el acceso de la población a los productos de uso recomendados como medidas higiénicas para la prevención de contagios por el COVID-19.

[52] See, once again, Art. 14 RDL 7/2020. See, in terms of direct taxation and the general conditions, supra sec. 2 and, particularly, nn. 23 and 24.

[53] See Artículo único RDL 14/2020. See also, for further detail on the extension of time limits, supra n. 27.

was also a time limit extension until May 20th for tax returns due between April 15th and May 20th by those taxpayers whose turnover was less than 600.000 in 2019 that may also applied to specific VAT tax returns[54].

Although there have been many tax rulings on VAT, particularly regarding the 0% VAT rate[55], it is interesting to recall the one related to the reduction of rental fees. The DGT interpreted that a reduction in the rental fees with respect to commercial property leases implies the reduction of the relevant taxable base only if such a reduction of fees stems from an actual formal agreement before, or by the moment, the fee is chargeable[56]. If the agreement is dated after the fee is chargeable, the taxable event is fulfilled and there will be taxation[57]. In this latter case, it would however be possible to reduce the taxable base according to the regular procedure afterwards, if the situation meets the correct conditions.

3. Procedural tax aspects

Some of the most relevant measures in the taxation field dealt with tax procedures and this section is dedicated to recalling those already mentioned supra[58], as well as other measures adopted throughout the pandemic in this regard. It is first worth highlighting that the Tax administration and all related procedures are highly digitalized, and it is actually mandatory for specific taxpayers to fulfill their tax duties exclusively by digital means. Notwithstanding such a reality, the vast complexities that have arisen as a result of the pandemic have led to specific measures being adopted to facilitate the fulfilment of the tax obligations by both the taxpayers and the Tax administration.

One the measures the State of Alert (RD 463/2020) brought was the halting of the prescription and limitation time limits from March 14th with respect to actions and rights in every field of law[59], as well as to judicial and administrative proceedings[60]. Nevertheless, it is important to highlight that the RD 463/2020 specifically excluded administrative procedures in the area of tax law from such suspension, as well as the time limits for tax returns[61].

[54] See, for instance, Form 303 – VAT Self-assessment and Form 349 – Information Return, Recapitulatory return of Intra-community transactions.

[55] See, among many others, supra n. 50.

[56] See, for instance, CV DGT 1497/2020, de 19 de mayo. See also CV DGT 2598/2020, de 30 de mayo.

[57] Id.

[58] See, for instance, supra nn. 22-27, 40-63 and related texts.

[59] See supra n. 40.

[60] See Disposiciones adicionales segunda y tercera of RD 463/2020, respectively.

[61] See Art. 33.6 RD 463/2020.

A different piece of legislation provided for the suspension of time limits in the tax field[62], which eventually lasted until May 30th[63]. As already considered, this suspension affected the prescription and limitation time limits of the actions and rights of both taxpayers and the Tax administration (e.g. deadlines for appealing, initiation of an auditing proceeding, collection of taxes)[64]. Moreover, the suspension of administrative tax procedures mainly meant the possibility of extending the time limit for completing general procedures on management and auditing of taxes and sanctioning procedures carried out by the Tax administration[65], as well as time limits for resolving claims brought before the Tax administration and Administrative Courts[66].

In addition to those time limit postponements and extensions for tax debts and tax returns already considered[67], it is important to highlight another measure that extended the time limits until May 30th for paying tax debts assessed by the Tax administration that should have been paid between March 18th and May 30th[68].

As considered supra in sec. 1, these measures, and particularly the ones related to tax deferral, had a relevant –and apparently temporary– impact on tax collection. Nevertheless, they have been proved necessary in most of the cases to ease the economic situation and the multilayered (tax) uncertainty stemming from COVID-19 to some extent.

4. International tax aspects

With regard to the field of international taxation, the tax issues related to COVID-19 and the measures adopted to tackle it primarily relate to the tax residence of corporations and individuals, as well as potential Permanent Establishment situations that would likely never have occurred in the absence of the pandemic.

[62] See Art. 33 RDL 8/2020. See also Disposición adicional novena of Real Decreto-ley 11/2020, de 31 de marzo, por el que se adoptan medidas urgentes complementarias en el ámbito social y económico para hacer frente al COVID-19 (hereinafter, RDL 11/2020).

[63] See Disposición adicional primera RDL 15/2020, which extends a first period of suspension of time limits in the tax field from April 30th to May 30th.

[64] See Art. 33. 6 RDL 8/2020. Article 66 of the General Tax Code lays down a prescription time limit of 4 years with respect to rights of both the taxpayers and the Tax administration. With respect to deadlines for administrative appeals, the appeal submission period restarted on May 30th according to Art. 33.7,2º RDL 8/2020.

[65] See Art. 33.5 RDL 8/2020.

[66] Id. See also Art. 33.7 RDL 8/2020 and Disposición adicional tercera RD 463/2020. See also Disposición adicional novena RDL 11/2020. RDL 11/2020 extends the suspension of time limits for resolving claims brought before Administrative Courts until May 30th, and of the prescription and limitation time limits with respect to actions, rights and procedures in the tax field within the powers of Regions (Comunidades Autónomas) and Local entities.

[67] See supra nn. 22-27, 40-63 and related texts

[68] See Art. 33. 1 RDL 8/2020. Among other situations, this extension also applied to postponements and payments in instalments already granted by the Tax administration and to callings of specific securities. Id.

No tax measure has dealt with these potential issues during this period in Spain and there is no hint on the Tax Administration's position with respect to them so far. Nonetheless, the DGT issued a tax ruling on a domestic matter with international implications and interpreted that the pandemic and lockdown measures are not reason enough for changing the interpretation and application of the183-day rule laid down in domestic legislation for considering an individual resident in Spain as already mentioned[69]. At first sight, this tax ruling would be contrary to the non-binding opinion of the OECD Secretariat on the matter since the OECD Secretariat recommends not to consider the lockdown periods for the purpose of determining the residence of individuals and corporations[70]. Although that contradiction would not be a problem whatsoever, in this case, the DGT interpreted the residence of the individuals from a domestic perspective without even referring to its interpretation from a treaty perspective mainly because there is no relevant tax treaty between Spain and the country from where the individuals were supposed to be resident (i.e. Lebanon)[71]. In this regard, the DGT's interpretation on an individual's residence from a treaty perspective may be different in the near future with respect to the one considered from a domestic perspective and meet the non-binding interpretation of the OECD Secretariat on the matter[72].

5. What now? Post-CoVID tax measures

The heath crisis due to COVID-19 has shown the need for greater involvement of the Public sector to meet the basic healthcare, social, labour and economic needs of the population during the pandemic, at least[73]. This means a consequential increase of public expenditure at different levels of the Public Administration in order to alleviate the harsh consequences of an economic downturn, an increase in unemployment rates, an increase

[69] See supra sec. 2 in fine and, particularly, nn. 43-44 and related texts.

[70] See OECD, 'OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis, 3 April 2020' (2020). See also, for an analysis of the document and among others, J.M. Calderón Carrero, 'COVID-19 y fiscalidad internacional. Las primeras recomendaciones de la OCDE' (2020) 446 CEF. Revista de Contabilidad y Tributación, 97-112; J.M. Macarro Osuna, 'Fiscalidad internacional en tiempos de pandemia', in: Rodriguez Ayuso and Atienza Macías (dirs.), Retos Jurídicos ante la crisis del Covid (La Ley – Wolters Kluwer 2020), 208-214. See also A. Báez Moreno and H. López López, 'Reflexiones sobre la pandemia y sus efectos en la fiscalidad internacional a partir de la Nota de la OCDE de 3 de abril de 2020' (2020) <https://ssrn.com/abstract=3624152>.

[71] Nevertheless, it is fair to point out that Báez Moreno and López López rightly consider that the OECD Secretariat surprisingly and inappropriately also refers to the tax residence of individuals from a domestic perspective. See Báez Moreno and López López (2020), 37-38.

[72] Although an interpretation in line with the OECD Secretariat opinion would deserve a critical analysis, this is far beyond the purposes of this country report. See, for a very critical analysis of the document of the OECD Secretariat, Báez Moreno and López López (2020). Macarro Osuna however considers that the exceptional circumstances of the pandemic should not have consequences in terms of residence. See Macarro Osuna (2020), 214.

[73] See, with respect to two measures adopted in this sense, supra sec. 1.

in inequality rates[74], etc. Apart from battling tax fraud and tax avoidance, there have been different proposals on adapting and amending the tax systems to fund public expenditure in the near future such as different forms of wealth taxes[75], taxation on digital economy, and an increase of excise duties on alcohol, tobacco and mineral oils[76], among many others.

Like many other countries – if not all, taxes are always cause for public debate in Spain and the pandemic period is no exception to that reality. In this regard, there have been strong proposals for the amendment of the wealth tax. Moreover, some amendments to the tax law and some taxes have been approved over the past months, however not necessarily related to the pandemic. It is worth highlighting that Spain finally adopted a tax on specific digital services (i.e. digital service tax)[77], and a tax on specific financial transactions)[78]. Most recently, the 2021 Government financial bill, which is still in process[79], laid down amendments to different pieces of tax legislation such as (1) an actual increase of the highest bracket of the wealth tax from 2.5% to 3.5%; (2) a limitation on specific tax benefits related to private pension plans in individual taxation; (3) a limitation on the exemption method on dividends (up to 95%) in corporate taxation; (4) an increase on the VAT rate applicable to sugar-sweetened beverages; and (5) an increase on the taxation of diesel (mineral oils)[80]. Nevertheless, it is necessary to wait for the final text and the tax measures that are eventually adopted.

Concluding remarks

In Spain the pandemic has led to a barrage of rules being adopted to alleviate the health, economic and social consequences of it. Only a few of these measures were tax related

[74] For instance, some authors have already pointed out an increasing trend in terms of inequality. See D. Furceri, P. Loungani, J.D. Ostry y P. Pizzuto, 'COVID-19 will raise inequality if past pandemics are a guide' (2020) <https://voxeu.org/article/covid-19-will-raise-inequality-if-past-pandemics-are-guide>. See also, in this regard, FAO, 'Addressing inequality in times of COVID-19' (2020) <http://www.fao.org/documents/card/en/c/ca8843en/> accessed 23 October 2020

[75] See, for instance, C. Landais, E. Saez, y G. Zucman, 'A progressive European wealth tax to fund the European COVID response' (2020) <https://voxeu.org/article/progressive-european-wealth-tax-fund-european-covid-response> accessed 24 October 2020; and, N. O'Donovan, 'How a one-off tax on wealth could cover the economic cost of the coronavirus crisis' (2020) <https://theconversation.com/how-a-one-off-tax-on-wealth-could-cover-the-economic-cost-of-the-coronavirus-crisis-137677> accessed 24 October 2020.

[76] See J.M. Martín Rodríguez, 'Medidas fiscales en España frente a la crisis del COVID-19. Respuesta inmediata a los problemas de liquidez y propuestas para garantizar la sostenibilidad en el medio y largo plazo', in: Rodriguez Ayuso and Atienza Macías (dirs.), Retos Jurídicos ante la crisis del Covid (La Ley – Wolters Kluwer 2020), 151.

[77] See Ley 4/2020, de 15 de octubre, del Impuesto sobre Determinados Servicios Digitales.

[78] See Ley 5/2020, de 16 de octubre, del Impuesto sobre las Transacciones Financieras.

[79] See Proyecto de Ley de Presupuestos Generales del Estado para el año 2021 (hereinafter, LPGE).

[80] The measure related to the increase on the taxation of diesel has apparently not succeeded in the negotiation process of the LPGE.

as a result of the consequences from the lockdown and the inherent economic standstill. Nevertheless, most of the tax measures adopted during the pandemic (and the interpretations of the tax law) may not be considered relevant from a structural point of view of the tax system and may likely have no relevance whatsoever due to their own nature once the pandemic is over. Although they may fulfill their purpose, particularly in terms of tax deferral, all these measures have been adopted because of the pandemic's exceptional circumstances and they must be read in this context and to that extent. How to deal with the economic and social consequences of the pandemic is truly a different kettle of fish that is unfortunately beyond the scope of this report.

In a nutshell, this country report has served the main purpose of systematizing the tax measures adopted in Spain in the field of tax law during the first part of the pandemic and of providing insight on the interpretation of the tax law by the Tax authority over this complex legal period.

Articles

Fiscal measures to counteract the economic consequences of the COVID-19 pandemic in Germany

Maximilian von Jähnichen*

Abstract

This article outlines and analyzes the different fiscal measures which have been realized in Germany in order to counteract the economic damages caused by the coronavirus pandemic and its subsequent lockdowns. Tools of direct as well as of indirect taxation will be explained in detail, but also procedural tax law and international tax aspects will be taken into consideration. Since domestic and international taxation are part of the global economy, the measures taken by the German Government will be regarded even from an economic perspective. In this case, this article also shows other non-fiscal tools that have to be mentioned in order to understand the rationale behind the federal supports. Furthermore, a critical point of view on the different approaches will be laid down for being able to evaluate the decisions of the Government. It will also be explained why the current and apparently relatively low unemployment rate could raise soon.

* Business consultant. PhD candidate at the Autonomous University of Madrid.

Keywords

Coronavirus – COVID-19 – Financial stimulus – Federal support – Corporate taxation – Income taxation – VAT – direct taxation – Indirect taxation – Double tax convention – OECD – Germany – Finance – Lockdown

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1. General overview

Despite being the biggest economy of the euro zone, Germany has also been dramatically affected by the economic impacts of the coronavirus pandemic. The origin of the virus

spreading across the Federal Republic of Germany can be traced back to patient zero, an employee of the company *Webasto* in Stockdorf, Bavaria, near Munich[1]. From 16 March 2020, the German Government announced border controls to his neighbor countries Austria, France, Switzerland, Denmark and Luxembourg in order to contain the spread of the virus[2], but also communicated strict contact restrictions for private persons (first lockdown in Germany)[3], as the closing of sites of cultural interests, fairs, bars, night clubs, but also private sports clubs and playgrounds (schools and universities had been closed at that time yet, because of rulings of the respective Federal State). On 28 October 2020, German Chancellor Angela Merkel announced a second lockdown for Germany ('lockdown light')[4] with effect from 2 November 2020 (schools, universities and other educational institutions could remain open[5]), since the coronavirus infection rate has significantly raised in autumn[6].

