

**Special Information Briefing COVID-19 (No. 8):
Key details on the first tranche of the Official Credit Institute's guarantee
facility for companies and self-employed individuals to alleviate the
economic effects of COVID-19**

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1. Introduction

On 26 March 2020, a Resolution of the Spanish Council of Ministers of 24 March 2020 was published, approving the details of the first tranche of the Official Credit Institute's ("ICO") guarantee facility for companies and self-employed individuals, to alleviate the economic effects of COVID-19¹ (the "**Council of Ministers' Resolution**").

The Council of Ministers' Resolution implements one of the measures established in Royal Decree-Law 8/2020, of 17 March, on urgent extraordinary measures to deal with the economic and social impact of COVID-19 (**RDL 8/2020**). These measures consist of the approval of a guarantee facility on behalf of the State, for a total amount of up to EUR 100 billion, to guarantee the financial debt (existing or new) of companies and self-employed individuals with respect to financial institutions² in relation to certain working capital and liquidity needs of such companies and professionals, as a means of mitigating the adverse effects of a liquidity crisis caused by COVID-19 (the "**Guarantee Facility**") on the business community.

For further information on the measures included in the aforementioned RDL 8/2020, please consult our Information Briefing of 18 March 2020, which can be found [here](#).

This first guarantee facility approved by the Council of Ministers is in keeping with the Temporary Framework of the State aid measures to support the economy in the face of the current COVID-19 outbreak, which was adopted by a Communication of the European Commission of 19 March 2020³ (the "**Temporary Framework**"). The Guarantee Facility was declared to be compatible State aid by the Commission's decision of 24 March 2020⁴ (the "**Commission's Decision**"), which was published yesterday.

In this Briefing, we will analyse the Guarantee Facility, as it is set out in the Council of Ministers' Resolution, with the additional information provided by the Commission's decision.

¹ Resolution of 25 March 2020, of the State Secretariat for the Economy and Business Support, Resolution of the Council of Ministers of 24 March 2020, approving the details of the first tranche of the ICO guarantee facility for businesses and the self-employed, to alleviate the economic effects of COVID-19.

² According to the Resolution of the Council of Ministers, financial institutions shall mean 'credit institutions, financial credit institutions, electronic money institutions, and payment institutions'.

³ Communication from the Commission of 19 March 2020. Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak. C (2020) 1863 final. Available [here](#).

⁴ European Commission Decision of 24 March 2020, State aid SA.56803 - Spain COVID-19 - Guarantee scheme for companies and self-employed persons to support the economy in the current crisis COVID-19. C (2020) 1925 final. Available [here](#). The authentic version of the decision is in English.

2. Main features of the Guarantee Facility

The Council of Ministers' Resolution establishes the terms of the first tranche of the Guarantee Facility, for an amount of up to EUR 20 billion, divided into two sub-tranches of EUR 10 billion each:

- (i) a first sub-tranche to guarantee financing operations granted to the self-employed and to small and medium enterprises ("**SMEs**"); and
- (ii) a second sub-tranche to guarantee financing operations granted to businesses that do not qualify as SMEs.

According to the Council of Ministers' Resolution (by reference to the Block Exemption Regulation⁵), "**SMEs**" are defined as undertakings with fewer than 250 employees and an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million.

The Commission's Decision provides that, according to European Union law on State aid, the Council of Ministers' Resolution includes three guarantee facilities:

- (i) a first facility for refinancing operations and new loans of less than EUR 1.5 million for the self-employed, SMEs and large companies
- (ii) a second facility for the self-employed and SMEs which have a need for funding in excess of EUR 1.5 million
- (iii) a third facility for large companies with a need for funding in excess of EUR 1.5 million⁶

The Commission's Decision notes that the Spanish authorities have considered that the guarantees granted under the first facility can be regarded as *de minimis* aid, so that, in accordance with the *Minimis* Regulation⁷, such aid does not have to be communicated to the European Commission. Consequently, in its decision, the Commission did not examine the compatibility of the aid with the internal market.

3. Management by the Official Credit Institute

Although the amounts corresponding to the losses that may arise from the execution of the guarantees, as well as the administration and management costs relating to them, will be covered

⁵ Commission Regulation (EU) n° 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in accordance with Articles 107 and 108 of the Treaty (the "**Block Exemption Regulation**") OJ L 187, 26.6.2014, p. 1

⁶ Paragraph (8) of the Commission's Decision.

⁷ Commission Regulation (EU) n° 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de Minimis* aid (the "**Minimis Regulation**") OJ L 352, 24.12.2013, p. 1.

