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The Spanish loan debt moratorium due to COVID-19, a minimal measure

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1. Introduction

The measures adopted by the government to tackle the economic crisis caused by the shutdown under the state of alarm notably include a loan debt moratorium.[1] This measure has been regulated in section IV of chapter 1 of Royal Decree-Law 8/2020 of 17 March on urgent special measures to tackle the economic and social impact of COVID-19, amended by Royal Decree-Law 11/2020 of 31 March, which supplements the former "with technical adjustments to facilitate its application", according to its preamble. Only a mortgage debt moratorium had originally been regulated. This is regulated again and also expanded to include a non-mortgage debt moratorium. This extension regulation also includes moratoria outside the scope of this present commentary, such as payment of rent and payment of self-employed national insurance contributions.

[1]The term "moratorium" used in loan debt moratorium is not common in legal doctrine. The *Diccionario del Español Jurídico* [Spanish Legal Dictionary] does not even define it. During the financial crisis of 2008, the Ombudsman proposed a mortgage debt moratorium to prevent evictions (in the report *Crisis económica y deudores hipotecarios: actuaciones y propuestas del Defensor del Pueblo* [Economic crisis and mortgage debtors: actions and proposals by the Ombudsman], 22 January 2012, page 107). However, this proposal was not considered. The only possibility included was restructuring with a five-year grace period for repayment of the principal for the most vulnerable debtors on the verge of social exclusion, together with other connected measures (Annex of Royal Decree-Law 6/2012 of 9 March on urgent measures to protect mortgage debtors without resources). This minimal protection of those at risk of social exclusion was used by the banks as an argument for the government not to approve a mortgage debt moratorium due to COVID-19 similar to that which took place in Italy (see Remolina, N., *Respuestas de Supervisores y Reguladores Financieros al COVID-19* [Financial regulators and supervisors' responses to COVID-19], 2020, page 10. Available on https://ssrn.com/abstract=3554557). In Italy, Decreto-Legge 17 marzo 2020, n. 18 regulated a moratorium on home mortgage repayments for those unemployed due to COVID-19 lasting 18 months, and 9 months for loans to the self-employed and professionals who file a self-declaration of having had their turnover reduced by more than a third by the health emergency.

However, the reform has not taken the opportunity to provide systematic regulation. With a pronounced lack of legal technique, mandates are repeated, and rules are duplicated, which hinders understanding of it and damages legal certainty.

2. Purpose

The purpose of the original regulation of the mortgage moratorium was, according to its preamble, "to guarantee the right to housing for mortgage debtors in a situation of special vulnerability, whose income has been reduced as a consequence of the health crisis". Despite the fact that we are not dealing with a financial crisis but instead a temporary shutdown of economic activity, the government took as a reference the measures to protect mortgage debtors without resources adopted after the 2008 crisis, emphasising the legal protection of the right to housing. Although during the financial crisis the aim was to tackle a major economic depression lasting several years, the objective regarding the COVID-19 shutdown is quite different. The aim is to jump forward in time to overcome the shutdown and restart economic life as if nothing had happened. It is not a social bailout; it is a measure to help restart economic activity. It seeks to give the most affected debtors breathing space to overcome the impasse.

Accordingly, the regulation reforming and expanding the moratorium takes on a new perspective and reformulates the aim of the moratorium. Going beyond protection of housing as an indirect objective, the immediate aim of the credit moratorium is now, according to the preamble, "to ensure that citizens are not excluded from the financial system due to not being able to temporarily fulfil their financial obligations as a consequence of the COVID-19 health crisis". It is seeking to provide a mortgage debt moratorium for "those having extraordinary difficulties in making payments as a consequence of the COVID-19 crisis".[2] The intention is to guarantee liquidity and prevent financial exclusion, which would hinder the resumption of economic life after the break caused by the health emergency. It is intended to be "economic relief", to give breathing space to households affected by the shutdown of the economy, especially the neediest who are in a situation of economic vulnerability.