Due to the impact of the coronavirus lockdown on the German economy, German Economy Minister Peter Altmaier expects GDP (Gross Domestic Product) to contract 5.5 % compared to 2019[7], although a double dip recession[8] could be possible if the new restrictions are likely to affect the economic recovery negatively again. The unemployment rate as of October 2020 is at 4.5 %[9] and still below the EU average of 7.6 %[10]. The relatively low

[1] On 27 January 2020, a 33-year-old man caught the coronavirus infection from a Chinese colleague visiting the Bavarian automotive company *Webasto* near Munich.

[2] Bundesministerium des Innern, für Bau und Heimat, *Vorübergehende Grenzkontrollen an den Binnengrenzen zu Österreich, der Schweiz, Frankreich, Luxemburg und Dänemark* (*BMI*, 15 March 2020) <www.bmi.bund.de/SharedDocs/pressemitteilungen/DE/2020/03/grenzschliessung-corona.html> accessed 31 October 2020.

[3] Presse- und Informationsamt der Bundesregierung, *Vereinbarung zwischen der Bundesregierung und den Regierungschefinnen und Regierungschefs der Bundesländer angesichts der Corona-Epidemie in Deutschland* (*BPA*, 16 March 2020) <www.bundesregierung.de/breg-de/aktuelles/vereinbarung-zwischen-der-bundesregierung-und-den-regierungschefinnen-und-regierungschefs-der-bundeslaender-angesichts-der-corona-epidemie-in-deutschland-1730934> accessed 31 October 2020.

[4] Order of the German Government and the German Federal States of 28 October 2020, *Videokonferenz der Bundeskanzlerin mit den Regierungschefinnen und Regierungschefs der Länder am 28. Oktober 2020* (*BReg*, 28 October 2020) <www.bundesregierung.de/resource/blob/997532/1805024/5353ededede6c0125ebe5b5166504dfd79/2020-10-28-mpk-beschluss-corona-data.pdf?download=1> accessed 31 October 2020.

[5] In Germany, educational issues are the responsibility of the Federal States.

[6] Accumulated figures as of 31 October 2020 show a total annual number of 518,753 infections of which 10,452 have died and 351,200 have recovered so far. This leads to an average mortality rate of 2 % and to an average recovery rate of 68 %. Robert-Koch-Institut, *COVID-19-Dashboard* (*RKI*, 31 October 2020) <https://experience.arcgis.com/experience/478220a4c454480e823b17327b2bf1d4/page/page_1/> accessed 31 October 2020.

[7] Expected GDP for 2020. Statista, *Veränderung des Bruttoinlandsprodukts (BIP) in Deutschland von 2005 bis 2019 und Prognose der Bundesregierung bis 2025* (*Statista*, 30 October 2020) <https://de.statista.com/statistik/daten/studie/164923/umfrage/prognose-zur-entwicklung-des-bip-in-deutschland/> accessed 31 October 2020.

[8] In a double dip recession, an economy's phase of growth slows down and slides into a second recession after having recovered from the previous recession.

[9] German unemployment figures of October 2020. Bundesagentur für Arbeit, *Arbeitslosenquote & Arbeitslosenzahlen 2020* (*BAA*, 29 October 2020) <www.arbeitsagentur.de/news/arbeitsmarkt-2020> accessed 31 October 2020.

[10] Unemployment figures as of August 2020 for the European Union. Statista, *Europäische Union: Arbeitslosenquoten in den Mitgliedstaaten im September 2020* (*Statista*, 3 December 2020) <https://de.statista.com/statistik/daten/stud-

unemployment rate in Germany results from the non-permanent work loss compensation *Kurzarbeitergeld*[11] ('Kug') which can be applied for under certain commercial conditions as obviously caused by the coronavirus[12]. Normally, this unemployment benefit can be received up to twelve months, but under certain labor market conditions up to 24 months. In this case, and if the labor market conditions do not get better in the near future, it can be assumed that after the expiration of this special form of work loss compensation the unemployment rate could end up higher, since the Kug tends to cover some permanent job losses in a middle or long-term view.

Furthermore, in order to circumvent a possible flood of bankruptcies, the *Bundestag* passed the new *COVID-19-Insolvenzaussetzungsgesetz* ('COVInsAG') on 27 March 2020 with retrospective effect from 1 March 2020[13]. On the basis of this new law, the general three-weeks-period of filing for bankruptcy according to German Bankruptcy Law (*Insolvenzordnung*; 'InsO')[14] was extended till 30 September 2020 when a company is overindebted or unable to pay due to the economic impact of the coronavirus. On 25 September 2020, the initial suspension of filing for bankruptcy was once again extended till 31 December 2020[15] under the single condition of overindebtedness[16].

It is clear that Germany – besides all the other countries affected by the coronavirus pandemic – will have to counteract the economic damage with stimulus packages or has even done so recently. It is expected for 2020 that the German public debt will reach almost 80 % of the GDP (after the World Financial Crisis, the public debt was the highest for years

ie/160142/umfrage/arbeitslosenquote-in-den-eu-laendern/> accessed 3 December 2020.

[11] § 95 SGB III. The *Kurzarbeitergeld* serves as a temporary social security for workers and employees of companies which would normally lay off its staff because of decreasing sales or less incoming orders in economically challenging times. In order to prevent these lay-offs, but also to reduce the personnel expenses of the affected company, the *Bundesagentur für Arbeit* bears at least 60 % of the net salary of the employee (67 % for employees with at least one child). According to its directive 202030015 of 30 March 2020, a basic condition is the loss of wages of more than 10 % for at least 10 % of all employees. Furthermore, 100 % of the social costs will be covered by the State till 31 December 2020. In its directive 20200500 of 28 May 2020, further expansion was communicated. When there is a salary loss of about more than 50 %, the Kug will be paid up to 70 % (77 % for employees with at least one child) with the beginning of the fourth month and up to 80 % with the beginning of the seventh month (87 % respectively for employees with at least one child). These benefits were originally valid until 31 December 2020 but have been extended for one more year until 31 December 2021, directive 202011007 of 6 November 2020. Furthermore, the State will bear the social costs of the affected companies up to 100 % until 30 June 2021 and from 1 July 2021 until 31 December 2021 up to 50 %.

[12] In the United States, there are no similar unemployment benefits. In the meantime, that is why the unemployment rate of the United States was at 14.7 % in April 2020. U.S. Bureau of Labor Statistics, *Unemployment rate rises to record high 14.7 percent in April 2020* (*BLS*, 13 May 2020) <www.bls.gov/opub/ted/2020/unemployment-rate-rises-to-record-high-14-point-7-percent-in-april-2020.htm> accessed 31 October 2020.

[13] Bundestag, *Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht*, 27.03.2020, BGBl. 2020 I 569.

[14] § 15a InsO. The general period of filing for bankruptcy is three weeks after the recognition of overindebtedness or inability to pay.

[15] Bundestag, *Gesetz zur Änderung des COVID-19-Insolvenzaussetzungsgesetzes*, 25.09.2020, BGBl. 2020 I 2016.

[16] § 1 para 2 COVInsAG. When a company is unable to pay, this law will not be applicable, and the company has to file for bankruptcy.

with a rate of more than 80 %)[17]. In total numbers, this means that the Government plans to contract new debts of about € 218 bn for 2020 calculating without a second coronavirus infection wave[18]. Taken as a whole, Germany's fiscal and financial efforts to fight the economic consequences caused by the coronavirus pandemic represent the biggest stimulus package in Germany's history[19].

2. Direct tax measures

2.1. General aspects

This section seeks to describe certain fiscal aids, either for private persons as a matter of personal income taxation, or for companies subject to corporate income taxation. There have not been fundamental changes in the national tax regime, so that the most important fiscal measures will be pointed out. Regarding both personal income tax law and corporate income tax law, on 19 June 2020, the German Government passed the *Corona-Steuerhilfegesetz*[20], a special act that contains several measures to support employees and employers.

2.2. Personal income taxation

2.2.1. *Tax-free benefits*

For individuals, there have not been developed special personal income tax benefits. Basically, there are certain procedural tax measures also for employees which will be analyzed later in this work. The most famous fiscal act to support employees during the pandemic was the release of a unique payment opportunity (*Corona-Sonderzahlung*) which is totally tax-free for employees and completely deductible from the taxable base for companies[21]. This benefit can be paid to each employee, so that this payment does not only address certain groups of employees, but even casual employees[22]. The amount of this special

[17] Expected worldwide debt levels based on the impact of the coronavirus. International Monetary Fund, *Gross debt position* (*IMF*, 1 November 2020) <www.imf.org/external/datamapper/G_XWDG_G01_GDP_PT@FM/ADVEC/FM_EMG/FM_LIDC/PER/DEU> accessed 1 November 2020.

[18] L. Feld, *Rekordschulden in der Coronakrise – kann sich der deutsche Staat das leisten?* (2020) 73 (8) *ifo Schnelldienst* 3.

[19] Bundesministerium der Finanzen, *Kampf gegen Corona: Größtes Hilfspaket in der Geschichte Deutschlands* (*BMF*, 22 May 2020) <www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Schlaglichter/Corona-Schutzschild/2020-03-13-Milliarden-Schutzschild-fuer-Deutschland.html> accessed 8 November 2020.

[20] *Gesetz zur Umsetzung steuerlicher Hilfsmaßnahmen zur Bewältigung der Corona-Krise* (*Corona-Steuerhilfegesetz*) of 19 June 2020.

[21] § 3 no 11a EStG. The *Einkommensteuergesetz* regulates the taxation of individuals but also of corporations as *lex generalis*.

[22] Casual workers in Germany earn a net salary of € 450 per month.

bonus will be tax-free up to € 1,500, whereas it can be split up in several payments. Payments that exceed this amount will be taxed accordingly. Since this opportunity is aimed at supporting employees who suffer from the economic consequences of the pandemic, this unique payment came into force on 1 March 2020 and is limited till 31 December 2020.

2.2.2. *Treatment of losses*

In addition, the legislator amended further sections in the *Einkommensteuergesetz* (EStG) which led to some temporarily limited changes in the application of the loss carryback[23]. In general, the taxpayer can deduct a limited amount of occurred losses that exceed the total income of the fiscal year from the total income of the previous fiscal year (loss carryback). Exceeding losses that cannot be considered under the application of the loss carryback can be deducted from the total income in the following fiscal years (loss carryforward). In the first step, the loss carryforward is unlimitedly deductible from an amount of up to € 1 m of the total income. In the second step, the remaining loss carryforward can be limitedly deducted with up to 60 % from the total income that exceeds the amount of € 1 m[24]. By the amendment of the new § 111 EStG, the loss carryback for the losses occurred in the fiscal years 2020 and 2021 to the fiscal year 2019 was widened to a maximum amount of € 5 m in the case of single taxation (previously € 1 m) and to € 10 m in the case of joint taxation (previously € 2 m)[25].

On request, for the tax assessment for the fiscal year 2019, a general amount of 30 % of the total income of 2019 can be deducted as loss carryback of the fiscal year 2020 (temporary loss carryback for 2020)[26]. Income from employment[27] cannot be considered in the calculation of the temporary loss carryback for 2020. For the temporary loss carryback to apply, it is necessary that the tax prepayments for 2020 have been reduced to € 0.00.

When the taxpayer is able to prove that his expected loss carryback will exceed the temporary loss carryback, then the general methods regarding the loss carryback and the loss carryforward apply[28].

2.2.3. *Prepayments*

Similarly, the taxpayer can request reductions of his tax prepayments made for the fiscal year 2019[29]. Based on this request, the base for the tax prepayments for the fiscal year 2019 will be decreased by a general amount of 30 % of the taxpayer's total income. Income from

[23] Art 2 *Zweites Gesetz zur Umsetzung steuerlicher Hilfsmaßnahmen zur Bewältigung der Corona-Krise* (*Zweites Corona-Steuerbilfegesetz*). The new § 110 and § 111 will be added to the EStG.

[24] § 10d EStG determines the application and the limit of both the loss carryback and the loss carryforward as *lex generalis*.

[25] New § 111 para 3 EStG.

[26] New § 111 para 1 EStG.

[27] § 19 EStG.

[28] New § 111 para 2 EStG.

[29] New § 110 para 1 EStG.

employment cannot be included in the total income. For a prepayment reduction for 2019, it is necessary that the prepayments for 2020 have also been lowered to € 0.00.

2.3. Corporate income taxation

2.3.1. *Taxable cash supports*

Parallel to the efforts that have been made to support the employees, some important economic aids have been developed for small companies as well. Although some of these supports have not been of fiscal, but more of financial nature, the benefits for the companies are totally considered in the profit and loss statement in accordance with German Tax Law.

The first major federal support was released on 27 March 2020[30]. The so-called *Corona-Soforthilfe* was aimed at small companies and other entrepreneurs which had a significant decrease in sales and cash positions. Germany provided € 50 bn of its supplementary national budget which could be applied for by the respective Federal States[31]. This kind of benefit was designed to help small companies and other similar businesses as self-employed individuals survive the economic impact of the pandemic and strengthen their economic position. The benefit is taxable and the period of this program was limited to three months.

In general, each resident company with up to 10 (in many Federal States up to 50) employees and self-employed individuals could apply for this benefit program in the case of a severely negative economic impact caused by the coronavirus. Businesses with up to 5 employees were able to file for a unique payment of up to € 9,000 for three months, businesses with up to 10 employees were able to file for a maximum amount of € 15,000 and businesses with up to 50 employees were able to file for a maximum amount of € 30,000. The respective application had to be filed till 31 May 2020. Businesses that had yet been in financial imbalance as of 31 December 2019, were not allowed to file for this support.

Subsequently, on 12 June 2020, Peter Altmaier announced further stimulus for small and medium-sized enterprises that have suffered from the economic consequences of the pandemic and that have been forced to completely close or significant parts of their businesses[32]. This *Überbrückungshilfe* program seamlessly continues and extends the *Corona-*

[30] Bundesministerium der Finanzen, *Weg für Gewährung der Corona-Bundes-Soforthilfen ist frei – Umsetzung durch die Länder steht* (*BMF*, 29 March 2020) <www.bundesfinanzministerium.de/Content/DE/Pressemitteilungen/Finanzpolitik/2020/03/2020-03-29-PM-Verwaltungsvereinbarung-Soforthilfe.html> accessed 8 November 2020.

[31] Germany's first supplementary budget for 2020 determines the national and federal supports. Bundesregierung, *Nachtragshaushalt 2020 – Mit aller Kraft gegen die Krise* (*BReg*, 27 March 2020) <www.bundesregierung.de/breg-de/themen/coronavirus/nachtragshaushalt-2020-1731686> accessed 8 November 2020.

