

**The Covid-19 health emergency has brought football to a standstill across Europe and has led to a change in sports broadcasting schedules. In Spain, the impact on sports has been significantly determined by the enactment of several government measures, which sports bodies have had to accommodate. Agustín Amorós Martínez gives an update on the situation of audiovisual rights in Spanish football.**

## **The sequence of events and the effect on sport activity**

Initially, on 11 March 2020, the Royal Spanish Football Federation (RFEF) agreed that all matches of non-professional Football and Futsal Competitions at the State level would be suspended from that date and for a period of two weeks.

On 12 March 2020, *Laliga* also decided to postpone at least the next two matchdays under the measures established in Royal Decree 664/1997 of 12 May 1997, on the protection of workers against the risks related to exposure to biological agents at work.

However, on 14 March 2020, the Spanish Government published the Royal Decree 463/2020, declaring a “*state of alarm*”<sup>11</sup> due to the management of the health crisis. This state of alarm was valid for 15 calendar days. Nevertheless, by Royal Decree 476/2020, it was decided to extend this situation, as well as the validity of the measures contained therein, until 12 April 2020.

The main substantive measures approved by the Royal Decree 463/2020 (which, in some cases, go far beyond the measures permitted under a state of alarm according to Article 11 of Organic Law 4/1981, of 1 June 1981, on States of Alarm, Exception and Siege) or in its implementing legislation, refer to restrictions on freedom of movement extended to the whole Spanish territory and to all types of activities, with a limited number of exceptions (health and social workers, food stores and food production,

industry, construction, banking, media, energy, water, and electricity supplies).

Any other activity or establishment that the competent authority considers may entail a risk of contagion, has been suspended. Accordingly, any sport activity, amateur or professional, has been suspended by the different autonomous governments.

As a consequence of the Government's decisions, on 23 March 2020, the Deputy Commissioner of the RFEF Assembly approved the standstill of all non-professional competitions. On the same day, the Monitoring Commission established by the current [RFEF-Laliga Coordination Agreement](#) agreed to the suspension of professional football competitions until the authorities of the Government of Spain and the General Administration of the State consider that they can be resumed without creating any health risk.

## **The effect on a club's income and audiovisual rights**

The relationships among these stakeholders are governed by a set of contracts, all of which ultimately face the same question: what happens to the rights and obligations under a specific contract?

Without playing matches, it's evident that the object of the almost one hundred audiovisual contracts concluded by *Laliga* remain impossible to fulfill. As Mr *Javier Tebas* has said, *"if you do not cast the signal, you won't be able to get money, that is clear. We have 25 percent of the season to play, and the entire budget will have to be reviewed, that is the damage that can occur if the competition is not finished"*, he added.

The Royal Decree-Law 5/2015, of 30 April 2015, implemented a system of collective marketing of audiovisual rights of the official football competitions in Spain through *Laliga*. That Decree established the criteria for revenue sharing and imposes on the clubs participating in the *Liga de Fútbol Profesional* (LFP), the obligation to contribute financially to the funding of other sports and other divisions in football.

Basically, the revenue from the joint selling of media rights of *Laliga* is distributed between the clubs and entities who participate in the First and

Second Divisions. 90% of the revenues go to the First Division and the remaining 10% to the Second Division.

According to *Laliga's* estimates, if the football season does not resume, the economic losses would up to EUR 678,4 million.

The First and Second Divisions clubs would stop receiving EUR 549 million in television rights, EUR 88 million for season-tickets, and EUR 41,4 for box office revenues.

Specifically, concerning audiovisual rights, the amounts pending represent 29,7% of the total general budget for the current season.

## **A legal approach to the affectation of audiovisual rights contracts**

Covid-19, as restrictive government measures contained in Royal Decree 463/2020 and Royal Decree-Law 8/2020, together with their implementing regulations, may be considered a *force majeure* event that makes it impossible to comply with contracts, but not because of Covid-19 *per se*, but because of the legislative prohibitions.

In cases whereby compliance with the contract is impossible or where there is a sudden change in the circumstances, the law demands that the parties do everything possible to overcome this situation and comply with the agreement, for example, by way of the extension of deadlines or alternative compliance.

If performance is not possible and based on the principle of good faith, the law allows for various exceptions that add flexibility to the compliance obligation and the responsibility of the debtor. In essence, the impossibility of performance will trigger *force majeure* clauses. Additionally, the legal principle of *rebus sic stantibus* allows for contracts to become inapplicable if a fundamental change of circumstances has occurred. In accordance with these exceptions, the party obligated to comply is released of its liability for non-performance (the obligation being temporarily or permanently extinguished), or the contractual relationship is amended or terminated.