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by the Ministry of Economic Affairs and Digital Transformation's budget item, which has been established for this purpose, the Guarantee Facility will be managed by the ICO, in collaboration with financial institutions, in circumstances where the ICO has been authorised to carry out all the actions necessary for the effective implementation of the Guarantee Facility within 10 days of the adoption of the Council of Ministers' Resolution (i.e. no later than 3 April 2020). In addition, the Council of Ministers' Resolution empowers the Minister of Economic Affairs and Digital Transformation to adopt the necessary measures to ensure the appropriate distribution of the Guarantee Facility among the relevant parties.

The ICO must also inform the Ministry of Economic Affairs and Digital Transformation about the use of the Guarantee Facility on a fortnightly basis, and resolve any incidents that may arise in relation to it.

In consideration for its participation, the ICO will charge a flat-rate management and administration fee of 0.05%, calculated on the volume of the guaranteed portfolio.

At the time of publication of this Briefing, the ICO has not yet effectively implemented the Guarantee Facility

4. Eligible loans

The Council of Ministers' Resolution provides that the guarantees granted under the Guarantee Facility will secure both new loans and renewals of existing financing operations granted by financial institutions (irrespective of the source of their funding⁸) to companies and self-employed individuals to meet financing needs arising, *inter alia*, from the payment of salaries, invoices, working capital requirements or other liquidity needs, including those arising from the maturing of financial or tax obligations.

Although the Council of Ministers' Resolution expressly mentions "eligible loans", the scope of the Guarantee Facility is not limited to lending operations in a strict sense but to financing operations in a broader sense.

The Commission's Decision states that the Guarantee Facility is open to all sectors and will apply throughout Spain. It also provides that the financing operations may be applied to both investment objectives and working capital requirements⁹.

5. Eligible borrowers

The Council of Ministers' Resolution establishes that only companies and self-employed individuals with their registered office in Spain and who have been affected by the economic effects of COVID-19 may apply for these guarantees, provided that they were not in a situation of default as of 31

⁸ If the financing operation granted by a financial institution is partially financed by the ICO, the scheme provided for in the Council of Ministers' Resolution will also apply to the participation of the ICO under the same conditions as the collaborating financing institution.

⁹ Paragraphs (17) and (18) b) of the Commission's Decision

December 2019, or subject to a bankruptcy procedure (or in any of the situations provided in Article 2.4 of Law 22/2003, of 9 July, on Bankruptcy) on 17 March 2020.

The Commission's Decision provides that financial institutions are excluded as eligible final beneficiaries¹⁰.

6. Objective scope of coverage of guarantees

Guarantees shall guarantee financing operations with the following terms:

- (i) Financing operations must have been concluded or renewed after 17 March 2020. The deadline for requesting guarantees is 30 September 2020, although, as stated in the Commission's Decision, this deadline may be extended until 31 December 2020 by a new Council of Ministers' Resolution, as set out in the Temporary Framework¹¹.
- (ii) The Council of Ministers' Resolution refers to the Temporary Framework for setting the maximum amounts per operation.

In this respect, the Commission's Decision provides that, for loans with a maturity beyond 31 December 2020, the amount of the principal of the loan must comply with one of the following alternative conditions:

- It must not exceed twice the annual wage costs of the beneficiary (including social security charges and the cost of staff working on the company premises but formally on the payroll of a subcontractor) for 2019 or the last year available. In the case of companies set up after 1 January 2019, the maximum amount of the loan may not exceed the estimated annual wage costs for the first two years of activity; or
 - It must not exceed 25 % of the total turnover of the beneficiary in 2019; or
 - With appropriate justification and on the basis of self-certification by the beneficiary of its liquidity needs, the amount of the loan may be increased to cover the liquidity needs for a period of eighteen months from the time it is granted in the case of SMEs, and twelve months from the time it is granted in the case of large companies¹².
- (iii) The duration of the guarantee shall be equal to that of the financing operation, up to a maximum of 5 years.

¹⁰ Paragraph (17) of the Commission's Decision

¹¹ Paragraphs (18) a) and (19) a) of the Commission's Decision and paragraph (25) c) of the Temporary Framework

¹² Paragraph (18) c) of the Commission's Decision

- (iv) The maximum percentage guaranteed by the guarantee will be (i) 80% of the financing operations (in respect of both new financing operations or the renewal of existing financial operations) undertaken by the self-employed and SMEs; (ii) 70% of new financing operations undertaken by companies that do not qualify as SMEs; and (iii) 60% of renewals of financing operations undertaken by companies that do not qualify as SMEs.