[32] Bundesministerium für Wirtschaft und Energie, *Altmaier: "Mit Überbrückungshilfe werfen wir den Mittelstandsmotor wieder an"* (*BMWi*, 12 June 2020) <www.bmwi.de/Redaktion/DE/Pressemitteilungen/2020/20200612-altmaier-mit-ueberbrueckungshilfe-werfen-wir-den-mittelstandsmotor-wieder-an.html> accessed 8 November 2020.

Soforthilfe program and was applicable from June to August.[33] Even those companies and businesses that had yet benefited from the *Corona-Soforthilfe* could apply for this program, too, when they have not recovered properly.

The aim of this program was – depending on the extent of the decreasing sales – to cover the fixed costs of the respective business. The application was open to enterprises and small businesses under the condition[34] that the cumulated sales of April and May 2020 are less than 60 % of the cumulated sales compared to April and May of the year 2019. The support covers an amount of

- 80 % of the fixed costs when the sales have decreased about more than 70 %, or
- 50 % of the fixed costs when the sales have decreased between 50 % and 70 %, or
- 40 % of the fixed costs when the sales have decreased between 40 % and 50 % in the month of the current year compared to the month of the previous year.

When the sales are at least 60 % of the sales compared to the same month of the previous year, then the benefit is not applicable for this month. In this program, the fixed costs include rents and leasing costs, running costs as electricity, water or gas, interests, administration costs, royalties, costs for personnel[35] and maintenance costs for necessary assets and other fixed costs as insurance fees. These costs must have been occurred before March 2020, whereas the program was originally applicable till 31 August.

As mentioned earlier, the period of this program was originally limited to the months of June, July and August, although it was extended later. Basically, the maximum amount that could be applied was of € 150,000[36] for those three months. The maximum support for businesses with up to 5 employees was of € 9,000 and for businesses with up to 10 employees € 15,000, respectively. In justified situations, exceptions were possible.

This benefit was, like the *Corona-Soforthilfe*, taxable, so that the received payment raised the base of the corporate income tax. In the case of an overpayment – which means that if an enterprise received an amount that exceeded the incurred costs and when the sales indeed were higher – there was a repayment obligation for the company.

[33] The total volume of this program was limited to € 25 bn and was backed by Germany's second supplementary national budget which was passed on 17 June 2020 and complements the first supplementary national budget. Bundesministerium der Finanzen, *Zweiter Nachtragshaushalt 2020 beschlossen – Kraftvolle und verantwortungsvolle Finanzpolitk zur Überwindung der Corona-Krise* (*BMF*, 17 June 2020) <www.bundesfinanzministerium.de/Content/DE/Pressemitteilungen/Finanzpolitik/2020/06/2020-06-17-Nachtrag-HH.html> accessed 8 November 2020 and *Zweites Nachtragshaushaltsgesetz 2020*.

[34] Bundesministerium für Wirtschaft und Energie, *Eckpunkte "Überbrückungshilfe für kleine und mittelständische Unternehmen, die ihren Geschäftsbetrieb im Zuge der Corona-Krise ganz oder zu wesentlichen Teilen einstellen müssen"* (*BMWi*, 12 June 2020) <www.bmwi.de/Redaktion/DE/Downloads/E/eckpunkte-ueberbrueckungshilfe.html> accessed 8 November 2020.

[35] Personnel costs will be covered by a general reimbursement of 10 % of the incurred costs of administration, leasing, interests, royalties, maintenance and running costs as well as other costs as insurance costs.

[36] In the case of a group, the maximum benefit of € 150,000 cannot be exceeded. This means that when a legally independent company is directly or indirectly controlled by the same person or by the same enterprise, € 150,000 would be the total benefit applicable for the group.

On 18 September 2020, the German Government announced the extension of the already existing *Überbrückungshilfe* (whose name was then changed into *Überbrückungshilfe I*) and introduced the continuous *Überbrückungshilfe II*[37]. This program serves as prolongation and is applicable for the months from September till December 2020. Some aspects of the program have been modified in order to facilitate the application and the accessibility for SMEs. In this context, the concerned businesses are able to apply for the *Überbrückungshilfe II* program when they have suffered from a decrease in sales of at least 50 % in two cohesive months in the period from April to August 2020 compared to the respective months in 2019 or when the business has suffered from an average decrease in sales of at least 30 % in the period from April to August 2020 compared to the respective months in 2019. The limited benefits of € 9,000 (for businesses with 5 employees) and € 15,000 (for businesses with 10 employees, respectively) was eliminated. Furthermore, the percentages of the covered costs have been raised or the decrease in sales has been adapted as follows:

– 90 % of the fixed costs when the sales have decreased about more than 70 %, or
– 60 % of the fixed costs when the sales have decreased between 50 % and 70 %, or
– 40 % of the fixed costs when the sales have decreased about more than 30 % in the month of the current year compared to the month of the previous year and
– a general compensation of 20 % for the incurred personnel expenses.

The maximum benefit for each month is € 50,000, or, for the period from September to December, in total € 200,000.

Due to the Government order of 28 October, many businesses, especially from gastronomy and hotel industry, had to completely or partially close their businesses[38]. Consequently, the Government announced another federal support, the so-called *außerordentliche Wirtschaftshilfe* or simply *Novemberhilfe*, which was principally aimed at businesses which were expected to suffer from the new lockdown restrictions[39]. The program has a volume of € 10 bn and is accessible from 25 November 2020 for companies and similar businesses that have been directly or indirectly affected by the new restrictions. In this context, the term 'directly affected' includes all the businesses (also public institutions) that had to completely close due to the order of 28 October. On the other hand, the term 'indirectly affected' includes all the businesses which habitually generate revenues of at least 80 %

[37] Bundesministerium für Wirtschaft und Energie, *Überbrückungshilfe wird verlängert, ausgeweitet und vereinfacht* (*BMWi*, 18 September 2020) <www.bmwi.de/Redaktion/DE/Pressemitteilungen/2020/09/20200918-ueberbrueckungshilfe-wird-verlaengert-ausgeweitet-und-vereinfacht.html> accessed 14 November 2020.

[38] Order of the German Government and the German Federal States (n 4).

[39] Bundesministerium der Finanzen, 'Außerordentliche Wirtschaftshilfe November – Details der Hilfen stehen' (*BMF*, 5 November 2020) <www.bundesfinanzministerium.de/Content/DE/Pressemitteilungen/Finanzpolitik/2020/10/2020-11-05-PM-ausserordentliche-wirtschaftshilfe-november.html> accessed 15 November 2020; Bundesministerium für Wirtschaft und Energie, *Maßnahmenpaket für Unternehmen gegen die Folgen des Coronavirus* (*BMWi*, 23 November 2020) <www.bmwi.de/Redaktion/DE/Downloads/M-O/massnahmenpaket-fuer-unternehmen-gegen-die-folgen-des-coronavirus.html> accessed 23 November 2020.

from customers which are directly affected by the order of 28 October (suppliers)[40]. The *Novemberhilfe* provides a weekly grant of 75 % of the weekly average sales of November 2019[41].

It is important to note that other federal benefits will be credited on the *Novemberhilfe* program what means that the payments received in November under the *Überbrückungshilfe I* and *II* as well as the Kug payments for November will be deducted from the new support. This is the same for sales generated in November 2020, so that merely a percentage of up to 25 % compared to the sales of November 2019 will not be considered in the credit. Sales that exceed the 25 % threshold will be credited partially.

For restaurants, there are certain exceptions when food and beverage are offered for take away. The granted benefits are limited to 75 % of the sales of the same period of 2019 and which were subject to the total VAT rate[42]. In so far, all the sales generated for take away are excluded from this calculation, since they are subject to the lower VAT rate[43]. On the contrary, there is no threshold for a sales credit of the take away sales, so that these cannot be deducted from the *Novemberhilfe* in order to support the take away services of the restaurants even if they exceed a percentage of 25 % as mentioned above.

Like the *Corona-Soforthilfe* and the *Überbrückungshilfe* (*I* and *II*), the *Novemberhilfe* is fully taxable and will therefore be totally considered in the profit and loss calculation according to German Tax Law.

As mentioned earlier, these programs do not present purely fiscal measures. Basically, there have not been actions like direct tax reductions or specific income exemptions to reduce the tax charge of the companies. But even the federal benefits under the above-mentioned programs directly affect, on the one hand, the cash positions of the companies and, on the other hand, are totally considered for fiscal purposes.

2.3.2. Deduction of financial *expenses*

Furthermore, for business income, the maximum deductibility limit of financial expenses has been modified[44]. Previously, the maximum deductibility was limited to € 100,000. The modified deductibility limit was then raised to € 200,000[45]. In this context, the legislator did

[40] For a group, more than 80 % of the generated group revenues ought to result from intragroup companies which are directly or indirectly affected.

[41] State funding of a volume of € 1 m is subject to Commission Regulation (EU) 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid [2013] OJ L352/1. State aid exceeding this amount is subject to art 107 (2) b) of the Treaty on the Functioning of the European Union.

[42] Food and beverage consumed in the restaurant are, basically, subject to the total VAT rate of 19 % according to § 12 para 1 UStG.

[43] Food and beverage for take away reasons are, basically, subject to the reduced VAT rate of 7 % according to § 12 para 2 no 1 UStG.

[44] § 8 no 1 GewStG.

[45] Art 5 *Zweites Corona-Steuerhilfegesetz*.

not restrict the modification to a certain timeframe. Based on this and on the assumption that many businesses will have to contract more debts in order to survive the financial effect of the pandemic, a widened deductibility limit of finance costs will represent a proper measure to help businesses consider their financial burden in income taxation not only in the current, but also in the future years. Generally, the addition of certain expenses concerning the taxable base of the *Gewerbesteuer* is based on the objective to tax business income independently of its funding. That means that interests which have lowered the earnings will partially be added to the taxable base since costs of equity are not deductible neither.

2.3.3. Treatment *of losses*

As explained under 2.2.2., the regulations of the *Einkommensteuergesetz* as *lex generalis* primarily apply to corporate taxation. Hence, the treatment of losses for purposes of corporate taxation is equal to the widened application of the loss carryback and the loss carryforward[46]. Consequently, the same conditions of the temporary loss carryback are applicable. The loss carryback to the fiscal year 2019 is temporarily limited to an amount of € 5 m for the losses occurred in the fiscal years 2020 and 2021.

On request, for the tax assessment for the fiscal year 2019, a general amount of 30 % of the total income[47] of 2019 can be deducted as loss carryback of the fiscal year 2020 (temporary loss carryback for 2020). For the temporary loss carryback to apply, it is necessary that the tax prepayments for 2020 have been reduced to € 0.00. When the taxpayer is able to prove that his expected loss carryback will exceed the temporary loss carryback, then the general methods regarding the loss carryback and the loss carryforward apply.

For purposes of the *Gewerbesteuer*, there is no loss carryback, but only a possible loss carryforward to the following fiscal years[48].

2.3.4. Pre*payments*

Prepayments for purposes of the *Körperschaftsteuer* can also be modified by the tax authorities. Based on a request, the base for the tax prepayments for the fiscal year 2019 will be decreased by a general amount of 30 % of the taxpayer's total income. For a prepayment reduction for 2019, it is necessary that the prepayments for 2020 have also been lowered to € 0.00.

[46] § 8 para 1 cl 1 KStG as general norm determines that the regulations of the *Einkommensteuergesetz* apply to corporate taxation.

[47] On the contrary to the different sources of income for individuals, like income from employment which has to be eliminated from the total income for purposes of the treatment of losses, corporate income taxation does not know about these different sources. Corporations just have one class of income, the corporate income. For the loss carryback it is important because the total income of corporations is literally the total amount of income generated by corporate business activities. *Lex specialis* of § 8 para 2 KStG.

[48] § 10a GewStG.

3. Indirect taxation

3.1. VAT

Even in the scope of indirect taxation (VAT), there have been developed some measures – both of systematic and procedural nature – to counteract the economic damage of the pandemic. From the systematic point of view, two major important changes have been implemented, although of temporary character. In German VAT law (*Umsatzsteuergesetz*), there are, basically, two tax rates[49].

The general tax rate of 19 % applies to most of the taxable business cases in accordance with § 12 para. 1 UStG. The reduced tax rate of 7 % according to § 12 para. 2 UStG applies to exceptional cases as accommodation services or food and beverage for take away.

On 30 June 2020, a temporary reduction of the VAT rates was announced[50]. With effect from 1 July 2020, the general VAT rate of 19 % was decreased to 16 % and the reduced VAT rate of 7 % to 5 %. The period is limited to six months, so that the VAT reduction exclusively applies till 31 December 2020[51]. The aim of this temporary regulation was that businesses should directly pass on this benefit to their customers. Obviously, this modification has not had any impact on business-to-business transactions since the net amount has remained the same and based on the fact that the input tax is deductible and the output tax will finally be imposed on the customer. Consequently, only the customer has noticed the VAT implementation due to the decreased tax burden. According to German Finance Minister Olaf Scholz, this effect was desired by the German Government in order to encourage more consumption after the first lockdown and to reach an economic impulse assuming that the customers will realize their future spending decisions in the current year. The German Government has repeatedly stated that the VAT reduction is of temporary character in order to avoid an ineffectiveness of the purchase incentive for the customers.

3.2. Tobacco tax

For tobacco tax purposes (*Tabaksteuergesetz*)[52], nothing has changed, so that the applicable law has remained untouched.

[49] The German tax rates for intracommunity deliveries or services are also of importance according to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L347/1.

[50] Bundesministerium der Finanzen, *Umsatzsteuer; Befristete Absenkung des allgemeinen und ermäßigten Umsatzsteuersatzes zum 1. Juli 2020*, III C 2 – S 7030/20/10009 :004, 2020/0610691, 30.06.2020.

[51] Based on art 3 *Zweites Corona-Steuerhilfegesetz* and § 27 para 1 UStG.

[52] § 2 para 2 TabStG.

4. Procedural tax law

4.1. Introduction

General tax procedures regarding deferrals, enforcements, late payment fines and default fines and interests for deferred payments are regulated in the fourth, fifth and sixth part of the *Abgabenordnung* ('AO').

