

Special Information Briefing on COVID-19 (Nº 27):

Royal Decree-law 25/2020 of 3 July on urgent measures to support economic recovery and employment

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Madrid, 8 July 2020

On 6 July 2020, Royal Decree-law 25/2020 of 3 July on urgent measures to support economic recovery and employment, ("**RDL 25/2020**"), was published in the Official State Bulletin and entered into force on 7 July. RDL 25/2020 establishes a series of measures, mainly of an economic nature, which expand upon and enhance those already adopted by means of the Royal Decree-laws approved in recent months to promote economic recovery following the end of the state of alarm approved by virtue of Royal Decree 463/2020 of 14 March, which declared the state of alarm for the management of the health crisis caused by COVID-19 ("**Royal Decree 436/2020**"), and its respective extensions.

Among other measures, RDL 25/2020 (i) provides for the creation of a fund to support the solvency of strategically important companies; (ii) approves a guarantee facility aimed at encouraging financing for investment; and (iii) includes a package of measures to support the tourism sector, including the approval of a moratorium on the payment of the principal of loans secured by mortgages on property used to operate businesses in the tourism sector.

We will briefly analyse these measures in this Special Information Briefing.

1. Solvency support fund for strategically important companies

RDL 25/2020 creates a fund to support the solvency of strategically important companies (the "**Fund**"), which will be initially endowed with EUR 10 billion and whose objective is to provide temporary public support to strengthen the business solvency of non-financial companies that are considered strategically important to national or regional business sectors, and that have been affected by the COVID-19 pandemic.

Although the operation, mobilisation of resources and liquidation of the Fund, as well as the applicable conditions and requirements to be met in these operations to support the solvency of strategically important companies, will be determined in the coming days by a Resolution of the Council of Ministers, RDL 25/2020 outlines the main aspects of these measures, which are analysed below.

A. Purpose and beneficiaries

The purpose of the Fund is to provide temporary public support to strengthen business solvency, through the granting of participating loans, subordinated debt, share issues or other capital instruments, to non-financial companies, which:

- (i) are experiencing severe temporary difficulties as a result of the COVID-19 pandemic; and

(ii) are considered strategically important to national or regional business sectors.

Among the reasons that justify this consideration as strategically important companies, RDL 25/2020 identifies the significant social and economic impact of these businesses, their relevance for security, healthcare, infrastructure, communications, and their contribution to the proper functioning of the markets.

B. Legal nature, applicable rules and compatibility with State aid

The Fund has no legal personality and will be managed through the State Company of Industrial Shareholdings (*Sociedad Estatal de Participaciones Industriales*) (SEPI) by a newly created management board (the Management Board of the Fund to Support the Solvency of Strategically Important Companies), attached to the Ministry of Finance. In all operations and actions relating to the Fund, SEPI will act in the name and on behalf of the General State Administration, acting as a custodian of the securities and contracts representing the transactions carried out, as well as exercising the rights that, as an administrator, may correspond to the involvement of the General State Administration.

The Fund is governed by the provisions of Law 40/2015, of 1 October, on the Legal System for the Public Sector, by Royal Decree 25/2020 and by the other applicable rules of general and special administrative law, and complies with the European Commission's regulations on State Aid.

In this regard, it should be noted that on 8 May the European Commission approved the amendment of the Temporary Framework on State Aid measures to support the economy in light of the current outbreak of COVID-19, approved by the European Commission's Communication of 19 March 2020 ("**Temporary Framework**"). The main new feature included in this amendment to the Temporary Framework is that it established the criteria that the European Commission will apply to allow Member States to provide public support in the form of equity and/or hybrid capital instruments to companies facing financial difficulties due to the COVID-19 outbreak. Our Special Information Briefing on the Temporary Framework can be found here. In line with these regulations, RDL 25/2020 states that operations financed by the Fund will comply with the European Commission's State Aid rules and in particular with the Temporary Framework.

It should be noted that the Temporary Framework establishes certain requirements to be taken into account by potential beneficiaries of the Fund and of the recapitalisation measures to be adopted, among which the following are noteworthy because of their relevance:

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- (i) Until the recapitalisation funds have been fully repaid, beneficiaries may not make dividend payments, non-mandatory coupon payments, or buy back shares, except in relation to the State.
- (ii) Until at least 75% of the recapitalisation funds have been repaid, the remuneration of each member of the management of the beneficiaries must not exceed the fixed part of their remuneration as of 31 December 2019. For persons who become members of the management at or after the recapitalisation, the applicable limit is the lowest fixed remuneration of any of the members of the management as of 31 December 2019. Under no circumstances will bonuses or other elements of variable or comparable remuneration be paid.