7. Fees of guarantees

The Council of Ministers' Resolution establishes the fees to be charged on the guarantees, which must be assumed by the financial institutions and which will be between 20 and 120 basis points depending on the amount of the guaranteed financing operation, the term of the operation and the financial position of the beneficiary of the guarantee. Thus:

- (i) The fees on guarantees granted for loans of up to EUR 1.5 million shall be 20 basis points on the balance of the total amount guaranteed
- (ii) The fees on guarantees granted to self-employed individuals or companies that are not considered SMEs for operations with a nominal amount exceeding EUR 1.5 million shall be:
- 20 basis points per year for guarantees with a maturity date of 1 year or less.
 - 30 basis points per year for guarantees with a maturity date due in 1 to 3 years.
 - 80 basis points per year for guarantees with a maturity date due in 3 to 5 years.
- (iii) The fees on guarantees granted to companies that are not considered SMEs for new operations with a nominal amount exceeding EUR 1.5 million shall be:
- 30 basis points per year for guarantees with a maturity date due in 1 year or less.
 - 60 basis points per year for guarantees with a maturity date due in 1 to 3 years.
 - 120 basis points per year for guarantees with a maturity date due in 3 to 5 years
- (iv) The fees on guarantees granted to companies that are not considered SMEs for renewal operations with a nominal amount of more than EUR 1.5 million shall be:
- 25 basis points per year for guarantees with a maturity date due in 1 year or less.
 - 50 basis points per year for guarantees with a maturity date due in 1 to 3 years.
 - 100 basis points per year for guarantees with a maturity date due in 3 to 5 years.

The Commission's Decision provides that the fees for guarantees is progressive over time and increases each year in relation to the capital outstanding until the final maturity of the underlying financing operation in order to incentivise early repayment¹³.

8. The priority of collections in the event of recoveries after the execution of the guarantees

The guarantees granted under the Guarantee Facility will have a "*pari passu*" rank, so that, in the event of the execution of a guarantee, the financial institution must pay the ICO the percentage of the sums recovered equivalent to the guaranteed risk, if any, of the unpaid amounts. The Commission's Decision explains that the losses are sustained proportionally, and under the same conditions, by the financial intermediary and the Spanish State¹⁴.

9. Cost of the guaranteed financing for borrowers and maintenance of working capital facility limits

The Council of Ministers' Resolution establishes that those financial institutions that grant financing guarantees through the Guarantee Facility must comply with the following requirements:

- (i) the costs of new loans and refinancing operations that benefit from these guarantees will be in line with the costs charged before the start of the COVID-19 crisis, taking into account the guarantee and its cost of coverage; and
- (ii) the limits of the working capital facilities granted to all its clients and, in particular, to those clients whose loans are guaranteed by the Guarantee Facilities must be kept unchanged (until at least September 30, 2020).

The Commission's Decision states that the financial institutions will pass on the advantages of the public guarantee to the final beneficiaries, and that, to this end, a supervisory system must be established. The Commission's Decision also recognises that the drawdown of the guarantees may be contractually linked to specific conditions, which are agreed between the parties when the guarantee is initially granted¹⁵.

10. Possible accumulation of aid

According to the Commission's Decision, the Guarantee Facility cannot be combined with other aid that Spain may grant in the future in the form of subsidised interest rates for loans, in circumstances where it is all related to the same financing operation¹⁶.

However, the Commission accepts that the aid under this measure may be combined with other compatible aid, *de minimis* aid or with other forms of financing provided that the maximum levels

¹³ Paragraph (19) f) of the Commission's Decision

¹⁴ Paragraph (19) c) of the Commission's Decision.

¹⁵ Paragraphs (19) i) and (20) of the Commission's Decision.

¹⁶ Paragraph (22) of the Commission's Decision.

of aid provided in the relevant Guidelines or Block Exemptions Regulations (“GBER”) are complied with and states that the aid limits and maximum combination levels established under the measure shall apply regardless of whether the support for the project is financed entirely from State resources or partly financed by the European Union¹⁷.

11. Monitoring and reporting

The Commission’s Decision provides the monitoring and reporting obligations of the Spanish State laid down in the Temporary Framework¹⁸.

In this respect, the Temporary Framework requires, *inter alia*, that, by 31 December 2020, Member States must provide the Commission with a list of the measures taken under the Temporary Framework and that Member States keep detailed records of the aid which is granted. Such records, which must contain all the information necessary to determine compliance with the established conditions, must be maintained for 10 years upon granting of the aid and must be handed over to the Commission on request.

In particular, the Commission’s Decision establishes in this regard, that the Spanish authorities shall provide information demonstrating that none of the beneficiaries were companies in financial difficulty on 31 December 2019 within the meaning of the GBER.

12. The legality of the measure and availability of State aid

The Commission’s Decision declares that the measure was communicated by Spain before its implementation and that the aid is therefore considered lawful within the meaning of Article 108(3) of the Treaty on the Functioning of the European Union (“TFEU”). Furthermore, the Commission considers that the measure constitutes aid within the meaning of Article 107(1) of the TFEU.