4.2. Direct taxation

In order to relieve corporations, employed and self-employed individuals as well as other similar businesses of payable federal tax charges administrated by the Federal States[53], their corresponding deferrals and tax enforcements, the legislator passed certain suspensions and modification opportunities for tax prepayments and tax advance returns[54]. Taxpayers which have been directly and significantly suffering from the consequences of the pandemic are able to request for deferrals of federal tax liabilities[55] and for modifications of the prepayments[56] for personal income tax[57] and corporate income tax based on the disclosure of their books until 31 December 2020. Those requests cannot solely be rejected when the taxpayer is not able to properly prove the incurred financial damage in terms of value. There are no strict requirements necessary for the verification of the conditions for the applied deferrals. A waiver of interests for deferred payments[58] is also possible[59].
Requests for deferrals of tax liabilities payable after 31 December 2020 as well as requests for modifications of prepayments concerning corporate income tax and personal income tax arising after 31 December 2020 can only be considered under special conditions[60].
When the tax authorities are aware that the taxpayer has been directly and significantly affected by the pandemic, then they are entitled to refrain from the execution of deferrals

[53] Federal taxes in Germany are: *Umsatzsteuer* (VAT), *Körperschaftsteuer* (corporate income tax), *Einkommensteuer* (personal income tax) and *Solidaritätszuschlag* (solidarity surcharge which is levied on both the corporate income tax and on the personal income tax).

[54] Bundesministerium der Finanzen, *Steuerliche Maßnahmen zur Berücksichtigung der Auswirkungen des Coronavirus (COVID-19/SARS-CoV-2)*, IV A 3 – S 0336/19/10007 :002, 2020/0265898, 19.03.2020.

[55] § 222 AO.

[56] § 164 AO.

[57] Bundesministerium der Finanzen, *Verlängerung der Erklärungsfrist für vierteljährliche und monatliche Lohnsteuer-Anmeldungen während der Corona-Krise*, IV A 3 – S 0261/20/10001 :005, 2020/0397950, 23.04.2020. Income tax prepayments have to be declared monthly or quarterly by the employers or by its authorized tax consultant. In this case and with no fault of their own, the legislator has entitled the tax authorities of the Federal States to grant an extension of the period for the prepayment declaration in accordance with § 109 para. 1 AO. The extension is limited to two months.

[58] § 234 AO.

[59] Bundesministerium der Finanzen (n 54) para 1.

[60] Ibid. para 2.

for payable tax liabilities until 31 December 2020[61]. Late payment fines[62] related to these payable taxes until 31 December 2020 have to be remitted, whereas the tax authorities are entitled to communicate the remissions on the basis of general orders[63].
For those parties which are solely indirectly affected, the general norms will apply[64].
Parallel to the federal taxes, the same measures were announced for the taxes levied by the respective Federal States on 19 March 2020[65], especially the *Gewerbesteuer*, which is imposed by the communities where businesses are located[66]. When the respective tax authority takes note of a decreased taxable base for *Gewerbesteuer* purposes, it will be entitled to modify the prepayments of the affected taxpayer for the fiscal year, especially when the tax authority has modified the prepayments for personal income tax and corporate income tax[67].
Corporations and businesses which have been directly and significantly suffering from the consequences of the pandemic are able to request for a reduction of the taxable base[68] for purposes of prepayments concerning the *Gewerbesteuer* based on the disclosure of their books until 31 December 2020. Those requests cannot solely be rejected when the taxpayer is not able to properly prove the incurred financial damage in terms of value. When the tax authorities determine the taxable base for purposes of prepayments concerning the *Gewerbesteuer*, the corresponding community is legally obliged to assess the resulting prepayments[69].
Requests for tax deferrals and remissions must generally be submitted to the respective community and only to the tax authorities when the respective community has not been entitled to assess and impose the *Gewerbesteuer*[70].

4.3. Indirect taxation

For VAT purposes, the general prepayment period is quarterly[71] or, when the assessed VAT charge of the previous fiscal year exceeds an amount of € 7,500, monthly[72]. In both

[61] Ibid. para 3.

[62] § 240 AO.

[63] Bundesministerium der Finanzen (n 54) para 3.

[64] Ibid. para 4.

[65] Order of the Finance Ministries of the Federal States of Germany of 19 March 2020, *Gleich lautende Erlasse der obersten Finanzbehörden der Länder zu gewerbesteuerlichen Maßnahmen zur Berücksichtigung der Auswirkungen des Coronavirus (COVID-19/SARS-CoV-2) vom 19. März 2020.*

[66] § 1 GewStG.

[67] § 19 para 3 GewStG and Guidelines to the *Gewerbesteuer* 19.2 para 1 cl 5 GewStR.

[68] The tax authority merely determines the taxable base for purposes of the *Gewerbesteuer*, whereas the respective community imposes the tax on the taxpayer.

[69] § 19 para 3 cl 4 GewStG.

[70] § 1 GewStG and Guidelines to the *Gewerbesteuer* 1.6 para 1 GewStR.

[71] § 18 para 2 cl 1 UStG.

[72] § 18 para 2 cl 2 UStG.

cases, the prepayments have to be declared until the tenth day after the expiration of the submission period (monthly or quarterly)[73]. The tax authorities are entitled to extend the submission period[74] for one month by order[75]. Businesses which have to submit monthly VAT declarations and which want to apply for the extended period, have to pay a special advance payment[76] which is calculated as one eleventh of the total VAT prepayments of the previous fiscal year[77]. Businesses which have to submit quarterly VAT declarations, also have to apply for this extension, but do not have to transfer a special advance payment. Since the VAT is a federal tax in Germany but administrated by the respective Federal States, the tax authorities have been entitled to refund the special advance payments in order to support the businesses affected by the pandemic. In this context, it is important to note that the duty of the special advance payment does not become invalid, but the refund merely serves as deferral.

5. International taxation

5.1. Introduction

In the context of international taxation, no special measures have been taken. Relevant – but temporary – steps merely aimed at employees.

5.2. Nexus of permanent establishment according to art. 5 OECD MC

Germany is part of the OECD and therefore designs its double tax treaties based on the OECD Model Tax Convention on Income and on Capital (OECD MC). This is not only important for aspects concerning the applicable rules of permanent establishment, dividends, capital gains and royalties, but also in the context of income from employment. One of the most important aspects in cross-border business activities is the assignation of a taxable base in accordance with art. 7 OECD MC to a permanent establishment of a non-resident company in the Source State. The concept of permanent establishment is defined in art. 5 OECD MC and has not been modified in the pandemic, neither the basic rules by the OECD nor the application by its Member States.

Since SARS-CoV-2 has been classified as worldwide pandemic by the WHO earlier this year, many jurisdictions decided to adapt temporary measures as long as the coronavirus remains considered as pandemic. Therefore, it can be assumed that the general application

[73] § 18 para 1 UStG.

[74] 'Dauerfristverlängerung'.

[75] § 18 para 6 UStG and § 46 UStDV.

[76] *Umsatzsteuersondervorauszahlung*.

[77] § 47 para 1 UStDV.

of art. 5 para. 1 OECD MC has not changed due to the temporary issues of the pandemic[78]. This is also the opinion of the OECD. The OECD Secretariat also stressed this point in its Analysis of Tax Treaties and the Impact of the COVID-19 Crisis of 3 April 2020. Due to *force majeure* of the pandemic and the subsequent government directives with its travel restrictions, the employee is forced to work abroad. This will unlikely result in a new habit, so that remote working would not create a permanent establishment due to the lack of permanency and continuity. Under normal circumstances, office rooms of a company would also be accessible to the employees[79].

Furthermore, the 'at the disposal'-requirement will not be fulfilled here. When an employee is working abroad, under the circumstances caused by the pandemic, the location of the employee will not be at the disposal of the enterprise. First, the mere fact that an employee is working from home for his employer does not mean that his home is at the disposal of the enterprise. Therefore, this would not create a permanent establishment. Second, the location where the employee is working due to the circumstances of the pandemic must be used in a continuous manner and it is also required by the enterprise to work remotely in order to qualify this location as permanent establishment[80].

5.3. Bilateral agreements for commuters working remotely

There are no fiscal discrepancies when an employee is situated and working in the same State where he derives income from employment. In this scenario, the Source State is the Residence State too and the domestic law of the respective jurisdiction exclusively applies. Besides the border controls announced in March 2020, Germany also agreed on further fiscal treatments for employees resident of a neighbor country but working in Germany or *vice versa*.

Art. 15 OECD MC assigns the taxing rights to the Source and to the Residence State (place of activity principle). According to art. 15 para. 2 OECD MC, non-resident employees deriving income from employment can only be taxed in the Source State when the employer is resident of the Source State, or when an employer's permanent establishment by which the income is borne is located in the Source State, or when the non-resident employee is present in the Source State for more than 183 aggregated days. This just applies to employ-

[78] As long as the pandemic is classified as temporary, the term 'permanency' will not be accomplished under the conditions of art 5 para 1 OECD MC. OECD, *Model Tax Convention on Income and on Capital* (OECD Publishing 2017) commentary n 28 on art 5 para 1.

[79] OECD, *OECD Secretariat analysis of tax treaties and the impact of the COVID-19 crisis* (*OECD*, 3 April 2020) <www.oecd.org/coronavirus/policy-responses/oecd-secretariat-analysis-of-tax-treaties-and-the-impact-of-the-covid-19-crisis-947dcb01/> para 9 accessed 20 November 2020.

[80] Ibid. para 8; OECD (n 78) commentary n 18 on art 5 para 1.

ees who are present in the Source State for more than 183 aggregated days, whereby these days are simply calculated by the 'days of physical presence'-method[81].

This matter has become more relevant due to the abovementioned border closures and travel restrictions. Due to these circumstances, an expanded period of remote working can trigger unprecedented issues in cross-border tax affairs for non-resident employees when the 183-day-rule is surpassed. This could be possible when remote working employees are urged to stay abroad. For this reason, the German Government has arranged additional agreements with some EU neighbor countries as Belgium[82], the Netherlands[83], Austria[84], France[85] and Luxembourg[86].

In these agreements which refer to the corresponding double tax convention, Germany and the Contracting States have stipulated an exemption from Source State taxation concerning the additional days spent working remotely by the non-resident employee at least until 31 December 2020. Accordingly, additional days spent abroad by the non-resident

[81] OECD (n 78) commentary n 5 on art 15 para 2. The calculation of the days on which the non-resident is present in the Source State is simply based on the fact if the employee is present or not. See also commentary n 4 on art 15 para 2 for 183 days which concern two fiscal years. In this case, it does not matter if the 183 days are overlapping two different years as long as they are coherent in a timeframe of twelve consecutive months.

[82] Agreement between the Federal Republic of Germany and the Kingdom of Belgium on the taxation of commuters of 6 May 2020. Bundesministerium der Finanzen, *Konsultationsvereinbarung zwischen der Bundesrepublik Deutschland und dem Königreich Belgien vom 6. Mai 2020; Besteuerung von Grenzpendlern*, IV B 3 – S 1301-BEL/20/10002 :001, 2020/0458382, 07.05.2020. And its third prolongation of 28 August 2020, *Dritte Verlängerung der Konsultationsvereinbarung zwischen der Bundesrepublik Deutschland und dem Königreich Belgien vom 6. Mai 2020; Besteuerung von Grenzpendlern*, IV B 3 – S 1301-BEL/20/10002 :001, 2020/0853868, 28.08.2020.

[83] Agreement between the Federal Republic of Germany and the Kingdom of the Netherlands on the taxation of commuters of 6 April 2020. Bundesministerium der Finanzen, *Konsultationsvereinbarung zwischen der Bundesrepublik Deutschland und dem Königreich der Niederlande vom 6. April 2020, Besteuerung von Grenzpendlern*, IV B 3 – S 1301-NDL/20/10004 :001, 2020/0348934, 08.04.2020. And its prolongation of 29 October 2020, *Konsultationsvereinbarung zwischen der Bundesrepublik Deutschland und dem Königreich der Niederlande vom 6. April 2020 zur Besteuerung von Grenzpendlern; Verlängerung*, IV B 3 – S 1301-NDL/20/10004 :001, 2020/1103978, 29.10.2020.

[84] Agreement between the Federal Republic of Germany and the Republic of Austria on the taxation of commuters of 15 April 2020. Bundesministerium der Finanzen, *Konsultationsvereinbarung zwischen der Bundesrepublik Deutschland und der Republik Österreich vom 15. April 2020; Besteuerung von Grenzpendlern und Grenzgängern*, IV B 3 – S 1301-AUT/20/10002 :001, 2020/0379571, 16.04.2020. And agreement between the Federal Republic of Germany and the Republic of Austria on the fiscal treatment of employee wages and of public servants working remotely and of short-time allowance and similar supports of 27 October 2020. Bundesministerium der Finanzen, *Konsultationsvereinbarung zwischen der Bundesrepublik Deutschland und der Republik Österreich vom 27. Oktober 2020; Steuerliche Behandlung des Arbeitslohns von Arbeitnehmern sowie von im öffentlichen Dienst Beschäftigten im Homeoffice sowie Kurzarbeitergeld und Kurzarbeitsunterstützung*, IV B 3 – S 1301-AUT/20/10002 :001, 2020/1109125, 30.10.2020.

[85] Agreement between the Federal Republic of Germany and the French Republic on the taxation of commuters of 13 May 2020. Bundesministerium der Finanzen, *Konsultationsvereinbarung zwischen der Bundesrepublik Deutschland und der Französischen Republik vom 13. Mai 2020; Besteuerung von Grenzpendlern*, IV B 3 – S 1301-FRA/19/10018 :007, 2020/0503105, 25.05.2020. And its prolongation of 23 October 2020, *Konsultationsvereinbarung zwischen der Bundesrepublik Deutschland und der Französischen Republik vom 13. Mai 2020 zur Besteuerung von Grenzpendlern; Verlängerung*, IV B 3 – S 1301-FRA/19/10018 :007, 2020/1058429, 23.10.2020.

[86] Agreement between the Federal Republic of Germany and the Grand Duchy of Luxembourg on the taxation of commuters of 7 October 2020. Bundesministerium der Finanzen, *Verständigungsvereinbarung zwischen der Bundesrepublik Deutschland und dem Großherzogtum Luxemburg vom 7. Oktober 2020; Besteuerung von Grenzpendlern nach Luxemburg*, IV B 3 – S 1301-LUX/19/10007 :002, 2020/1055401, 20.10.2020.

employee working remotely which are solely spent abroad due to regulations and restrictions of the Residence State and which would not have been spent abroad if such regulations or restrictions had not been made, will be exempted from taxation in the Source State (factual fiction). The concerned employees are obliged to document those days for both the Source State and the Residence State.
This will not apply to situations where a non-resident employee works remotely in a third country or when he habitually works remotely based on the agreements set down in his labor contract.
These agreements are of temporary character and solely apply to these circumstances caused by travel restrictions and limited mobility for the affected commuters. Nevertheless, for the future, it can be assumed that more remote working aspects will find its way into bilateral or multilateral conventions when the labor behavior has fundamentally changed. Many multinationals have offered their staff to permanently work remotely and even have canceled rent contracts of office rooms to safe costs. The cost aspect was primarily focused, but due to the worldwide lockdowns and curfews, people's behavior regarding working, shopping and other aspects as practicing sports remotely has generally changed to more remote activities, so that multinationals and other enterprises could proceed a fundamental change in labor means and could tend to rationalize large office rooms or even cancel rent contracts to limit the office rooms to the minimum due to less occupancy.