In this situation, what the regulation is seeking is to apply a political economic measure to prevent the shutdown from becoming an economic crisis. With this aim in mind, it entitles the debtor to request a moratorium. However, not all debtors are affected by the state of alarm, only those who, as a consequence of the shutdown, are in a "situation of economic vulnerability". Although, in principle, all debtors may be deserving of this moratorium, since they are all affected by force majeure, the regulation limited its scope to those who have been most affected and are in a situation of vulnerability. In this way, it seeks to reduce the impact of the moratorium on lending institutions and prevent a systemic risk. One must take into account that the measure is also adopted in the interests of the banks themselves, since the preamble in the original regulation states that "it helps limit bad debts". The moratorium suspends the agreement, by prolonging its term, which in principle does not affect the solvency of the lending institution, which therefore does not have to make provisions.[3]

[2] Article 7 of Royal Decree-Law 8/2020 of 17 March, as worded by Royal Decree-Law 11/2020 of 31 March.

[3] Quite rightly, the reference to "not including it in the calculation of risk provisions" has been removed by the reform. This prudential aspect has been clarified by the European Banking Authority, in the *EBA Guidelines on legislative and*

In short, it is not a regulation that provides a social bailout but instead a bridging regulation, which seeks to prevent the COVID-19 shutdown from affecting the right to housing and the continuity of family and business life. For this reason, it is not appropriate to interpret its contents in light of the doctrine on the protection of mortgage debtors that arose from the 2008 crisis. It is a different system in which the vulnerable customer may request a moratorium and the bank may implement it, i.e. put it into operation by suspending the loan.

3. Objective and subjective scope

The moratorium applies to all loans from financial institutions.[4] Loans with or without a mortgage guarantee are covered, including consumer loans, albeit with a special regulation.

The mortgage debt moratorium includes home loans, but following the reform it also includes loans to acquire properties used for the economic activity of businesspeople or professionals in a situation of economic vulnerability and buy-to-let homes when the landlord has a mortgage debt and has ceased to receive rent due to the health emergency.

The subjective scope is defined by "economic vulnerability". The beneficiaries of the moratorium are debtors who are in a situation of economic vulnerability due to the health emergency, as well as the principal debtor's guarantors, with regard to their principal place of residence.

The original regulation does not list "requirements" for economic vulnerability, nor does it stipulate that they will be applied cumulatively. It merely lists the "requirements" that must be used to prove a "situation of economic vulnerability", which is the basis for requesting a moratorium. It leaves it up to the banks not only to process the applications and implement them, but also to decide how long the moratorium will last. It thus leaves it up to the banks' social responsibility to handle applications and provide a sufficient duration to overcome the break in economic activity created by COVID-19. The regulation modifying the moratorium is configured as a right that the debtor holds, which it may exercise when it meets the requirements, with sanctions for a financial institution that breaches the obligation to implement the moratorium.

In order to be considered vulnerable for the purpose of the mortgage debt moratorium, it is necessary to cumulatively meet four requirements:[5]

a) Unemployment or, in the case of a businessperson or professional, having suffered a substantial loss of income or a fall in turnover of 40%.[6]

non-legislative moratoria on loan repayments applied in the light of the COVID-19 crisis, EBA/GL/2020/02, 2 April 2020, which stipulates "*the criteria that payment moratoria have to fulfil not to trigger forbearance classification*".

[4] Although the regulation does not expressly state it, the moratorium only affects loans granted by financial institutions registered with the Bank of Spain.

[5] These are stipulated in article 16 of Royal Decree-Law 11/2020 of 31 March. However, this regulation does not expressly repeal article 9 of Royal Decree-Law 8/2020 of 17 March on the definition of the situation of vulnerability, which is a rule that we must consider tacitly repealed.

