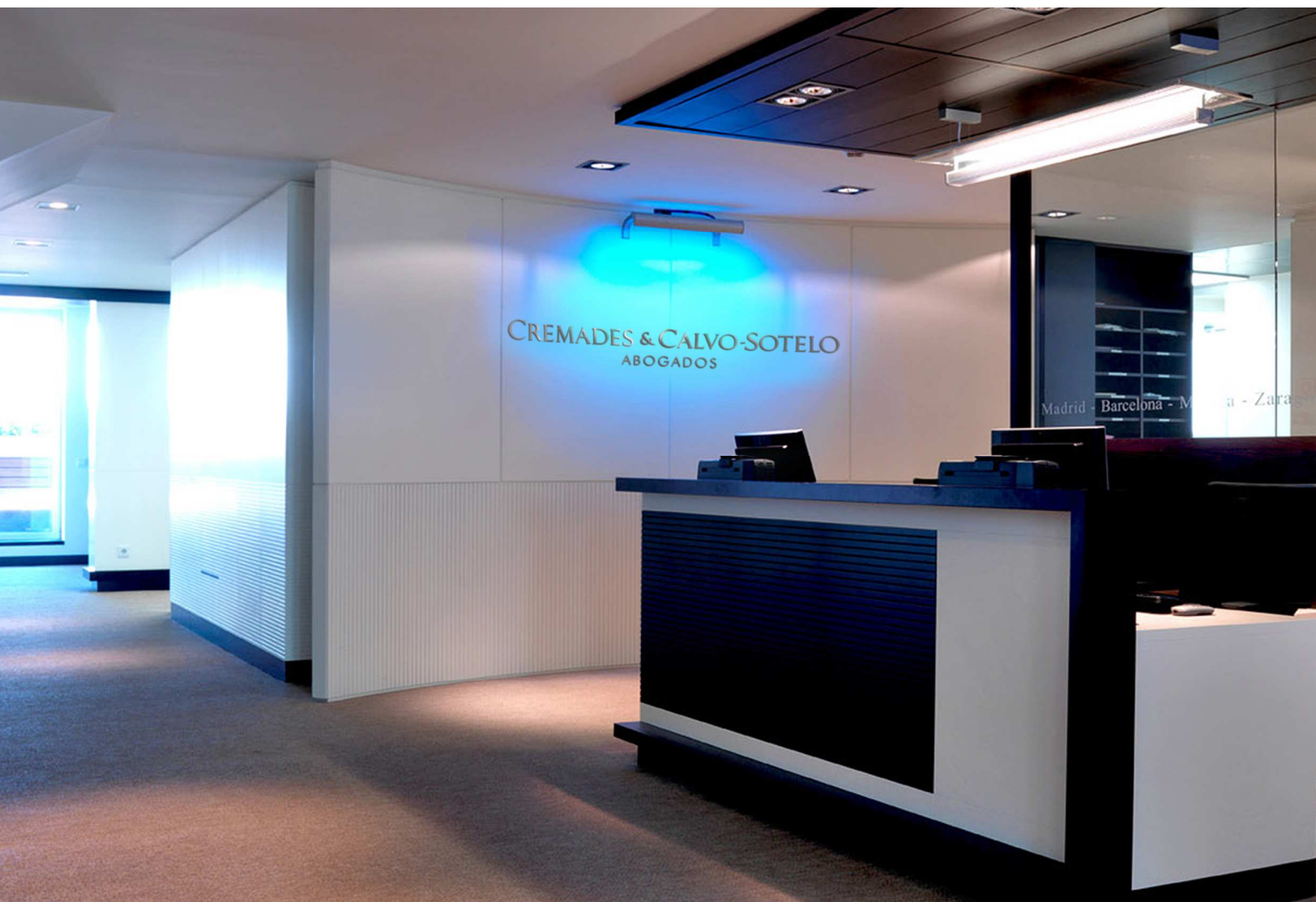


**Direct right of action against insurers  
of Spanish Public Bodies: changes in  
the legal framework.**

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**CREMADES & CALVO-SOTELO**  
ABOGADOS

*The Law 39/2015 on the Common Administrative Procedure and Law 40/2015 establishing the Legal Framework of the Public Sector (hereinafter LLFPS) came into force on the 2<sup>nd</sup> October 2016 replacing the longstanding Law 30/1992 on the Legal Framework of the Public Administration and the Common Administrative Procedure. As a result of this substantial change modifications are likely to be implemented in what concerns claims against Public Bodies and their insurers such as Local Authorities, Public Hospitals and Airports.*

The subject matter of this newsletter is a change which has been introduced by the new legal framework in relation to claims for damages caused by Public Bodies introduced in the Article 35 of the Law 40/2015 ("LLFPS"). As we will see, the wording of this section might imply that in the future civil actions pursued directly against the insurers of a Public Entity may no longer be brought before the Civil Courts but will have to be brought before the Administrative Courts following the Administrative Procedure rules. This, as we will further develop, could bring along important procedural changes with regards to the direct right of action against insurers of Public Bodies.