According to the Supreme Court Judgment (First Chamber, Civil) no. 318/2004, of 5 June 2004, "*there is no impossibility when compliance is possible by way of a voluntary effort by the debtor. The Judgment of 14*

*February 1994 refers to analyzing the due diligence doing all that is possible to overcome the impossibility, and the Judgment of 2 October 1970 invoked having exhausted all possibilities of compliance.”*

Also, the Supreme Court Judgment (First Chamber, Civil) of 11 November 1987 (RJ 1987\8372) specifies that: *“the impossibility of performance, in the precise method agreed upon in the obligations, determines the adjustment (...) of the content of the clause, in a manner that (...) rationally results [in] adequate [remedies] in relation to the pursued [ends].”*<sup>121</sup>

In the case of audiovisual rights related to football competitions in Spain, there is no doubt about the real impossibility of performance.

When it comes to determining the legal consequences of *force majeure*, the starting point is, again, the contract between the parties. Contracts related to major international sports events typically contain a clause that governs the occurrence of *force majeure*. Regularly, such provisions will, in the first place, state what *force majeure* entails and whether pandemics are considered to be a case of *force majeure*.

Under Spanish Law, there is no legal definition of *force majeure*. However, following our legal doctrine, Article 1105 of the Civil Code refers, although not expressly mentioned, and together with the fortuitous case, to *force majeure* when it establishes that: *“Outside of the cases expressly mentioned in the law, and those in which the obligation should require it, no one shall be liable for events which cannot be foreseen or which, being foreseen, should be inevitable.”*

The Spanish jurisprudence concerning swine flu provides reliable support in this regard, indicating a presumption that Covid-19 can be considered a clear case of *force majeure*.

In this sense, the Judgment of the Court of Appeals of Valencia (Section 7) no. 204/2011 of 11 April 2011, stated: *“an outbreak of swine flu (...) falling within a clear case of force majeure, was able to affect the claimants’ expectations in the carrying out of its scheduled trip.”* Also the Judgment of the Court of Appeals of Madrid (Section 20) of 10 December 2013, stated: *“before the declaration of the swine flu pandemic, that the World Health Organization had declared (...) which was unforeseeable and unavoidable and which met the necessary requisites to consider that the resulting situation originated because of a force majeure event and they cannot be held liable for the damages that may have been occasioned on the appellants here.”*

In the same spirit, the Judgment of the Court of Appeals of Barcelona (Section 14) no. 346/2012 of 8 June 2012, stated: “*the undeniable events (...) due to a force majeure (...) the incident being sudden and unanticipated by the defendant, which has been recognized as the swine flu, led to a change in the scheduled trip, although, given the closure of the archaeological area and the recommendations of the Mexican authorities, the defendant did not have any option but to recognize this change as necessary to avoid losses.*”

As to their content, most contract clauses on *force majeure* will, on the one hand, release the parties from the duty to perform their obligations; for example, the broadcaster does not have to pay for television rights. On the other hand, the clauses will most likely exclude the right of a party to claim damages from the other.

In the absence of an express agreement by the parties, the general legal regime dealing with cases of *force majeure* will be of application. If effectively there exists the impossibility of performance, then the party that does not perform will be released from liability stemming therefrom.

## **Special provision about using TV rights for guaranteeing the payment of tax and social security obligations**

Finally, it is worth mentioning that Royal Decree-Law 5/2015 of 30 April 2015 provides a tool in order to use audiovisual rights to help clubs financially but with a scope limited to the payment of tax and social security obligations.

According to the First Additional Provision of this Royal Decree-Law 5/2015, the LFP may use all the rights whose commercialization it has legally assigned as a guarantee to access financing, but with the sole purpose of providing the affiliated clubs with resources to settle their debts with the Public Administrations.

Consequently, the LFP must pass on the corresponding amount to each participating entity whose debts have been paid, totally or partially, with these financial resources, guaranteeing the return thereof.

<sup>[1]</sup> In Spain, the state of alarm (*estado de alarma*) is the lowest of the three degrees of state of emergency that allows the Spanish Government to perform actions or impose policies that it would normally not be permitted to undertake. Article 116.2 of the Constitution of the Kingdom of Spain regulates the state of alarm.

<sup>[2]</sup> Brackets are placed around additional words to clarify the meaning of the official Spanish Civil Code translation.