Pérez-Llorca

Measures applicable to the moratorium on mortgage payments

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# Measures to ensure the protection of homeowners with mortgage debt and borrowers of unsecured loans established in the Royal Decree-law 11/2020, of 31 March, adopting additional urgent social and economic measures to deal with COVID-19

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On 1 April 2020, **Royal Decree-law 11/2020 of 31 March** was published in the Official State Bulletin, **adopting additional urgent social and economic measures to deal with COVID-19** ("**RDL 11/2020**"). RDL 11/2020 establishes a new range of measures, mainly of a social and economic nature, which expand upon and enhance those already adopted through the Royal Decree-laws approved in recent days, as well as Royal Decree 463/2020, of 14 March, which declared the state of alarm for the management of the health crisis caused by COVID-19, and its subsequent extension, approved by Royal Decree 476/2020, of 27 March.

Royal Decree-law 8/2020, of 17 March, on extraordinary urgent measures to address the economic and social impact of COVID-19, introduced certain measures to ensure the protection of homeowners with mortgage debt. With RDL 11/2020 some amendments and/or clarifications have been introduced in relation to this matter, as well as new measures for the protection of non-mortgage borrowers, as set out below.

## 1. AMENDMENTS TO THE ROYAL DECREE-LAW 8/2020

RDL 11/2020 amends the scope of the application of the moratorium on mortgage debt incurred for the purchase of the primary residence, which was introduced by the Royal Decree-law 8/2020 (the "**Mortgage Moratorium**").

Said Mortgage Moratorium will apply to all loan or credit agreements secured by a real estate mortgage, where the borrower is in a situation of economic vulnerability established under RDL 11/2020 (which includes the same situations already provided for in the aforementioned Royal Decree-law 8/2020), and provided that said real estate mortgage is registered in respect of:

(i) The primary residence;

(ii) Properties used for the economic activity of entrepreneurs or professionals who have suffered a substantial loss of income or a substantial drop in turnover (defined as, at least, 40%); or

(iii) Dwellings other than the primary residence which are subject to a leasehold and for which the mortgage holder, individual, owner, and lessor of such dwelling, has stopped receiving the rental income since the entry into force of the state of alarm.

Regarding evidence of the existence of circumstances of economic vulnerability, Royal Decree-law 8/2020 established that the borrower had to submit to the creditor entity certain documents that demonstrated his or her situation of economic vulnerability in the terms defined in RDL 11/2020 (e.g. family book, certificate issued by the competent entity stating the amount received, land registry excerpt, etc.).

However, RDL 11/2020 has established that in the event that it is not possible to provide any of the required documents, the borrower can replace them with an affidavit ("*declaración responsable*") which includes an explanation of the reasons that prevent them from providing such documentation (reasons that must necessarily be related to the consequences of the COVID-19 crisis). However, all documentation that has been replaced by the affidavit must be provided within a maximum period of one month as from the end of the state of alarm, and any subsequent extensions. The option of submitting such affidavit is a response to certain criticism of the rigidity of the system provided for in Royal Decree-law 8/2020, whose documentary obstacles limited the borrowers' ability to avail of the moratorium.

Furthermore, the Mortgage Moratorium may be requested up to fifteen (15) days after the end of the validity of RDL 11/2020 (instead of fifteen (15) days after the end of the validity of Royal Decree-law 8/2020), that is, one month after the end of the state of alarm, and any subsequent extensions.

Regarding the duration of the Mortgage Moratorium, RDL 11/2020 provides that the suspension of the mortgage debt will be for a period of three (3) months and that, during this period, the early maturity clause regulated in the mortgage loan agreement will not be applicable.

Finally, RDL 11/2020 provides that the amounts that would be payable by the borrower if the Mortgage Moratorium were not applied will not be considered overdue, meaning that the suspended instalments are not due at the end of the Mortgage Moratorium, but all the remaining instalments are postponed for the same period, thus extending the relevant amortisation scheme.

## 2. NEW MORATORIUM FOR HOLDERS OF UNSECURED LOANS

RDL 11/2020 establishes a new moratorium on obligations arising from loan and credit agreements not secured by a real estate mortgage, applicable to individuals who are in a situation of economic vulnerability as a result of the health emergency caused by COVID-19 (the "**Loan Moratorium**").

### A. Scope of the Loan Moratorium

The Loan Moratorium will apply to all loan or credit agreements not secured by a real estate mortgage in force on the date that RDL 11/2020 comes into force, provided that they have been entered into by an individual in a situation of economic vulnerability as a result of the health emergency caused by COVID-19. These protection measures are extended to the guarantors and sureties who are also in a situation of economic vulnerability.

### B. Definition of economic vulnerability

The definition of economic vulnerability that applies to borrowers of unsecured loans and credits is the same definition given for mortgage debtors. In brief, for a borrower to be considered economically vulnerable as a result of the health emergency caused by COVID-19, all of the following requirements must be met:

(i) The borrower must become unemployed or, if he is an entrepreneur or professional, suffer a substantial loss of income or a substantial drop in turnover (which is defined as, at least, 40% of his sales).