Article 35 reads:

*"When public bodies act, directly or through a private law entity, their responsibility will be claimed in accordance with the provisions under Articles 32 et seq., of this law, even when the public body concurs with subjects of private law or when liability is claimed directly against the entity of private law through which the public entity has acted or against the insurer that covers its liability."*

### **Change of the competent Jurisdictional Order?**

As it has been repeatedly confirmed by the Spanish Supreme Court (See for all *Judgment of the 15<sup>th</sup> October, 616/2013*), until now, in claims for damages caused by the Public Administration, it was possible to bring proceedings before the Civil Courts when the only defendant against whom proceedings were being issued was the insurer of the Public Administration on its own. That was possible thanks to the direct right of action against insurers recognised in Article 76 of the Spanish Insurance Contract Act. This, along with the wording of Article 9.4 of the Organic Law of the Judicial Power which, with some obscurantism, states that Administrative Courts should have jurisdiction over the claims brought against the insurers of the Administration only when pursued jointly with the Administration, determined the above interpretation by the Supreme Court (when Insurers are not joint defendants with the Administration but defendants on their own then proceedings do not have to be brought before Administrative Courts but before Civil Courts).

The position might now change after the entering into force of the LLFPS and its Article 35 which states that

even where a claim is brought against the insurer of the Public Administration the validity of the claim will be determined by the provisions of the same LLFPS.

It is not clear at all what the legislator meant with this but the likely interpretation intended by the legislator may be that any claim for damages pursued directly against the Public Body's insurers should be governed by Administrative Laws and therefore be heard by Administrative Courts. Following this, Courts may understand that the legislator's will was that from now on the Administrative Courts' jurisdiction should attract the claims against the insurers of the Public Administration.

On the other hand, one may also argue that the referral made by Article 35 to the provisions under the LLFPS would be only considered from the point of view of substantive law but not on the grounds of the procedure. The reason for this is that any other interpretation would clearly contravene Article 76 of the Spanish Insurance Contract Act which has not been amended and therefore still recognizes the direct right of action against all insurers which, in attendance to the relevant case law should be pursued through the Civil Courts.

### **Potential effects on the limitation periods**

The interpretation of Article 35 could therefore have an important impact on the procedure to follow in claims pursued directly against the insurers of a Public Administration. First of all, before going to court, the mandatory administrative procedure would have to be exhausted. This administrative procedure should be issued before the relevant Public Body within a year from the loss, and this limitation period cannot be interrupted. This is a dramatic change from the current situation applicable until now where if the injured party decided to pursue his claim against the insurer of the Administration, civil procedural rules applied and therefore the limitation period, although of a year too, could be interrupted as many times as the injured party deemed fit.

Once the administrative procedure has been initiated and after a decision is taken by the relevant Public Body, which (if no extraordinary extension has been used by the administration) should be within six months from the initiation of the procedure (otherwise the legal fiction of a by-defect rejection is applied) a claim before the Administrative Courts would have to

be issued within two months from the positive resolution or six months from the by-defect rejection.

### **Potential effects on cross border claims**

Another important consequence that the new legal framework may bring with it, especially grievous for claimants from other EU Member States, would be that the courts in their countries would no longer have jurisdiction to hear their cases by exercising the direct right of action against the Public Body's insurer in the courts of the claimant's domicile. This is possible thanks to EU Regulations and the *Odenbreit* decision that establish that, where a direct right of action is permitted by the applicable law, the insurance company of the party responsible for the damage, can be sued in the country of domicile of the claimant.

If Article 35 of LLFPS is strictly applied, the possibility to issue proceedings against the insurer of the Spanish Administration in the courts of the country of domicile of the claimant may no longer exist since the action against the insurance company of the Public Body will have to be brought before the Spanish Administrative Courts along with the relevant Public Body responsible for the damage.

This is, obviously, going to be the subject of strong discussions bearing in mind that such interpretation would mean that the direct right of action recognized under Article 76 of the Spanish Insurance Act would no longer be recognized in these cases.

We are acting in numerous cases where claimants are pursuing their direct right of action against insurers of Spanish local authorities, public hospitals and airport authorities in the jurisdiction where they are domiciled. Should you require further information on this subject, please do not hesitate to contact:



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