In this respect, the measure can be attributed to the State because (i) it was enacted by a Royal Decree-Law, (ii) it is administered by the Ministry of Economic Affairs and Digital Transformation and (iii) it involves State resources since it is publicly funded.

The Commission considers that the measure is selective since it is awarded only to certain undertakings that fulfil the aforementioned conditions. Furthermore, the second guarantee facility applies only to self-employed individuals and SMEs, and the third guarantee facility applies only to large undertakings, and the measure applies only to undertakings registered in Spain. Although it applies to all business sectors, credit institutions are excluded as eligible final beneficiaries.

According to the Commission’s Decision, the measure confers an advantage on its beneficiaries in the form of guarantees on loans because it relieves those beneficiaries of costs, which they would have had to bear under normal market conditions. In addition, it is likely to distort competition,

¹⁷ Paragraphs (21) and (23) of the Commission’s Decision.

¹⁸ Paragraph (24) of the Commission’s Decision.

since it strengthens the competitive position of its beneficiaries. It also affects trade between Member States, since those beneficiaries are active in sectors in which intra-Union trade exists.

13. Compatibility of aid

The Commission has declared that the Guarantee Facility is compatible with the internal market in accordance with Article 107(3)(b) of the TFEU, which allows the declaration of the compatibility of aid granted by Member States in order “to remedy a serious disturbance in the economy of a Member State”.

The Commission accordingly considers that the measure is necessary, appropriate and proportionate to remedy a serious disturbance in the economy of a Member State and meets all the conditions of the Temporary Framework, *inter alia*, for the following reasons:

- (i) The increased degree of risk-sharing ensures a sufficient incentive for intermediary financial institutions to adequately assess the risk of providing a loan. The Commission attaches particular importance to the compulsory and additional analysis of the risk profile that the ICO must carry out before the approval of the new loan or refinancing operation for all transactions above EUR 50 million.
- (ii) The guarantees cover up to 80%, 70% or 60% of the loan principal, and the losses stemming from the loans are sustained proportionally and under the same conditions by the financial institutions and the State. Furthermore, when the size of the loan decreases over time, the guaranteed amount decreases proportionally.
- (iii) The measure introduces safeguards in relation to the possible indirect aid in favour of the credit institutions or other financial institutions to limit undue distortions to competition. Such safeguards ensure that these institutions, to the largest extent possible, pass on the advantages of the measure to the final beneficiaries. Moreover, credit institutions are excluded as eligible final beneficiaries.
- (iv) The Commission notes that the financial intermediary must be able to demonstrate that it has put in place a mechanism that ensures that the advantages are passed on, to the largest extent possible, to the final beneficiaries. In this respect, the Commission observes that the beneficiary undertakings are experiencing substantial losses hampering their ability to service expensive debt. Considering the banks’ relatively high exposure to the loans, they have an incentive to offer loans on the most favourable terms possible to prevent the undertaking from defaulting, both on the new loan and any other, older loans granted earlier. The Commission also takes into account the fact that all commercial banks have, in principle, access to the guarantee scheme, creating competition between the banks. Finally, the Commission welcomes the obligation that the costs applied by the banks to the new loans and the refinancing operations will have to be in line with those applied before the start of the COVID-19 crisis, thus minimising possible benefits retained by the financial intermediaries.

14. Compliance with the Framework on Bank Resolution

Finally, without prejudice to the possible application of the BRRD¹⁹ or the SRMR²⁰, in the event that an institution benefiting from the measures meets the conditions for the application of that Directive or of that Regulation, the Commission notes that the communicated measures do not appear to violate intrinsically linked provisions of the BRRD or the SRMR.

Even though the measure may also constitute an indirect advantage to the financial institutions, such indirect aid granted under the measure does not have the objective of preserving or restoring the viability, liquidity or solvency of those institutions. The objective of the measure is to remedy the liquidity shortage faced by undertakings that are not financial institutions and to ensure that the disruptions caused by the COVID-19 outbreak do not undermine the viability of such undertakings, especially of SMEs.

As a result, aid granted under the measure does not qualify as extraordinary public financial support under Art. 2(1) No 28 of the BRRD and Art. 3(1) No 29 of the SRMR.

The information contained in this Information Note is of a general nature and does not constitute legal advice. This document was prepared on 28 March 2020 and Pérez-Llorca does not assume any commitment to update or review its contents.

¹⁹ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (“BRRD”), OJ L 173, 12.6.2014, p. 190.

²⁰ Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (“SRMR”), OJ L 225, 30.7.2014, p. 1.