5.4. Country-by-Country-Reporting

Furthermore, the Federal Finance Ministry has been entitled by the German Government to order regulations concerning Country-by-Country-Reporting (CbCR) in order to fulfill extensions for notifications regarding cross-border tax planning activities passed by the European Union[87].

6. Further measures

The fiscal measures have been analyzed earlier in this work, but other supports have also been developed by the German Government. This mainly concerns financial stimulus as simplified accessibility to the federal *KfW*[88] bank loans and the new federal fund, the so-called *Wirtschaftsstabilisierungsfonds* ('WSF').
The WSF consists of a total volume of € 600 bn and was established in order to stabilize the domestic economy during and after the pandemic. This fund is not at aimed at special businesses, but to all those whose bankruptcy would cause a severe damage for the Ger-

[87] Art 4 *Corona-Steuerhilfegesetz*.
[88] *Kreditanstalt für Wiederaufbau*.

man business location or the labor market. The following two measures are applicable. First, public guarantees in order to protect bank loans, credit lines and liability backed financial products and, second, strengthen the equity of affected companies. A combination of both measures is possible too. Under this fund, € 400 bn are assigned to State guarantees, € 100 bn to direct federal shareholding and the remaining € 100 bn to refinancing programs of the *KfW*[89].

Parallel to the WSF, the public *KfW* bank developed a special credit program[90] amid the pandemic and is able to grant various loans to companies and similar businesses which have been suffering from the consequences of the coronavirus. Since the *KfW* is a federal facility, its credits are guaranteed by the State which enables the affected creditor a significantly simplified accessibility to its loans. The most important vehicle of its special credit program which will be accessible until 30 June 2020 is the *KfW-Schnellkredit*[91] (fast credit) which is totally secured by the State. It is applicable to companies and other businesses which have been at least existing since January 2019 and the maximum credit volume for each business is of 25 % of the total sales and revenues of 2019. The maximum amounts are € 300,000 for companies and businesses with up to 10 employees, € 500,000 for companies and businesses with between 10 and 50 employees and € 800,000 for companies and businesses with more than 50 employees. The company must prove that its financial difficulties result from the pandemic and that it was in a stable financial situation as of 31 December 2019. The interest rate of 3 % is fixed for ten years, whereby the first two years are relieved from the redemption period. Furthermore, it is necessary that the company can at least show one year of profit between 2017 and 2019 (in the case of foundation prior to 2019).

Additionally, the *KfW-Unternehmerkredit* can be applied for by companies that have been existing for more than five years and the *ERP-Gründerkredit* can be applied for by companies that have been existing for at least three years. The maximum amount of the credit volume for both the *KfW-Unternehmerkredit* and the *ERP-Gründerkredit* is of € 100 m for each company, but generally limited to 25 % of the total sales and revenues of 2019, twice the labor costs of 2019, the current finance requisitions for the next 18 months of small

[89] Bundesministerium für Wirtschaft und Energie, *Corona-Virus – Wirtschaftsstabilisierungsfonds (WSF)* (*BMWi*, 21 November 2020) <www.bmwi.de/Redaktion/DE/Coronavirus/WSF/wirtschaftsstabilisierungsfonds.html> accessed 21 November 2020 and Bundesministerium für Wirtschaft und Energie, *Wirtschaftsstabiliserungsfonds* (*BMWi*, 3 April 2020) <www.bmwi.de/Redaktion/DE/Artikel/Wirtschaft/Corona-Virus/unterstuetzungsmassnahmen-faq-08.html> accessed 21 November 2020.

[90] State funding subject to articles 107 and 108 of the Treaty on the Functioning of the European Union.

[91] For the entire credit program see *KfW*, *KfW-Corona-Hilfe: Kredite für Unternehmen* (*KfW*, 22 November 2020) <www.kfw.de/inlandsfoerderung/Unternehmen/KfW-Corona-Hilfe/> accessed 22 November 2020 and Bundesministerium für Wirtschaft und Energie, *KfW-Sonderprogramm wird verlängert und erweitert – KfW-Schnellkredit nun auch für Kleinstunternehmen* (*BMWi*, 6 November 2020) <www.bmwi.de/Redaktion/DE/Pressemitteilungen/2020/11/20201106-kfw-sonderprogramm-wird-verlaengert-und-erweitert-kfw-schnellkredit-nun-auch-fuer-kleinstunternehmen.html> accessed 22 November 2020.

and medium-sized companies or for the next 12 months of big companies, or 50 % of the total indebtedness, or 30 % of the total assets of the entire group for credits exceeding a volume of € 25 m. The State secures the credits for small and medium-sized companies to 90 % and for big companies to 80 %.
Finally, the *KfW-Konsortialfinanzierung* (syndicated loan) is applicable for medium-sized and big companies, whereby the *KfW* covers 80 % of the risks, restricted to a maximum percentage of 50 % of the total indebtedness, or 30 % of the total group assets. The risk capital consists of at least € 25 m and is limited to 25 % of the total sales and revenues of 2019, twice the labor costs of 2019, or the current finance requisitions for the next 12 months.

7. Conclusions

The coronavirus pandemic has dramatically been damaging the entire global cross-border economy for almost one year but has led to more and faster digitalization. Many employers and employees are still suffering from the economic consequences of the national lockdowns, even Germany as the biggest European economy and a contraction of new debts was considered as the only way out of a longer and severe recession. In a short-term view, this might seem legitimate to alleviate the economic damages caused by the lockdowns and the haltered economy. It is evident, that these federal supports can only be financed by public debt. These new debts can only be reduced, if so, in the future by those businesses which will survive the impact of the pandemic. This will undoubtedly result in higher or additional taxes (direct or indirect) or in additional social costs.
As mentioned initially, the great advantage of the Kug could merely be a temporary effect before permanent job claims will appear. Taking into consideration that not solely Germany will face a double dip recession, it can be assumed that worldwide unemployment rates will significantly raise. Furthermore, additional federal supports like the current ones can be expected in 2021.
By passing the *Corona-Steuerhilfegesetz* and the *Zweites Corona-Steuerhilfegesetz*, the German Government has reacted quickly and properly to the economic impact of the coronavirus by amending either new regulations or by adapting changes to current tax law. These amendments and modifications concern procedural tax law but also the fiscal profit and loss accounting.
From the perspective of direct taxation, all the measures realized in the legal frame as the reduction of prepayments or widened opportunities regarding the application of loss carryback and loss carryforward have helped support the affected taxpayer and strengthen his cash flow as fast as possible during the pandemic. A strong cash position is the only way to survive a crisis. On the other side, the legislator even knows about the long-term burden of new debts. That is why the Government has limited cash payments as the *Corona-Soforthilfe* for employees to certain amounts (€ 1,500) or to determined timeframes

(most of them until 31 December 2020). A great benefit is that this incentive is totally tax-free and, therefore, the employee receives 100 % of the considered payment.
The payments under the *Corona-Soforthilfe* and both the *Corona-Überbrückungshilfe I* and *II* are also proper vehicles to strengthen the cash positions of the affected businesses, although they are totally taxable. The legislator has used all the legally possible tools to widen the scope of action of the resident business, also by the remission of fines, the deferral of taxes and the extensions of tax submissions. On the other hand, it is obvious that the legislator should at least use those common procedural tools to support the affected taxpayers since the legal frame is not overstrained in this case.
Other measures as temporary VAT reductions serving as consumption incentive for consumers are a soft implementation of a certain economic stimulus, but it can be assumed that this reduction is, indeed, of temporary character. VAT revenues represent an important percentage in public household. Based on this fact, it can be expected that the VAT rate will, at least, turn back to the previous levels of 19 % and 7 % – if not higher – to adequately compensate the loss in public household.
A critical assessment demonstrates that especially the vehicles used under procedural tax law do not represent new legal provisions, since merely already existing rules have been temporarily widened in their scope of application. On the other hand, in order to strengthen the cash positions of the affected taxpayer, the Government has developed and released various instruments which, at first sight, obviously support the affected businesses and its employees, but, at second sight, lead to an increase of public debt which has to be seen critically.
Summarized, it can be said that the approaches realized by the Government have helped the affected businesses in a short-term view by strengthening the cash positions and, in consequence, avoiding bankruptcies. In a crisis, the only way to survive is liquidity. But the base for the recent federal supports has been reached by the German Government due to the stable household of the last years and, furthermore, due to the contraction of new debts.
The most interesting point in international taxation refers to remote working and its implication for commuters. In this scenario, it could be possible that the Contracting States of the temporary agreements on the treatments of additional days of remote working in the Source State renegotiate the permanent arrangements that assign the taxing rights for non-resident employees working remotely in the Source State. This issue could lead to cross-border tax competition for remote workers if a Contracting State recognizes a significant benefit in offering – or trying to offer – kind of exemptions in this case.
On the other hand, even the federal refinancing program carried out by the *KfW* represents a vehicle of national remediation. By granting the *KfW-Schnellkredit* with its interest rate of 3 %, the Government is possibly – despite the big credit risk default – making a

good deal since the deposit facility rate of the ECB is far lower[92]. This would result in an arbitrage-transaction based on the negative interest rates granted by the ECB and on the positive interest rate of 3 % charged on the national creditors.

This has to be seen, at least, critically since also the other alternative, direct national shareholding[93], should not serve as remediation due to the potential influence[94] on economic decisions of the private sector given to the Government. The global travel and tourism sectors have been hit the most. Struggling German big players as *Lufthansa* and *TUI* have been refinanced by *KfW* credits and direct federal shareholding so that these stock exchange listed companies are partially in the hands of the Government – at least – for the next years. This could discourage private investors due to haltered dividends or too much national influence on the economic decisions of the management boards.

[92] Deposit facility rate is of - 0.50 %. European Central Bank, *Monetary policy decisions* (*ECB*, 12 September 2019) <www.ecb.europa.eu/press/pr/date/2019/html/ecb.mp190912~08de50b4d2.en.html> accessed 23 November 2020.

[93] See stock market performance of *Commerzbank AG* and *Deutsche Telekom AG* over the last years.

[94] Or at least veto rights.

Articles

Tax Reactions to the SARS-CoV-2/ COVID-19 Pandemic in Portugal

João Félix Pinto Nogueira*

Abstract

This study is focused on the tax measures that have been enacted in Portugal, following the health and economic crisis created by the SARS-CoV-2/COVID-19 pandemic. First, it aims at comprehensively characterizing the measures enacted, structuring them by thematic clusters, enabling the reader to understand the concrete impact of the significant array of legislation and administrative guidance does not allow. Second, it aims to critically assess the measures adopted and uncover the rationale behind their adoption. The study allowed us to conclude that the tax system was not the priority weapon used by the government to react to the pandemic. Nevertheless, many measures have been enacted, most of them with a non-substantial nature and related to the postponement of deadlines for the submission of tax returns or for payments of taxes due. A careful review of the measures revealed that some areas could have been better dealt with, in order to increase legal certainty of the addresses of the measures. Moreover, the connection between some measures and the pandemic is not completely clear, which raises suspicion on the real reasons behind the adoption of the rules. The same careful review has shown that many governmental actions correspond to best practices that should not only be praised but also be considered as examples to be followed by other countries. This is namely the case of the care in providing correct, easy-to-follow guidance to taxpayers on the impact of the measures that have been adopted. All in all, these surgical tax measures adopted seem to be able to avoid further commercial and financial disruptions in

* Deputy Academic Chairman at IBFD – International Bureau of Fiscal Documentation, Honorary Associate Professor at the University of Cape Town. Member of CEJEA – Centro de Estudos Juíricos, Económicos e Ambientais. Lecturer at Catholic University, Portugal.

the economy, avoiding situations of bankruptcy or avoidable hardships for taxpayers which would have only added more disruption to the one that the SARS-CoV-2/COVID-19 inevitably introduced.

Keywords

Tax measures – Pandemic – Portugal

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1. General Overview

As a member of the global economy, Portugal was not immune to the SARS-CoV-2/COVID-19 pandemic. The entry of the virus in our country was confirmed on 2 March when two Portuguese individuals[1] tested positive.

Despite the huge impact of the pandemic on our country, it was not affected like neighboring or comparable EU countries. There is no clear explanation of the reasons that could explain such a phenomenon. It may be related to an early governmental reaction and closure of schools and public offices. It may also be related to the fewer economic links with other EU countries and its peripheral geographical location.

Unlike in other countries, and at the political level, there was a noticeable level of consensus and of support of the government action (namely by the President of the Republic, by the Parliament, by the opposition parties and by civil society). There were no major controversies or sensitive reactions against the measures taken. This allowed a swift implementation of the measures which were adopted as early as a week after the first case[2]. On 12 March, merely ten days after the first cases, the government declared the "alert state"[3] and adopted a more comprehensive set of rules.[4] On 18 March, the President of the Republic further escalated, by declaring the "state of emergency"[5] – something that only he may declare – for a period of 15 days. This period was extended twice, until 2 May[6].

More recently, Portugal entered the so-called "second wave", and the government adopted the "state of contingency", which allows it to adopt some exceptional measures[7]. At the time of writing this report, the country is still reaching new daily peaks, both in terms of the number of infections as in what concerns the number of deaths.

The situation we experience since March led, besides the health crisis, to an economic crisis whose contours are yet unknown. Economic activity decreased significantly and, in several sectors, completely stopped. Unemployment rose, and part of the people remained

[1] A 30-year old man returning from working in Spain and a 60-year old man returning from vacation in the north of Italy.

[2] Order 104/2020 XXII, of 9 March of the Secretary of State for Tax Affairs. Hereinafter, we will refer to different orders (which corresponds to the Portuguese "circular", all of which adopted by the Secretary of State for Tax Affairs.

[3] "Estado de alerta".

[4] Decree-Law 10-A/2020, of 13 March 2020.

