

The new normal? COVID-19 legislation: subsidies, consumer protection and air transport



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Introduction

Since the World Health Organisation declared the COVID-19 outbreak a pandemic on 11 March 2020, governments worldwide have made significant efforts to cope with this unforeseen situation and control the spread of the virus. Numerous legal provisions, both temporary and permanent, have been introduced in an attempt to strike a delicate balance between public health and safety, individual freedoms and economic stability. As a result, a complex maze of laws, regulations, directives, recommendations and instructions has made it difficult to identify the obligations of air passengers.

This article is the first in a series which provides a snapshot of new Spanish legislation that affects the air travel industry. At the time of writing, the pandemic is far from under control, although substantial progress has been made with the approval of rapid detection tests and the imminent deployment of vaccines. Nonetheless, many of the measures passed by governments in recent months appear to be here to stay, so this series may also provide a glimpse of the new normal insofar as aviation legislation is concerned.

General legislation

State of alarm

On 14 March 2020 the government issued Royal Decree 463/2020, declaring a state of alarm under the authority afforded by Article 116.2 of the Constitution and Article 4(b) of the Organic Act (4/1981) in case of sanitary crises. This royal decree ceased to have effect on 21 June 2020, causing the state of alarm to expire at a time when the health data indicated that the first wave of the virus had been overcome. Thus, all legal provisions whose validity was directly or indirectly linked to this first royal decree ceased to have effect on 21 June 2020 – even if they had not been specifically derogated.

In light of the alarming data provided by the health authorities with respect to the second wave of the virus, a new state of alarm was declared on 25 October 2020 by way of Royal Decree 926/2020. This second state of alarm had an initial expiry date of 9 November 2020, but was later extended to 9 May 2021. Notably, Royal Decree 926/2020 did not extend or reinstate the initial provisions of Royal Decree 463/2020, but rather introduced new specific measures.

Social measures

Early in the pandemic, the government approved a series of social measures to alleviate the impact of the COVID-19 crisis, initially through Royal Decree-Law 8/2020 of 17 March 2020. The key measures in this respect are summarised as follows:

- Enterprises must implement measures to allow for teleworking whenever technically and reasonably possible; these measures take priority over temporary dismissals or the reduction of activity.
- The government has relaxed the mechanisms for temporary lay-offs or a reduction of working hours on grounds directly relating to a loss of activity due to COVID-19. Faced with unprecedented prohibitions on flying and a decline in passenger numbers, all Spanish airlines have made use of these mechanisms.

Economic measures

In addition to legislative measures which aim to offer flexibility in the labour market, through Royal Decree-Laws 8/2020, 11/2020 and 34/2020, the government passed a number of measures to alleviate the burden on distressed companies, including as follows:

- Debtors which objectively find themselves in an insolvency situation have until 14 March 2021 to submit the mandatory application to the court. No creditor applications to have a debtor declared insolvent will be accepted before that date, which takes some pressure off companies and directors in financial trouble.
- Financial injections made after the declaration of the state of alarm by parent or group companies to their Spanish subsidiaries, which are subsequently declared insolvent before 14 March 2022, will be classified as 'ordinary credits' (ie, equal in rank to those of normal trade creditors) rather than as subordinated credits (as foreseen by the Insolvency Act).
- Losses incurred during the 2020 financial year will not be taken into account for the purposes of the thin capitalisation rule contemplated by the Companies Act, which obliges directors to request the winding up of companies if certain minimum capitalisation thresholds are not met. In practice, companies can thereby remain undercapitalised until approximately March 2022.
- In line with EU regulations, the general liberalisation regime relating to direct foreign investment has been temporarily suspended in respect of certain industries, including transport and airspace infrastructure and air and space technology. A suspension is also ordered where the investment is made by foreign governments. Consequently, all such investments must be authorised by the Spanish Council of Ministers unless the investment amount is less than €1 million.
- Despite the requests of all industry representatives, no deferral in the payment of taxes or other tax reliefs have been allowed thus far.