[6] With regard to the requirement for "unemployment", Segismundo Álvarez Royo-Villanova considers that it includes Temporary Workforce Reduction Plans (ERTE) in https://twitter.com/sarv66/status/1246815186352308226?s=20. However, in relation to the vulnerability of a tenant, a distinction is made between unemployment and an ERTE in article 5.1(a) of Royal Decree-Law 11/2020 of 31 March.

b) The household income in the month prior to applying for a moratorium does not exceed a certain amount.[7]

c) The mortgage repayment, plus expenses and basic utilities for the principal place of residence does not exceed 35 per cent of the household's net income.

d) Due to the health emergency, the household's mortgage repayments, as a proportion of its income, has multiplied by at least 1.3.[8]

These are independent requirements, although they may overlap and in many cases they do. In fact, loss of employment or a fall in sales may result in a substantial fall in household income that also affects loan repayments as a proportion of income. However, the regulation is clear in requiring the debtor to "comply with all of the requirements" and it is necessary to "jointly" meet these conditions. The original wording does not require cumulative compliance. However, the banks have taken a restrictive approach to the regulation and on their websites they require applicants to meet each and every one of the requirements. In order to resolve the irregularity of these banking practices, the government has decided to restrict access to the moratorium to the most extreme cases, requiring cumulative compliance with all of the requirements, as the banks wished. *In claris non fit interpretatio*, we cannot agree with these arbitrary interpretations that, under the new legal framework, are seeking to combine requirements in order to expand the group of customers that can access the moratorium.[9] There is a clear political decision expressed in the regulation with the status of law to leave the majority of vulnerable debtors out of the moratorium, which contrasts with the European Banking Authority's position in favour of this kind of moratorium in the current situation.[10]

Furthermore, the vulnerability required for the non-mortgage debt moratorium has some specific aspects. Vulnerable mortgage debtors are also vulnerable in terms of non-mortgage debt. Hence, the beneficiaries of the mortgage moratorium can also benefit from the moratorium on personal debt. This is because the calculation of their vulnerability as a non-mortgage debtor takes into account the mortgage debt, even if it has been suspended by a mortgage moratorium.[11] In turn,

[7] Generally speaking, the limit is three times the Public Indicator of Income for Monthly Multiple Purposes (IPREM), which is increased 0.1 times for each child in the household or 0.15 in the case of a single-parent family, 0.1 for each elderly person over 65 years old in the family unit and, in the case of family members with a disability of more than 33 per cent, in a situation of dependence or an illness that prevents them from engaging in employment, the limit is four times the IPREM.

[8] For example, if a household pays a €500 mortgage with income of €2000, which falls to just €1000 due to the health emergency, it will meet this requirement since its mortgage repayment as a portion of income will rise from 25% to 50%, which is a multiplier of 2, higher than the 1.3 required.

[9] Segismundo Álvarez Royo-Villanova expressed this opinion on the *Hay Derecho* blog, stating "a corrective interpretation should be made such that it is sufficient to comply with paragraph (d) even if the grounds for the reduction in income are not those in paragraph (a). Otherwise, workers would be placed in a worse position than the self-employed." Available on https://hayderecho.expansion.com/2020/04/02/cuando-y-como-puedo-pedir-la-moratorium-hipotecaria-y-no-hipotecaria/

[10] "*The EBA sees the payment moratoria as effective tools to address short-term liquidity difficulties caused by the limited or suspended operation of many businesses and individuals*", in *EBA Guidelines on legislative and non-legislative moratoria on loan repayments applied in the light of the COVID-19 crisis*, EBA/GL/2020/02, 2 April 2020, page 6.

[11] This is stipulated in article 18.1(a) of Royal Decree-Law 11/2020 of 31 March, in keeping with the non-exclusion of the benefit from the rent debt moratorium when calculating of the vulnerability of the personal debtor who lives off rent income. Regarding this point, we follow the superior judgement of Segismundo Álvarez Royo-Villanova, rectifying

debtors that do not have a mortgage may benefit from the personal debt moratorium when they meet the four requirements listed above, although the last two are adapted to their particular circumstances. With regard to the third requirement, the applicant's loan repayments, plus the expenses and basic utilities for their principal place of residence, including the rent they pay for their principal place of residence, even if the rent debt is also covered by a moratorium, must not exceed 35 per cent of the household's net income.[12] With regard to the loan repayment burden envisaged in paragraph four, it is calculated taking into account the sum of the foregoing items, i.e. the sum of the loan repayments, plus the expenses and basic utilities for their principal place of residence, including the rent they pay for their principal place of residence, even if the rent debt is also covered by a moratorium. According to the preamble, these specific aspects "are intended to guarantee fair treatment of all creditors and landlords." This is a curious and complicated system in which the personal loan debtor may accumulate the benefits of the mortgage or rent debt moratorium.