[5] "Estado de Emergência", an exceptional constitutional regime regulated by Art. 19 of the Constitution of the Portuguese Republic. It was declared by Presidential Decree of 14-A/2020, of 18 March, and regulated by governmental Decree 2-A/2020, of 20 March 2020. It was the first time-ever that this regime was in force.

[6] First extension by Presidential Decree 17-A/2020 of 2 April 2020 (regulated by governmental Decree 2-B/2020 of 2 April) and second extension by Presidential Decree 20-A/2020, of 17 April (regulated by governmental Decree 2-C/2020, of 17 April.

[7] Although not as severe as those that are possible under the "state of emergency", which is the only one capable of temporarily suspending the exercise of constitutional rights, freedoms and guarantees

unemployed according to the official data provided by the national institute for statistics[8]. The unemployment growth was partly limited due to the adoption of partial lay-off rules by which the government-subsidized two-thirds of the salaries of employees of non-vital companies in case the employer decided to suspend normal activity, allowing employees to stay at home[9].

The economic crisis and the governmental reaction lead to a decrease in tax revenues of the second quarter of the year. At the moment, the exact impact is not yet known. Anyhow, the latest available figures for the third quarter of 2020 show that tax revenues have bounced back, even if the numbers are yet far from the pre-pandemic indicators.

In general, the governmental reaction was focused on non-tax measures and subsidies[10]. Despite that trend, it has adopted meaningful measures in the tax field, both in the framework of direct taxes and in the field of indirect taxes. Many of the measures had a procedural nature and were enacted to be in force for a limited period of time.

The government is still discussing possible medium- and long-term reactions to the present situation. A recovery plan aimed at optimizing the use of EU funding has been bespoken to an independent expert. It was further adjusted by the government and, at the time of writing this report, is still under discussion and review. The first comprehensive set of mid-term reactions, the Portuguese State Budget for 2021 was presented, but – at the time of the writing of this report – is also under discussion at the Parliament.

The aim of this study is first to clearly identify the different profile of tax measures adopted in Portugal[11] as a reaction to the SARS-CoV-2/COVID-19 given the lack of comprehensive studies on this matter[12]. Secondly, it aims to critically assess and review measures while providing recommendations on how to deal with this situation and this type of events in the future.

[8] "Instituto Nacional de Estatística". The overview is available on the following site: https://www.ine.pt/xportal/xmain?xpid=INE&xpgid=ine_indicadores&contecto=pi&indOcorrCod=0005599&selTab=tab0 (last access 25 October 2020).

[9] Decree-law 10-G/2020, of 26 March 2020.

[10] See, namely, Decree-Law 10-A/2020, of 13 March 2020, Law 1-A/2020, of 19 March 2020, Decree-Law 10-J/2020, of 26 March 2020, Portaria 85-A/2020, of 3 April 2020, Law 4-A/2020, of 6 April 2020, Decree-Law 12-A/2020, of 6 April 2020, Law 7/2020, of 10 April 2020, Portaria 91/2020, of 14 April 2020, Decree-Law 14-E/2020, of 13 April 2020, Law 10/2020, of 18 April 2020, Portaria 100/2020, of 22 April 2020, Decree-Law 20/2020, of 1 May 2020, Despacho 5545-C/2020, of 15 May 2020, Decree-Law 22/2020, of 16 May 2020, Despacho 5638-A/2020, of 20 May 2020, Portaria 121/2020, of 22 May 2020, Law 16/2020, of 29 May 2020, Decree Law 24-A/2020, of 29 May, Decree-Law 37-A/2020, of 15 July, Portaria 181/2020, of 4 August, Decree-Law 51/2020, of 7 August 2020, Decree-Law 53/2020, of 11 August 2020, Law 31/2020, of 11 August, Decree-law 58-B, of 14 August 2020, Law 43/2020, of 18 August 2020, Decree-Law 62-A of 3 September 2020, Decree-Law 78-A/2020, of 29 September 2020, and Decree-Law 87-A/2020, of 15 October.

[11] Our goal is to identify the main categories and the main lines of this measure. Given the expected readership of this study, it does not include a comprehensive description of the measures or of the connected compliance issues.

[12] One of the few articles referring to Portugal is I. M. Ramos & J. Rodrigues, Portugal's Economic Response to COVID-19: Are We on the Right Path?, (1 May 2020), Journal Articles & Papers Tax Analysts (accessed 19 Oct. 2020). Besides, there is an article which includes a chapter on Portugal: T. Morales & J. Rogers-Glabush, Emergency Tax Measures in Response to the COVID-19 Pandemic: The Full Picture in Europe, 60 Eur. Taxn. 7 (2020), section 4.1.1.34

This study only takes into account data, materials and normative instruments published until 20 October 2020.

2. Direct tax measures

2.1. Introduction

Before addressing the direct tax measures adopted (which will be done in the next subsections), it is important to make a note regarding the tax measures that were not adopted. Even though they were expected, they were taken by other European countries and even proposed by international organisations.

During the "state of emergency", Portugal re-instated border checks, and both entries and departures were limited to exceptional situations. Moreover, and for a longer period, circulation was discouraged and work from home strictly recommended (both by our as by other governments). This had an impact on the physical location of some individuals who got stranded in Portugal, being unable (or found it extremely burdensome) to return to their states of residency. The above-described situation may have tax impacts at several levels, the most significant as physical presence and permanence are tax-relevant criteria for both domestic[13] and tax treaty law[14].

Notwithstanding, there was neither any hard- nor soft-law indication on how the limitations on traveling should be taken into consideration for triggering the tax rules that are linked to a physical presence. As a consequence, tax authorities will be free to assess the situation, and likely we will see an increase of litigation which will be taking place at the international level since taxpayers, affected by overlapping (residence) claims of two different EU Member States, can now invoke the mechanism set in force by the tax dispute Settlement directive[15].

Portugal adopted fewer substantive measures than comparable EU MS. In the next sections, we will cover those measures, starting with direct taxation and moving, then, to indirect taxation.

2.2. Personal Income Taxation

As mentioned, most of the economic support to individuals was granted through non-tax measures. For instance, there were no tax credits or extra deductions for healthcare workers. In what concerns those professionals, the government preferred to remove any caps

[13] Namely for residency, art. 16 of the Portuguese Personal Income Tax Code (hereinafter PITC).

[14] Residence article (normally art. 4) of the Portuguese tax treaty network.

[15] Council Directive (EU) 2017/1852, of 10 October 2017 on tax dispute resolution mechanisms in the European Union, implemented in Portugal through Decree-Law 120/2019, of 19 September 2019.

to the remuneration of extra-work, allowing professionals wanting to work beyond their schedule the opportunity of increasing their final pay-check.

The most noticeable measure was an exceptional regime for the withdrawal of amounts invested in pensions saving plans[16] which would otherwise only be possible – without triggering tax consequences – at the moment of retirement or after a specific age. The tax-free withdrawal was conditioned to the following circumstances: i) one could only withdraw amounts invested before 31 March 2020; ii) withdrawal would have to take place during the state of emergency; iii) the amount should be below 438.81 EUR[17]; iii) the withdrawer, or one of the members of the household, would have to be in one of the pre-defined situations of need (quarantine, prophylactic isolation or illness; absence from work to assist children or grandchildren[18]; unemployment or suspension of the work contract; or reduction of the weekly working hours due to one of the measures adopted by the government).

2.3. Corporate Income Taxation

One of the main concerns of the government was to strengthen the national health system. On the tax side, the government decided to promote donations to that sector. Accordingly, all donations (including in-kind donations) granted to public health institutions could be deducted from the CIT taxable base up to 140% of its amount and, furthermore, were exempted from stamp duty. This measure, first applicable to donations during the period of the state of emergency[19], was extended to those made until 31 July 2020[20] and later on those made until 31 October 2020[21].

Another measure regarded the payments that both companies and self-employed individuals have to make in advance of the tax due at the end of the year ("pagamentos por conta"). Such advance payments are computed on the basis of the economic indicators of the previous year. Given the reduction in economic activity, many of those became disproportionally higher than the amount of tax they were supposed to anticipate. Accordingly, the government decided to extend the cap for advance payments to cases beyond those foreseen in the CIT. Taxpayers were allowed to decrease the amount of the advance payment in case there was a significant (20% in some cases, 40% in other cases) of the 2020 turnover[22].

[16] "Planos-poupança reforma". This regime was instituted by Law 7/2020, of 10 April 2020.

[17] Which is the amount of the amount of the 2020 social support index ("Indexante de Apoios Sociais"), set by Portaria 22/2020, of 31 January 2020, in the framework of Law 4/2007, 16 January.

[18] Since schools were closed since the 16th of March 2020.

[19] § 1 of Order 137/2020 XXII, of 3 April 2020, which "extended" the interpretation of Art. 62(1)(a) of the Statute for Tax Incentives.

[20] Order 157/2020 XXII, of 4 May 2020.

[21] Order 272/2020 XXII, of 27 July 2020.

[22] Art. 12(2) to (8) of Law 27-A/2020, of 24 July 2020.

Following the understanding that smaller companies were hit harder than big ones, the government adopted several rules specifically applicable to them: i) a waiver for the 2020 advance payment; ii) an extraordinary tax credit to investment; iii) a special regime for losses resulting from corporate reorganizations, and; iv) a special regime to the carry forward of losses. We will deal with each one of these measures in the following paragraphs.
Micro, small and medium companies, could (hereinafter MSM) benefit from a temporary waiver for the 2020 advance payment ("pagamento por conta") and even request the reimbursement of the payments previously made insofar as they were not used to pay existing taxes and the amounts exceeded the foreseeable tax due for 2020[23]. The same applied to the credits of special advance payments ("pagamentos especiais por conta")[24].
To encourage economic recovery of MSM, the government instituted an extraordinary tax credit to investment ("crédito fiscal extraordinário ao investimento II") for companies meeting certain conditions.[25] This consisted of a tax credit of 20% of the investment expenses[26] made in the period of one year (from 1 July 2020 to 1 June 2021) with a cap of 5 M EUR. Said credit can only be used against up to 70% of the tax due in 2020 and 2021, but remaining amounts (if existing) can be carried forward up to five years. Companies opting for this credit assume an additional compromise of not terminating any employment agreement over the following three years.
As a consequence of the decrease of the economy, the government considered that corporate reorganisations should be promoted beyond the normal terms. As such, MSM companies were also allowed to postpone any taxes that became due just because of the infringement of the rules concerning the deductibility of losses in cases of mergers, insofar as certain stringent conditions were met[27]. In addition, the resulting (merged) company was exempted of the normally applicable surcharge on CIT ("derrama estadual") for three years[28].
Finally, MSM could also benefit from a special regime for the carry-forward of tax losses ("regime especial de transmissibilidade de prejuízos fiscais"),[29] in cases they would meet the conditions to be considered companies facing financial trouble.

[23] Art. 1 and 2 of Law 29/2020, of 31 July 2020.

[24] Art 13 of Law 27-A/2020, of 24 July 2020.

[25] Art. 16 of Law 27-A/2020, of 24 June 2020 and Annex V. This credit would be available to companies with: i) with organised accounts; ii) whose taxable profit is not determined by indirect methods; iii) that have no enforceable tax debts.

[26] The eligible expenses are: i) expenses with development projects; ii) expenses with intellectual property.

[27] According to Art. 14 of Law 27-A/2020, of 24 June 2020. These conditions were: i) none of the merged taxpayers were created by demerger in the three years prior to the merger; ii) the main activity of the merged entities is substantially the same; iii) all taxpayers started their activity more than 12 months ago; iv) no profits are distributed in the three years after the moment of the merger; v) there are no special relations between the companies involved; vi) none of the companies have enforceable tax debts at the moment of the merger.

[28] Art. 14(3) of Law 27-A/2020, of 24 June 2020.

[29] Art. 15 of Law 27-A/2020, of 24 June 2020 and Annex IV.

3. Indirect taxes

3.1. Introduction

Surprisingly, there were not that many measures in the field of indirect taxes. As we will further illustrate in the following subsections, the government seems to have limited its action in this sector to the strictly indispensable measures required by the new context.

3.2. VAT

VAT was also used to strengthen support to the healthcare sector. Following the framework provided by the Commission Decision (EU) 2020/491 of 3 April 2020[30], the government adopted a temporary VAT exemption for the supplies of listed medical devices. This exemption was temporary and only valid from 30 January 2020 and 31 October 2020[31]. Initially, the exemption was limited to goods acquired by the State, public entities and not-for-profit entities. Later, this measure was extended to fire departments, charitable or philanthropic entities as well as entities devoted to answering to social needs[32].

Still connected with health concerns but no longer restricted to the health sector, the government adopted a temporary extension of the VAT reduced rate[33] list of goods to cover facial masks and disinfection skin gel[34]. Unlike the previous one, this measure applied regardless of who was acquiring. As facial masks and disinfection gel started to be of mandatory use in many daily situations, they became essential goods, a fact that provided the needed legitimacy for the inclusion of those goods on the reduced VAT rate list. The law included a sunset clause, being only valid until 31 December 2020. Notwithstanding, as the use of these goods becomes mandatory in an increasing number of spaces and situations, one should not exclude the possibility of an extension of the measure.

Besides the healthcare sector, also the not-for-profit sector was contemplated. For the duration of the state of emergency, the exemption for supplies to the State and certain not-for-profit institutions of goods for persons in need, normally extended to goods distributed to those persons in need, was extended to cases when those goods were kept in possession of those entities. This may have been done to allow these entities to stock

[30] Commission Decision (EU) 2020/491, of 3 April 2020 on relief from import duties and VAT exemption on importation granted for goods needed to combat the effects of the COVID-19 outbreak during 2020.

[31] See Art. 5 of Law 13/2020, of 7 May, and Art. 3 of Law 43/2020, of 18 August 2020 (which extended the deadline from July to October 2020).

[32] Despacho 8422/2020, of 3 September 2020.

[33] Currently 6% in mainland Portugal.

[34] The conditions that a product needed to fulfil in order to be considered as disinfecting skin gel were further defined in Despacho 5335-A72020, of 7 May 2020.

up, facilitating a better preparation for the months to come. Furthermore, the concept of "persons in need" was extended to those receiving health treatments[35].

Taking into account the importance of tourism, the government approved a reimbursement of 50% of the non-deductible VAT borne by companies active in the organization of fairs, congresses and similar events provided that certain conditions are met. The eligible expenses were: i) transportation, business and staff transportation, including tolls; ii) accommodation, food and beverages; iii) reception costs, including of non-staff members; iv) costs with immovable property and its equipment if mainly affected to those receptions[36].