(ii) The total income of the members of the family unit must not exceed, in the month prior to the application for the Loan Moratorium, approximately, the maximum of three times the Public Multiplier Effect on Index of Revenue (**"IPREM"**)[1], in other words, EUR 1,613.52. The aforementioned limit may be increased in situations of special vulnerability when the family unit[2] is comprised of minors, persons over 65 years of age, persons with disabilities, mental illness, etc.

(iii) The mortgage payment, plus the basic expenses and supplies of the family unit, must be greater than or equal to 35% of the net income received by all of the members of the family unit.

(iv) The family unit must have suffered, as a result of the health emergency, a significant deterioration in its economic circumstances in terms of the effort required to access housing. For these purposes, such deterioration exists when the mortgage burden on the family income has been multiplied by at least 1.3 times.

Notwithstanding the above, to determine whether an individual can be a beneficiary of the Loan Moratorium, in circumstances where they are already a beneficiary of the Mortgage Moratorium, for the calculation of (iii) and (iv) above, the amounts subject to the Mortgage Moratorium will not be taken into account. Similarly, if the beneficiary has not taken out a mortgage loan, but has to make periodic payments (either in respect of rent for the primary residence, or of any type of unsecured financing, or both), to determine the situation of economic vulnerability, the amount of the mortgage payment will be replaced by the total sum of these amounts.

The guarantors and sureties who find themselves in the situation of economic vulnerability as defined above may require the creditor to exhaust the principal borrower's assets before claiming the guaranteed debt from them, even if they have expressly waived the benefit of exemption in the contract.

[1] The IPREM is an index used in Spain as a reference for the granting of aid, subsidies or unemployment benefits. In 2020, the monthly IPREM is EUR 537.84.

[2] Family unit is defined as consisting of the borrower, his or her spouse not legally separated or registered partner and the children, regardless of age, residing in the dwelling, including those linked by a relationship of guardianship, care or foster care and their spouse not legally separated or registered partner, residing in the dwelling.

### C. Conditions for applying for the Loan Moratorium

The Loan Moratorium may be requested up to one month after the end of the state of alarm. Together with the request, borrowers must prove the existence of circumstances of economic vulnerability, submitting to the creditor entity certain documents that demonstrate his or her situation of economic vulnerability in the terms defined in RDL 11/2020 (e.g. family book, certificate issued by the competent entity stating the amount received, land registry excerpt, etc.). If the borrower is unable to provide any of the documents required by RDL 11/2020, the borrower can replace them with an affidavit ("*declaración responsable*") which includes an explanation of the reasons that prevent them from providing such information (reasons that must necessarily be related to the consequences of COVID-19). However, all documentation that has been replaced by the affidavit must be provided within a maximum period of one month as from the end of the state of alarm, and any subsequent extensions.

Once the Loan Moratorium application has been made and the economic vulnerability has been verified, the creditor will automatically suspend the obligations arising from the unsecured loan or credit agreement.

### D. Effects of the Loan Moratorium

The Loan Moratorium has the following effects:

(i) The Loan Moratorium will have a duration of three months, which may be extended by an agreement of the Council of Ministers ("*Acuerdo del Consejo de Ministros*"). Although it is not clear, we understand that the calculation of the three months starts not from the declaration of the state of alarm but the date of the granting of the moratorium.

(ii) During the Loan Moratorium, the creditor may not request the payment of any instalment, or any of the items therein (amortisation of principal or payment of interest), either in full or in a percentage. No interest will be accrued, neither ordinary nor default.

(iii) The maturity date agreed under the loan or credit agreement will be extended, because of the Loan Moratorium, for the same duration as the Loan Moratorium, without any amendment of the remaining agreed conditions. This means that the suspended instalments will not be due at the end of the Loan Moratorium, but all remaining instalments are postponed for an identical period, in terms identical to the Mortgage Moratorium.

(iv) The amounts that would be payable by the borrower if the Loan Moratorium were not applied shall not be considered due.

### E. Consequences of the improper application of the protection provided for in RDL 11/2020

As in the case of mortgage holders trying to avail of the Mortgage Moratorium, the borrower of an unsecured loan or credit agreement who has benefited from the Loan Moratorium without meeting the requirements set out in RDL 11/2020 will be responsible for any loss and damage that may have occurred, as well as for all the expenses generated by the application of these relief measures, without prejudice to any other liabilities that the borrower's conduct may give rise to (e.g. criminal liability).

The amount of damages and expenses may not be less than the benefit unduly obtained by the borrower from the wrongful application of the rule. The borrower who seeks to place or maintain himself in circumstances of economic vulnerability in order to benefit from these measures will also be liable, although in this case it is up to the creditor to prove these facts.