This vulnerability for the purpose of being a beneficiary of the loan debt moratorium is not exactly the same as the vulnerability required to benefit from the rent debt moratorium or receive benefits for essential services, which have their own nuances.[13]

4. Proof of the subjective conditions

The applicants may prove that they are in a vulnerable situation through a "responsible declaration", i.e. a self-declaration, justifying that they are unable to provide other documents at the moment due to the COVID-19 crisis.[14] Given the state of alarm and economic shutdown, which is a public fact, and the urgency of applying the moratorium, it must be presumed that a responsible declaration is the most effective way to access the moratorium. The lender institution bears the burden of proof for the ease of access to documentation when it comes to rejecting the application. In fact, it is envisaged that, once the state of alarm comes to an end, the beneficiaries of the moratorium will have one month to provide the expressly listed documents they were unable to provide.[15] Notable among these documents is the requirement to prove "the cessation of business of self-employed workers" when, in order to benefit from the moratorium, businesspeople or professionals merely need to prove that they have suffered "a substantial loss of income or a substantial fall in their turnover of at least 40%." Therefore, it is not necessary to

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our position in the first version of this study, after exchanging opinions on the internet: https://twitter.com/sarv66/status/1247078084697784321?s=20

[12] In the cited post, Segismundo Álvarez Royo-Villanova rightly considers that "the loans of the various members of the household must be added together, since the income of all of them is added together in the denominator of the fraction".

[13] The definition of the situation of economic vulnerability for the purpose of obtaining moratoria or benefits for the rent payable for one's principal place of residence is stipulated in article 5 of Royal Decree-Law 11/2020 of 31 March. In turn, the status of a vulnerable consumer, being severely vulnerable or being at risk of social exclusion are defined in articles 3 and 4 of Royal Decree 897/2017 of 6 October, regulating the concept of a vulnerable consumer, subsidised utility bills and other measures to protect domestic consumers.

[14] Proof of the subjective conditions is regulated in article 17 of Royal Decree-Law 11/2020 of 31 March. However, this regulation does not repeal article 11 of Royal Decree-Law 8/2020 of 17 March, which regulated them, so this article should also be considered tacitly repealed.

[15] Article 17.1(e) repeats that the responsible declaration concerning compliance with the requirements should be submitted. This is superfluous since if all of the accrediting documents are provided, there is no need to provide an additional responsible declaration at that time.

prove the cessation of business in order to benefit from the moratorium, although cessation of business obviously proves that the economic activity has decreased by the required percentage. There is also no justification for the beneficiary of the non-mortgage debt moratorium being required to prove the amount of periodic repayments for the financing "by providing the relevant agreement signed with the financial institution". That agreement must be in the institution's files and it is not pertinent to require the customer to provide it. Denying the moratorium for this reason would go against the good faith that must preside over relationships between the financial institution and its customers.

5. Application and granting of the moratorium

The lending institution must grant the moratorium to the beneficiaries that apply for it when they prove that they meet the legal requirements. This may be performed through a responsible declaration. With regard to the deadline for the application, the beneficiary may request the moratorium up to 45 days after the lifting of the state of alarm.[16]

Once the application has been received and it has been proven that the relevant requirements have been met, the lending institution must implement it within a maximum of 15 days. It is an urgent measure. The moratorium must be applied immediately, as soon as the application has been processed and proof that the requirements have been met has been verified. Its application is not conditional upon formalisation of the relevant contractual modification. In fact, it does not require agreement between the parties or a novation of the agreement in order to take effect. However, since it is a measure that suspends the agreement, it must be formalised in a public deed and registered in the Land Registry. The agreement can, of course, be modified by exercising freedom of will and the customer can be given benefits that go beyond the legal moratorium. The notarial and registry fees arising from formalisation and registration are borne by the lending institution and are discounted.