3.3. Excises and other duties

Excises on cigarettes, cigars and other products subject to tobacco tax, are levied by means of a special stamp ("estampilha") which is valid for a limited period of time. With the reduction of trade, there was the fear that these apostilles would lose their validity. Therefore, and only for those products, the validity of those stamps was extended until 31 December 2020. Furthermore, the government adopted special rules for the levy and collection of this tax in 2020[37].

Regarding alcohol tax, there was a new and special procedure allowing the production, storage and denaturation of alcohol outside of the designated warehouses ("entreposto fiscal"). It also allowed adjustments to packing, labelling and commerce of alcohol products, insofar as the labelling was still adequate taking into account the special risks of the product[38]. This procedure, originally in force until the end of the "state of emergency"[39] as extended until 31 December 2020[40].

In the above-mentioned cases of donations to health institutions, and as mentioned before, no stamp duty was levied until 31 October 2020.[41]

3.4. Surcharge on banks

One of the most emblematic measures (included on the second amendment to the state budget for 2020)[42] was a surcharge on banks entitled "solidarity additional over the banking sector"[43].

[35] Order 122/2020 XXII, of 24 March 2020.

[36] Art. 2 and 3 of Decree-Law 54/2020, of 11 August 2020.

[37] Order 115/2020 XXII, of 17 of March 2020 and Portaria 350/2020, of 7 April.

[38] Portaria 89/2020, of 7 April 2020.

[39] Art. 5 of Portaria 89/2020, of 7 April 2020.

[40] Art. 1 of Portaria 105/2020, of 30 April.

[41] Order 157/2020 XXII, of 4 May 2020 and Order 259/2020 XXII, of 16 July 2020.

[42] Law 27-A/2020, of 24 July 2020.

[43] Art. 18 of Law 27-A/2020, of 24 July 2020, further described on the Annex VI to the law.

This surcharge is levied on a territorial basis on: i) credit institutions with "effective and main seat of the administration", and on; ii) Portuguese branches and subsidiaries of credit institutions with seat in other countries[44]. A rate of 0.02%[45] is applied on the amount: i) of the passive of the banks (*grosso modo*, the deposits held by a bank), deduced from the passive of own funds and of credits with special mandatory guarantees; ii) on the notional amount of off-balance derivatives[46]. Those amounts are computed on the basis of the half-year averages of each month in what concerns the levy due for 2020, and on the basis of the accounts regarding the second semester of 2020, in what concerns the levy due for 2021[47]. The law specifically stated that the amount is not deductible against the CIT taxable base[48]. This surcharge entered immediately in force and, recently, the government proposed that it remains in force for 2022[49].

4. Procedural tax aspects

4.1. Introduction

As mentioned, the government's reaction was quite swift, with the first measures being adopted on 9 March (merely one week after the confirmation of the first case). At that time, all the measures were procedural and were adopted as taxpayers and tax authorities became unable to perform their normal functions and obligations in a timely manner. That concern continued throughout the year, and it is still present.

This required the adoption of several non-substantive tax measures. We will deal with them along the next sections. For a better understanding of the measures, we have decided to group them into clusters: i) justification of non-compliance; ii) suspension of procedures; iii) postponements of deadlines for returns; iv) postponements of payments and payment in instalments; v) anticipation of reimbursements; vi) digitalization.

4.2. Justification of non-compliance

One of the first measures adopted concerns the opportunity for taxpayers or accountants of taxpayers to argue force majeure ("*justo impedimento*") for non-compliance with procedural obligations[50] in case they were either infected or placed in prophylactic isolation.

[44] Art. 2 of annex VI of Law 27-A/2020, of 24 July 2020.

[45] Art. 5 of annex VI of Law 27-A/2020, of 24 July 2020.

[46] Art. 3 of annex VI of Law 27-A/2020, of 24 July 2020.

[47] Art. 21 of Law 27-A/2020, of 24 July 2020. The return was adopted by Portaria 191/2020, of 8 October 2020.

[48] Art. 10 of annex VI of Law 27-A/2020, of 24 July 2020.

[49] According to the proposal draft budget for 2021.

[50] §4 of Order 104/2020 XXII, of 9 March 2020 and Art. 14 of Decree-Law 22/2020, of 16 May 2020.

This measure was subsequently amended: i) on the one hand, to extend it to any tax obligations (not only procedural obligations); ii) to also cover cases when the taxpayer or its accountant could not transpose the border of a municipality or region due to special sanitary areas ("cerca sanitaria"); iii) on the other hand, to reduce the scope to cases where prophylactic isolation was determined by a health authority[51].

4.3. Suspension of procedures

All tax enforcement and foreclosure procedures were suspended from 12 March until 30 June 2020, being applicable to (namely for the purposes of computation of deadlines) the regime for judiciary holidays[52]. The latter regime was also extended: i) to all deadlines running in favour of the taxpayer (namely in administrative and judicial appeals)[53]; ii) to all instalment payment plans (however, the taxpayer could decide to continue to meet the payment deadlines)[54].

4.4. Postponement of deadlines for tax returns

Many of the adopted measures consisted of the postponement of deadlines for tax returns. The following deadlines were postponed: i) for the monthly and quarterly VAT returns (between April and August)[55]; ii) for the annual CIT return (up to 31 August[56], further increased with a tolerance of 72 hours)[57]; iii) for the simplified commercial information return (postponed first to 7 August[58] and then to 15 September 2020[59]); iv) for the transfer pricing dossier (postponed until 31 August 2020)[60]; v) for the submission of the overview of salaries and other income paid in the previous month (on the basis of which, namely, withholding taxes are computed)[61]; vi) for submitting the invoices issued in the previous month[62].

[51] §5 of Order 129/2020 XXII, of 27 March 2020 and Art. 14 of Decree-Law 22/2020, of 16 May 2020. Taxpayer would have to justify it on the basis of a declaration issued by the competent health authority.

[52] Art. 1 and 5 of Decree-Law 10-F/2020, of 26 March 2020.

[53] Art. 7 of Law 1-A/2020, of 19 March 2020.

[54] Art. 1 and 5 of Decree-Law 10-F/2020, of 26 March 2020.

[55] See, namely, §1 of Order 141/2020, of 6 April 2020, §4 of Order 153/2020 XXII, of 24 April 2020, Order 229/2020, of 24 June 2020, v) of Order 296/2020 XXII, of 31 July 2020, and Order 330/2020 XXII, of 31 August 2020.

[56] §2 of Order 104/2020 XXII, of 9 March 2020.

[57] Last paragraph of Order 296/2020 XXII, of 31 July 2020.

[58] §1 of Order 153/2020 XXII, of 24 April 2020.

[59] §1 of Order 259/2002 XXII, of 16 July 2020 and iv) of Order 296/2020 XXII, of 31 July 2020.

[60] §2 of Order 153/2020 XXII, of 24 April 2020 and vi) of Order 296/2020 XXII, of 31 July 2020.

[61] See, for instance, §5 of Order 153/2020 XXII, of 24 April 2020 and Letter i) of Order 386/2020 XXII, of 12 October 2020, extending the deadline expiring on the 10 of September 2020 to the 15 October 2020.

[62] Letter ii) of Order 386/2020 XXII, of 12 October 2020, extending the deadline expiring on the 8 of September 2020 to the 15 October 2020.

The government approved a new model for the stamp duty declaration. To avoid further inconveniences derived from that novelty, it determined that it would only be applicable until 1 January 2021[63].

As in many other States, and following the adoption of Council Directive (EU) 2018/822[64], the deadlines for reporting arrangements under DAC6[65] were extended by six months[66]. Accordingly, the deadline for reporting arrangements implemented or made available: i) between 25 June 2018 and 30 June 2020 was extended from 31 August to 28 February 2021; b) after 1 July 2002, instead of 1 to 31 July to 31 January 2021. For template arrangements (i.e. implementable without the customization) the reporting deadline is now 30 April 2021. This also required a postponement of the first moment for exchanging information covered by DAC6 which is now 30 April 2021 (previously it was 30 April 2020).

4.5. Postponement of deadlines for payments and payment in instalments

Many deadlines for payments were also postponed and payments in instalments were authorized or even promoted. We will deal with such measures under this section.

The following deadlines for payments were postponed: i) the deadline for VAT resulting from the monthly and quarterly returns due until June 2020[67]; ii) the deadline for self-employed individuals to pay the first or second instalment of the PIT advance payment which was postponed to the deadline of the third instalment[68]; iii) the deadline for the special advance payment ("pagamento especial por conta") for CIT purposes[69]; iv) the deadline for the first advance payment ("pagamento por conta") and supplementary payment ("pagamento adicional por conta) of CIT[70]; iv) the deadline for the first advance payment ("pagamento por conta") of PIT (pushed from 31 July to 31 August); v) the deadline for payment of stamp duty due from January until March (postponed until 20 April 2020)[71]

[63] § 1 of Order 121/2020 XXII, of 24 March 2020.

[64] Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

[65] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.

[66] Decree-Law 53/2020, of 11 August 2020.

[67] See, namely, §2 of Order 141/2020, of 6 April 2020, § 4 of Order 153/2020 XXII, of 24 April 2020, Order 229/2020 XXII, of 24 June 2020 and Order 330/2020 XXII, of 31 August 2020.

[68] Art. 12(1) Law 27-A/2020, of 24 July 2020.

[69] §1 of Order 104/2020 XXII, of 9 March 2020 and i) of Order 296/2020 XXII, of 31 July 2020 determined a postponement from 31 March to the 30th of June. A further temporary postponement was introduced by Law 29/2020, of 31 July 2020.

[70] §3 of Order 104/2020 XXII, of 9 March 2020, last paragraph of Order 258/2020 XXII, of 16 July 2020, and iii) of Order 296/2020 XXII, of 31 July 2020. The regime was further extended by Law 29/2020, of 31 July 2020.

[71] § 4 of Order 121/2020 XXII, of 24 March 2020. In this case, postponement was conditioned to the fulfilment of all other tax obligations (including tax returns). The procedures regarding returns and payments were further clarified with Circular letter n. 90.029, of 3 April 2020.

and the one due in April and May (postponed until 25 May and 25 June)[72]; vi) the deadline for the payment of social security contributions due within the first three months after the declaration of the emergency state; two thirds of the amount due could be paid between July and December in case of companies with up to 50 employees or companies, for companies with up to 250 employees or in the aviation and tourism and a reduction of 20% of their turnover, and for any companies in case their activity was legally suspended, in case they were non-for profit[73]; vii) the deadline for the payment of taxes withheld regarding April and May 2020 (payment postponed to 25 May and 25 June)[74].

Payments in instalments were allowed in exceptional cases. During the second semester of 2020, CIT, PIT and VAT due amounts could be paid up to six instalments with no late interests due. This regime would be applicable only to companies and self-employed individuals, in the following circumstances: i) if the 2018 turnover was below 10 Million EUR, or; ii) if their activity started after 1 January 2019, or; iii) if their activity was suspended by law, or; iv) any taxpayers – regardless of meeting the previous conditions, in case their turnover at the month in which the payment had to take place suffered a decrease of 20% or more in comparison with the average turnover of the previous three months[75].

Payments of instalment plans for social security contributions were also temporarily suspended during the period in which the activity was legally closed[76].

The government adopted an exceptional regularization plan for tax and social security amounts: i) regarding facts occurred between 9 March and 30 June 2020, or; ii) regarding debts emerging in the same period[77]. Besides allowing a deferral and payment in instalments, the government also allowed taxpayers in procedures of recovery or bankruptcy to include those debts in said plans.

Besides allowing, as in the above-mentioned cases, the taxpayer to apply for the payment in instalments, the government also determined that tax authorities should actively offer taxpayers, *ex officio*, the opportunity to create an instalment plan for PIT and CIT amounts, without the need of providing guarantees, in the following cases: i) the taxpayer does not owe any other taxes administered by the tax authority; ii) the deadline for voluntary payments has not yet expired, and; iii) the amount is due until 31 December 2020; iv) the debt is inferior to 5,000 EUR (in case of PIT) or 10,000 EUR (in case of CIT)[78].

[72] §5 and 6 of Order 153/2020 XXII, 24 April 2020.

[73] Art. 3 of the Decree-Law 10-F/2020, of 26 March 2020.

[74] §5 and 6 of Order 153/2020 XXII, 24 April 2020.

[75] Art. 2 of Decree-Law 10-F/2020, of 26 March 2020.

[76] Art. 5 of the Decree-Law 10-F/2020, of 26 March 2020. Suspension followed the regime applicable to judiciary holidays.

[77] Art. 17 of Law 27-A/2020, of 24 July 2020

[78] See Order 354/2020 XXII, of 11 September 2020. The regime was further detailed by Despacho 8844-B/2020, of 14 September 2020.

4.6. Anticipation of reimbursements

To increase liquidity of MSM companies, the government determined that whenever the withholding taxes and advance payments in PIT or CIT or VAT assessments were higher than the amount effectively due (thus generating a credit), the taxpayer would be entitled to a reimbursement to be received up to 15 days after the corresponding request[79].

4.7. Further digitalization

Over the past years, there was a notable effort of digitalizing the tax administration, and, currently, it is virtually possible to comply with any tax obligation online. Immediately at the onset of the pandemic, the government stressed that the preferential means of contact with the tax authority should be by phone and on the tax portal[80]. Moreover, the tax authority created a specific subsection on his portal, gathering all COVID-19 measures and related information[81].

This effort was also visible in case of hybrid systems, such as VAT, that combines digital and paper features. To avoid compliance issues, and in what concerns taxpayers with limited turnover[82], the government determined that, exceptionally, VAT returns could be submitted based on the data available on the taxpayer's e-portal, without the need of any accompanying documents. Any data that referred to physical documents could be submitted until July 2020 with a substitution declaration including a waiver of the applicable interest and penalties[83]. Furthermore, and for a limited period of time[84], .pdf invoices could be treated as e-invoices (those issued from the tax authority portal)[85]. This procedure was subsequently extended to the first quarter and to the March and April VAT returns[86] and to the May and June VAT returns[87].

[79] Art. 4 of Law 29/2020, of 31 July, being in force, under Art. 5 of the same instrument, until the end of the year until the end of the year in which the exceptional and temporary measures to respond to the SARS-CoV-2 epidemic and COVID disease cease".

[80] § 5 of Order 104/2020 XXII, of 9 March 2020.

[81] Available at: https://info.portaldasfinancas.gov.pt/pt/apoio_contribuinte/COVID_19/Paginas/default.aspx (last access on the 31 October 2020).