C. Access to the Fund, instruments, and operation

The Fund, with an initial allocation of EUR 10 billion, will be deployed through various instruments on a case-by-case basis, including:

- (i) the granting of equity loans;
- (ii) the acquisition of subordinated debt; or
- (iii) the issuance of shares or other equity instruments.

Interested companies must apply for access to the Fund. The authority to approve these applications is vested in the Management Council of the Fund, and the authorisation of the Council of Ministers is required for the approval of operations. From the time the application is submitted, the maximum period for resolution shall be six months, and once this period has elapsed without an express resolution having been issued and communicated, it shall be understood that the application has been rejected. The resolutions of the Management Board will end the administrative procedure and an appeal for judicial review may be lodged against them.

The amount of the dividends, interest, capital gains and other income resulting from (a) the investments or transactions carried out, (b) the participation, where applicable, in the managing bodies of the applicant companies, or (c) the divestments and reimbursements made, shall be paid into the Public Treasury and shall be considered income under public law.

It is important to note that the Fund's acquisition of shareholdings in these companies will be exempt from the obligation to make a takeover bid in the cases provided for in Articles 128 and 129 of Royal Legislative Decree 4/2015 of 23 October, adopting the revised text of the Securities Market Law.

2. Guarantee facility

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**") approved an initial guarantee facility on behalf of the State, for a total amount of up to EUR 100 billion. The purpose of this guarantee facility was to guarantee the financial debt assumed by companies and self-employed individuals in respect of their working capital and liquidity needs, in order to mitigate the adverse effects of a liquidity crisis caused by COVID-19.

Article 1 of the RDL now provides for the creation of a new guarantee facility, to be granted by the Ministry of Economic Affairs and Digital Transformation for financing granted by supervised financial institutions to companies and self-employed individuals. The objective of this new guarantee facility is different, as it will be aimed mainly at meeting the financial needs of these companies and self-employed individuals resulting from the implementation of new investment projects in the industrial sector.

This new guarantee facility will also be implemented by the Official Credit Institute (ICO), and guarantees may be granted until 31 December 2020 for a maximum amount of EUR 40 billion.

The specific features of the guarantee facility, the percentages of coverage, and its distribution in tranches will be established by Resolution of the Council of Ministers in the coming weeks, with no further regulatory steps required for its implementation. In any case, it has been anticipated that it is planned to replicate the approval and management model of the previous guarantee facility, in order to optimise the resources and the flow of funds into the industrial sector.

3. Measures to support the tourism sector

A. Mortgage moratorium for the tourism sector

RDL 25/2020 establishes a new moratorium on the payment of the principal of mortgage loans granted to finance properties used to operate businesses in the tourism sector, applicable to those self-employed individuals and legal entities with a registered office in Spain who are experiencing financial difficulties as a result of the health emergency caused by COVID-19 (the "**Tourism Moratorium**").

(i) Scope of the Tourism Moratorium

The Tourism Moratorium will apply to loan agreements subject to Spanish law that have a mortgage guarantee over a property that is affected by the performance of a business activity in the tourism sector carried out in the national territory of Spain,

only in circumstances where said loan agreements were signed prior to the entry into force of Royal Decree 463/2020, and provided that:

- they are held by self-employed individuals or legal entities with a registered office in Spain who are experiencing financial difficulties as a result of the health crisis caused by COVID-19; and
- said loan has not been subject to any of the moratoriums approved by RDL 8/2020, Royal Decree-law 19/2020, or other moratoriums voluntarily agreed between the borrower and the lender after the entry into force of Royal Decree 436/2020.

If the loan has been subject to any of these moratoriums for a period of less than twelve (12) months, the borrower may benefit from the Tourism Moratorium for the remaining time up to a maximum of twelve (12) months. Also, in the event that a voluntary moratorium has been agreed between the borrower and the lender, the borrower may waive the moratorium in order to benefit from the Tourism Moratorium.

(ii) Definition of "tourism sector activity" and "financial difficulties as a result of the health crisis caused by COVID-19"

For the purposes of RDL 25/2020, activity in the tourism sector is understood to be that which is included in one of the following codes of the National Classification of Economic Activities (CNAE): 5510 (Hotels and similar accommodation), 5520 (Tourist accommodation and other short-stay accommodation) and 7911 (Travel agency activities).