Subsidies

The provisions passed in connection with government subsidies to assist companies and individuals in financial distress are manifold and require a case-by-case analysis. From the perspective of the air travel industry, perhaps the most relevant provisions are those found in Royal Decree-Law 25/2020 of 3 July

2020, whereby a specific Fund to Support Strategic Enterprises, managed through the State Society of Industrial Participations, was established. The aim of the fund is to provide temporary public support to reinforce the solvency of designated enterprises through:

- participative loans;
- subordinated debt;
- share subscription; and
- other financial instruments.

Beneficiaries can be companies which are experiencing serious temporary financial difficulties as a consequence of the pandemic and which are considered strategic at a national or regional level due to (for example):

- their social and economic impact;
- their relevance for security, public health, infrastructure or communication; or
- their contribution to the proper functioning of the markets.

Detailed provisions regulating the access, use and eligibility criteria of this fund were issued through Order PCM/679/2020.

In the airline industry, Iberia, Air Nostrum, Vueling and Volotea have secured government-backed loans. In early November 2020 the government approved a rescue loan to Air Europa under the rules of this special fund, and Iberia and Air Nostrum are presently considering the pros and cons of applying for funds under this scheme. Ryanair has challenged this aid before the European Court of Justice on the grounds that it is available only to Spanish-licensed operators, which could be discriminatory in light of EU legislation.

Consumer protection

Immediately after the pandemic was declared, it became apparent that all types of travel, particularly air travel, would be seriously affected. The numerous flight cancellations imposed by the public authorities in most countries coincided with the cancellations of reservations by passengers fearing the consequences of travelling. On 18 March 2020 the European Commission published Notice (C2020) 1830 on interpretative guidelines on EU passenger rights regulations in the context of the developing COVID-19 situation. The principles embodied in this notice were only partially implemented in Spain.

By way of Royal Decree-Law 11/2020, consumers were given the right to terminate consumer contracts (whether purchase or services agreements) within 14 days if it was impossible to comply with the terms thereof due to government measures (eg, flight prohibitions and travel bans). This particularly affects air tickets, package travel holidays and similar products acquired in advance by consumers, who are now in a position to cancel them. Although the legal provisions contemplate a good faith negotiation among the parties in the first instance, companies must refund consumers if no agreement can be reached within 60 days. Companies can offer vouchers instead of a refund, but this must be accepted by the consumer. Thus, neither airlines, tour operators nor travel agents can offer vouchers as the only available alternative because consumers have the final say in this regard.

On 22 December 2020 the General Consumer and Protection Act was amended through Royal Decree-Law 37/2020 to provide more transparency with respect to in-house customer claims services.

Air transport

Provisions have also been issued concerning air transport in general. On 25 May 2020 the EU authorities stopped almost all flight operations throughout the European Union. EU Regulation 2020/696 amended EU Regulation 1008/2008 and allows national aviation authorities not to suspend or revoke the operating

licence of a Community carrier provided that safety is not at risk and there is a realistic prospect of a satisfactory financial reconstruction during 2021. Member states can refuse, limit or impose conditions on the exercise of traffic rights if this action is necessary in order to address the COVID-19 pandemic. Further, contracts of or authorisations granted to suppliers of ground-handling services that expire between 28 May 2020 and 31 December 2021 may be extended until 31 December 2022.

From a domestic perspective, flight restrictions and public service obligations were imposed on flights to and between the Balearic Islands and the Canary Islands, but these have mostly been lifted now. Notably – and as testimony to Spain's dependence on the tourism industry – Order SND/518/2020 of 11 June 2020 established a pilot programme which created safe touristic corridors to the Balearic Islands and partially lifted internal borders. As of 15 June 2020 passengers from the Schengen area can travel to the Balearic Islands through specific air routes (detailed in an annex, but initially to and from Germany) without quarantining, provided that the following requirements are met:

- The sanitary situation in the Balearic Islands must meet certain thresholds.
- The passengers must reside in the same Schengen country as the airport of origin.
- The country of origin must meet certain sanitary thresholds.
- The flights must arrive at one of the airports designated by Order TMA/410/2020.
- Airlines must comply with the recommendations of the European Union Aviation Safety Agency and the European Centre for Disease Control.
- Airlines must provide passengers with a passenger location card as per Annex 9 of the Chicago Convention.

Finally, in September 2020 the Organic Act 1/2020 on the use of passenger name record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime was passed. This act implements EU Directive 2016/681 and came into force on 18 November 2020.

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