[82] That would be the case of taxpayers with a 2019 turnover below 10 M EUR, taxpayers who activity started on or after 2020 and, finally, taxpayers which had re-initiated its activity on or after 1 January 2020 and whose turnover in 2019 was below 10 M EUR.

[83] §1 and 2 of Order 129/2020 XXII, of 27 March 2020.

[84] More precisely, until 20 December 2020, as determined by letter a) of Order 229/2020 XXII, of 24 June 2020and vii) of Order 296/2020 XXII, of 31 July 2020.

[85] § 4 of Order 129/2020 XXII, of 27 March 2020.

[86] Order 153/2020 XXII, of 24 April 2020.

[87] Order 229/2020 XXII, of 24 June 2020.

5. International tax aspects

Portugal has not adopted any hard or soft instrument on international tax aspects. It should be noted that, even with the reinstatement of border controls, frontier workers were always allowed to circulate. Moreover, Portugal allowed both the return of their citizens as the return of anyone residing and working in Portugal, even if they were occasionally living abroad. However, as mentioned, border checks made it impossible in some cases and in others extremely burdensome (or risky) to move from the place where the taxpayer got shelter. And many non-resident taxpayers ended up being stranded in Portugal.

In what concerns the OECD guidance on tax treaties, Portugal is a member of the OECD and, as such, it is expected to follow those guidelines. There are no noticeable cases of divergence with OECD recommendations and positions. However, and at the time of writing of the report, there are no indications on whether such guidance will be followed or not.

Although not strictly a tax measure, it should be noted that the supplementary budget[88] prohibited access to public subsidies to all companies located in a country with a more favourable tax regime[89]. Which is part of a normative trend on creating limitations on commerce and any other commercial and financial relations with companies located in the so-called tax havens. Of course, this measure may be considered as infringing the free movement of capital, and it does not seem to be justifiable under any of justifications normally accepted by the Court of Justice of the European Union[90].

6. Post-CoViD tax measures

6.1. Introduction

This paper covers all measures adopted until the moment in which is being written. In what concerns future measures, the only indication that we have is the proposal for the 2021 State Budget[91] which is currently being discussed at the Parliament. Even though not all of the tax measures present a direct link with the current health situation, the fact is that the SARS-CoV-2/COVID-19 pandemic has had a powerful influence in their design. In the following sections, we will cover those measures.

[88] Law 27-A/2020, of 24 July 2020.

[89] Art. 19 of the supplementary budget, Law 27-A/2020, of 24 July 2020. The list of countries located in a more favourable jurisdiction is currently listed on Portaria 150/2004, of 13 February 2004.

[90] On the issues related to the compatibility of measures that apply automatically against third-countries see J.F. Pinto Nogueira, GloBE and EU Law: Assessing the Compatibility of the OECD's Pillar II Initiative on a Minimum Effective Tax Rate with EU Law and Implementing It within the Internal Market, 12 World Tax Journal 3 (2020), section, 4.4.3.

[91] Draft budget Act, n. 61/XIV, presented by the government to the parliament on the 12 October 2020. Hereinafter we will refer to it as draft budget.

6.2. Direct tax measures

In what concerns personal income tax, the most interesting measure regards the slight decrease (on average 2%) of the withholding rates for individuals. This measure allows for an immediate increase of the net monthly amount of the wages without creating a permanent reduction of the underlying tax of PIT, whose rates are kept the same.

One of the most relevant proposals regards broadening the PE concept, which will now include offshore PEs and service PEs. It further aligns domestic CIT with the OECD MC 2017 in what concerns both preparatory and auxiliary activities, and the realm of the dependent agent concept. Finally, a limited rule of attraction is included by which the income generated by any sales of a company having a PE in Portugal will be considered as attributable to the Portugal located PE insofar as: i) the acquirer is a tax resident in Portugal; ii) the goods are identical or similar to those sold by the PE. This force of attraction is likely aimed at tackling online sales by multinationals but will not apply insofar as the company is located in a country with a tax treaty with Portugal.

The 10% autonomous taxation applicable to companies with tax losses will no longer apply to micro, small and medium companies under certain conditions. These companies, regardless of whether they registered losses, will be entitled to a new but temporary incentive for external promotion. Under this regime, companies may deduct 110% of the expenses incurred in 2021 and 2022 with external promotion (such as fairs and exhibitions abroad, acquisition of certain specialized services and promotion of internationalization).

There is also a new incentive scheme for keeping employees, that can be invoked by companies that do not qualify as micro, small and medium companies insofar as they: i) are active in agricultural, commercial or industrial activities; ii) book profit in 2020. These companies will only benefit from direct subsidies and tax incentives if they keep the employment levels of 2020.

Entities located in territories with a more favourable tax regime or whose ultimate beneficial owner is located in those territories will no longer benefit from the extraordinary tax regimes created in the framework of the governments' reaction to COVID-19.

There are also several adjustments in an existing tax incentive for R&D expenses and the government requested a legislative authorization to create a new tax incentive for companies creating jobs in interior regions of the mainland territory.

6.3. Indirect tax measures

Most indirect tax measures refer to VAT. Some of the temporary measures created during 2020 see their time-spam being expanded or become permanent. The government proposes to extend permanently the application of the reduced VAT rate for masks and skin disinfecting gel. Furthermore, the above-described exemption for supplies of certain medical equipment is extended until 30 April 2020.

There are new VAT benefits for universities, not-for-profit entities active in the field of science and technology and even to the Institute for the Conservation of Nature and Forests.

The most emblematic measure is the creation of the VAT-voucher. Under this measure, VAT paid in certain services (such as restaurants, accommodation and cultural services) can be

converted into a voucher that the taxpayer can use for acquiring the same type of services in the following quarter.

6.4. Other measures

In the framework of the transfer of real estate tax, the government proposes extending the tax even to indirect transfers of immovable property. Accordingly, it is also considered covered by this tax the transfer of public limited companies whose asset value is derived in 50% or more from immovable property located in the Portuguese territory if said immovable property is used in commercial, industrial and agricultural activities.

7. Concluding remarks

The pandemic was a stress-test for governments throughout the world, being forced to react in a short amount of time with limited resources and without proper guidance or reasonable impact assessments.

Situations as this one we all have experienced should be taken into account when designing new features of the tax system, to ensure its adaptability to crisis situations. In the next examples, we will provide some illustrations on what can be corrected in the future or, on the other hand, of the best practices followed by the Portuguese government that could be considered as an example to other countries.

One of the issues faced was keeping the pace of all the developments. And ensuring that the measures would enter into force when they were supposed to. Sometimes, the government could not have full control of the legislative process and was doubtful whether a measure would enter into force in time. And, to avoid administrative action contradicting with future legislation, it issues administrative guidance. For instance, the State Secretariat for Tax Affairs felt the need to issue an order to ensure that a certain payment, postponed by a Supplementary budget, would not be requested by tax authorities in case the proceedings for the approval of that budget extended the deadline for that payment[92]. And this was expressly mentioned in the administrative order.

Despite the crisis situation, the pandemic has not abolished or suspended the Constitution or the Rule of Law (besides what was required by the exceptional state of emergency decree). Therefore, we were surprised to see an extension of the subjective or objective tax exemptions[93] by a mere order of the State Secretariat for Tax Affairs without any habilitating law or authorization by the State of Emergency Decree. Even if, in some cases, the

[92] See Order 258/2020 XXII, of 16 July 2020, already described.

[93] Namely the already described extension of the VAT exemption for supplies to people in need, granted by Order 122/2020 XXII, of 24 March 2020 and whose subjective scope was even extended by a mere joint Despacho of three secretaries of State – see Despacho 8422/2020, of 2 September 2020.

extension was made under the cover of legislative interpretation. These are situations that, under the Rule of Law, should not be admissible – even if they are enacted in favour of the taxpayer. The legislative function is not to be exercised by an Order of the Secretariat of State.

Furthermore, we have noticed that some normative instruments mixed several topics which made its interpretation much more complex and reduces or eliminates the relevance of the "systematic" or "structural" element in normative interpretation[94]. It would have been better if each legislative act was monothematic.

The past months were likely record months in terms of legislative and overall normative production. And many diplomas were amended several times in a limited period of time. In our view, it would have been better if the government, besides all the efforts in creating guides and brochures for the general audience, had decided to publish consolidated versions of the normative instruments. Despite the advantages of a brochure, there is nothing better for legal certainty than certainty about the law which is in force.

Despite the urgency, legislative measures should only be enacted when they have been or will be carefully thought. And in certain cases, we believe that more care should have been observed in legislative production. Some non-sufficiently revised wordings or by certain normative options (namely on deadlines[95] and on sunset clauses[96]) will inevitably lead to legal uncertainty. Furthermore, some measures will lead to extra – and eventually avoidable – administrative costs (many administrative procedures and software systems have to be adjusted in a short amount of time)[97] and compliance costs (even when the measure

[94] For instance, Law 13/2020, of 7 May, included both VAT related matters and an extension of the maximum thresholds for the concession of guarantees by the State, the latter measure being a derogation to the State Budget Law, whose amendments follow a special procedure. Decree-Law 54/2020, of 11 of August 2020, mixed tax-relief measures for COVID-19 with VAT-relief measures for those affected by the 2017 fires in a specific region of Portugal. Law 43/2020, of 18 August 2020 mixed the extension of an exceptional VAT-relief with the temporary tax regime applicable to entities organising the UEFA champions league final in Portugal.

[95] For instance, instead of postponing the deadline by 3 days, Order 292/2020, of 31 July 2020, published on the very same day of the deadline for submitting the CIT annual return, granted a tolerance of 72 hours for submitting this declaration. Said novel wording will lead to uncertainties in what respects tax features connected with that deadline namely the computation of interests and fines.

[96] Art. 5 of Law 29/2020, of 31 July determines that the special tax measures implemented by that normative instrument will remain in force "until the end of the year until the end of the year in which the exceptional and temporary measures to respond to the SARS-CoV-2 epidemic and COVID-19 disease cease". In our view, this may lead to a lot of uncertainty since it is not clear: i) if this requires or not an explicit declaration by the government, by the president or even by an international organisation, such as the World Health Organisation; ii) what type of exceptional and temporary measures have to stay in force for the validity to be extended; iii) if both temporary and (cumulatively) exceptional measures have to be in force, or if merely one of these type of measures have to be valid; in fact, it is not unlikely that many exceptional – but not temporary – measures will stay in force for several years as one cannot foresee that the virus will be completely eradicated soon; iv) if the relevant underlying health situation is the SARS-CoV-2 epidemic and COVID-19 disease (or if both of them cumulatively).

[97] For instance, Law 13/2020, of 7 May, introducing a VAT exemption for certain medical supplies, despite entering into force on the 8th of May, retroacted the exemption to the 31 of January 2020. This means that a significant number of returns, already processed, had to be revised and the VAT amounts re-calculated.

grants a postponement of a deadline, the taxpayer has to interpret new normative instruments and to adjust some routines and procedure).

In legislating, one should always take into account that any temporary tax measure has a "vocation for universality" regardless of whether it generates tax revenues or creates a tax advantage for taxpayers[98]. And that some of the more perennial taxes were once mere temporary measures.

In some cases, the health situation is used as a justification to adopt measures with no[99] or limited connection[100] with the underlying situation. This extensive use of the crisis to adopt non-connected measures should be avoided in the future. Or, as an alternative, the government could use preambles (or even press releases) to explain a bit better why the crisis situation requires a new tax break for travel agencies[101].

There are also several aspects in which the Portuguese approach deserves to be particularly praised. For instance, the inclusion of clear timelines or sunset clauses for temporary measures which will no longer be applicable *ipso iure* and regardless of any further intervention of the legislator[102]. Or the clear and graphically appealing instructions provided to taxpayers wanting to benefit from the flexibilization of payments[103].

One should also highlight and praise the efforts of the government and of tax authorities in making all the information more accessible to taxpayers, namely by creating the already mentioned specific sub-site for COVID-19 related measures, by the publication of summaries of measures or deadlines[104], and by creating created a FAQ section on the tax authority website where repeated questions by taxpayers are listed and answered[105]. Finally,

[98] In the subject matter covered by this study, see the two enlargements of the deduction of CIT of donations granted to people in need, in the extended interpretation provided to Art. 62(1)(a) of the Statute for Tax Incentives, by § 1 of Order 137/2020 XXII, of 3 April 2020.

[99] That is the case of the reimbursement of the 50% of the non-deductible VAT borne by companies dedicated to the organisation of fairs, congresses and similar events, under art. 2 and 3 of Decree-Law 54/2020, of 11 August 2020. It is undeniable that this sector suffered an impact due to the pandemic. However, there is no empirical evidence that the impact on this specific sub-sector was disproportionally higher than the impact on other tourism sectors such as hotels. Therefore, it is difficult to understand the connection of this measure with the pandemic, which is invoked in the preamble of this law as the reason legitimising this exceptional measure.

[100] For instance, the VAT exemption for medical supplies covered acquisitions made as of the 31st of January. It is difficult to admit that, as early as of the 31 of January 2020, health institutions were already massively acquiring medical devices for bracing themselves for the pandemic. Besides, most of the acquisitions covered by this exemption were already exempt which creates a doubt on the real addressees or goals of such a measure. Finally, the list of exempted good was quite comprehensive including, namely, any humidifiers, any devices for monitoring patients, any ultrasound portable scanners and any cotton buds.

[101] See supra n. 100.

[102] That is the case of the VAT exemption and extension of the reduced rate provided by Law 13/2020, of 7 May.

[103] Available at: https://info.portaldasfinancas.gov.pt/pt/apoio_contribuinte/Manuais/Documents/Apresentacao_Flexibilizacao_Pagamentos.pdf (last access on 31 October 2020).

[104] See, for instance, Order 292/2020 of 31 July 2020.

[105] Available at: https://info.portaldasfinancas.gov.pt/pt/apoio_contribuinte/COVID_19/Paginas/default.aspx under "Resposta às questões frequentes (FAQ)".

one should praise the proactiveness required by law, ordering tax authorities *ex officio* to offer taxpayers the opportunity of paying in instalments if amounts were due within the deadline for voluntary payment[106].

All in all, the overall assessment is positive. Despite the secondary place granted to the tax system as an instrument of reaction against the health or economic crisis, there were several surgical changes that allowed some companies to avoid financial hardships, avoiding creating bankruptcies of taxpayers, which would only add more disruption to the one that the SARS-CoV-2/COVID-19 made inevitable.

[106] Order 354/2020 XXII, of 11 September 2020 further detailed by Despacho 8844-B/2020, of 14 September 2020.