Once the moratorium has been applied, the institution must notify the Bank of Spain for administrative control purposes. In fact, each day, they must notify the supervisory body of the details concerning the application of the moratoria.[17]

6. Effects of the moratorium

The moratorium suspends the term of the agreement for three months and extends it for the same period.[18] Consequently, the debtor will not have to pay the mortgage repayments during that three-month term. Moreover, the loan agreement does not accrue interest during the suspension of the agreement and the lending institution "cannot demand payment of the mortgage repayments or any of the items included in it (repayment of principal or payment of interest)". In addition, "it

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[16] As stipulated in article 12 of Royal Decree-Law 8/2020 of 17 March, in its new wording, pursuant to that stipulated in final provision twelve of Royal Decree-Law 11/2020 of 31 March.

[17] They must specifically notify the daily data concerning the number of applications made and granted, the number of beneficiaries who are debtors, guarantors, salaried workers or businesspeople/professionals, the number of loans affected with an outstanding balance, the repayment of which is suspended, the NACE code for the activity that was performed by the debtor and the number of loans for which the debtor has requested that the suspension be documented in a notarial deed.

[18] Although the government has been authorised to extend the suspension.

cannot apply default interest during the term of the moratorium" with "the consequent non-application during the moratorium's term of the early termination clause". These reiterations reflect the degree of distrust in financial institutions, as if calling into doubt their compliance with the regulations.[19]

7. System of penalties

The consequences for breach of the moratorium system are determined for both the lending institution and the applicant.

With regard to institutions, they are regulatory and disciplinary rules and breaching them is subject to the penalties stipulated in the Law 10/2014 of 26 June 2014 on the regulation, supervision and solvency of credit institutions.[20] As it is common in banking regulations, the civil consequences of the breach are not specified and the liability rules in the Civil Code apply.

The applicant's civil liability for breaching the moratorium system is specified. A debtor who has benefited from the moratorium without meeting the requirements or who has simulated a situation of vulnerability "shall be liable for the damages and losses that may have arisen, as well as all of the expenses generated by the application of these flexibilisation measures, notwithstanding any other liabilities to which the debtor's conduct may give rise." In order to make it easier for the financial institution to file liability action, the amount of the indemnity is set at the "amount of the damages, losses and expenses, which may be no less than the benefit unduly obtained by the debtor by application of the regulation". However, the burden of proof that there has been simulation of vulnerability is borne by the institution.

This is a forceful warning taken from article 7 of Royal Decree-Law 6/2012 of 9 March on urgent measures to protect mortgage debtors without resources, which may discourage applications given the risk of aggravating the situation of vulnerability of someone who is financially dependent at the worst of times. There is a strikingly different tone concerning breach, when breach by a professional is always more serious than that of an inexperienced person who was ignorant of his or her regulatory compliance and in a situation of vulnerability due to the health emergency and economic shutdown. This system applies the traditional doctrine that seeks to avoid the abuse of a benefit by a person who does not need it. However, given the academic and economic shutdown, we cannot distinguish between debtors acting in good or bad faith. The worsening of economic life has affected all of us and one cannot attribute bad faith to an unprecedented event outside of our control. There may be isolated cases of people unduly taking advantage of the moratorium, but they will be marginal in a context of a general shutdown of economic activity. There are no opposing interests between the debtor and creditor here, since the creditor bank itself is the party with the greatest interest in avoiding bad debts and moving forward.

[19] Obviously: "this non-applicability of interest does not apply to debtors or agreements other than those regulated" in the regulation.

[20] This provision is taken from article 15 of Royal Decree-Law 6/2012 of 9 March on urgent measures to protect mortgage debtors without resources, although the categorisation of the breach as serious is not mentioned.

8. Conclusions

We are dealing with an urgent regulation that was rushed through and had to be modified a few days later to fill gaps and complete its scope. It is a minimal regulation, which the banks must take advantage of to overcome the temporary shutdown of economic life and which is particularly affecting loan debt. At this critical time, the banks must act in the service of society. This is no time for bargaining,[21] although the first example of this happening was when the government required the application requirements to be cumulatively applied, thus excluding the majority of debtors affected by the economic shutdown associated with the health emergency from being beneficiaries.

[21] See the author of the post, with the same title, in *Revista de Derecho del Mercado Financiero* of 20 March 2020, available on http://www.rdmf.es/2020/03/no-tiempo-regateos/