Financial difficulties as a result of the health crisis are deemed to exist in circumstances where the mortgage borrowers referred to in RDL 25/2020 have experienced, in the monthly average of the months from March to May 2020, a reduction in income or turnover of at least 40% when compared to the monthly average of the same months of the year 2019.

Evidence of the reduction in income or invoicing shall be provided by means of the accounting information that supports it, which may be done through (i) a copy of the record of invoices issued and received, (ii) the daily record of income and expenses, (iii) the record of sales and income, or (iv) the record of purchases and expenses. In the case of self-employed individuals who are not required to keep the abovementioned records, they must provide evidence of the reduction required by any legally admissible means of proof.

Financial difficulties as a result of a health crisis are not considered to exist when:

- the loan is in arrears when RDL 25/2020 comes into force, having been in default (either in full or in part) in respect of any of its repayments since before 1 January 2020; and
- the borrower's insolvency proceedings have been declared prior to the entry into force of Royal Decree 436/2020.

(iii) Requirements for applying for the Tourism Moratorium

The Tourism Moratorium may be applied for from the entry into force of RDL 25/2020 until 30 September 2020.

Along with this application, applicants must provide evidence of:

- the corporate purpose of the business;
- their tax domicile;
- the CNAE code of their activity;
- that the property is directly affected by the performance of a business in the tourism sector; and
- that there are financial difficulties as a result of the health crisis caused by COVID-19. This shall be demonstrated in accordance with the provisions of section 3.A.(ii) of this Special Information Briefing.

Once the application for the Tourism Moratorium has been made by the applicant and the required evidence has been provided, the lender will proceed to apply it automatically, executing the renewal in accordance with the general rules.

(iv) Effects of the Tourism Moratorium

The Tourism Moratorium will have the following effects:

- The Tourism Moratorium will be applied to payments due and unpaid from 1 January 2020 and will entail the suspension of loan principal payments during the

period requested by the borrower (up to a maximum of twelve (12) months), without any modification of the rest of the agreed conditions.

- For the repayment of the deferred amount, the borrower may choose between:
 - a. redistribution of the payments, without changing the maturity date and without altering the applicable interest rate; or
 - b. the extension of the due date by a number of months equivalent to the duration of the Tourism Moratorium requested by the borrower.
- In the event of an extension of the initial term of the loan, the registration of such renewal shall be fully effective against the registered intermediate lenders, even if they do not consent to it.
- The application of the Tourism Moratorium will be extended to the guarantors, without the necessity of their consent or opposition.
- The amounts that would be due to the borrower if the Tourism Moratorium were not to be applied shall not be considered overdue.
- The principal of the loan whose payment is deferred will accrue the ordinary interest established in the loan agreement during the application of the Tourism Moratorium.
- The recognition of the application of the Tourism Moratorium will not be subject to the provisions of Law 5/2019, which regulates real estate credit agreements.
- Legal entities that request the Tourism Moratorium will not be able to distribute profits, make returns of capital, repurchase their own shares, or return the capital in any form until the Tourism Moratorium has ended.

(v) Tourism Moratorium and the leasing of real estate used for tourism activities

In the event that the borrower applies for the Tourism Moratorium, if the property affected by the activity of the tourism sector has been the subject of a lease agreement, the beneficiary of the Tourism Moratorium must grant the tenant a moratorium on the payment of the rent equal to at least 70% of the amount of the Tourism Moratorium. This is provided that said moratorium or the total or partial waiver of the same has not already been achieved by agreement between both parties.

In the event that the financial difficulties due to the health crisis caused by COVID-19 mentioned in section 3.A. (ii) above do not affect the borrower, but do affect the tenant, the tenant may urge the borrower to request the Tourism Moratorium. For this purpose, the tenant will provide the borrower with the necessary information as evidence of the circumstances that allow the application of the Tourism Moratorium. In this case, the prohibition on distributing profits, making capital returns, repurchasing own shares, or returning capital will apply to the tenant and not to the borrower until the Tourism Moratorium has ended.

(vi) Consequences of the improper application of the protection provided for in RDL 25/2020

The borrower who has benefited from the Tourism Moratorium without meeting the requirements of RDL 25/2020, will be responsible for any damage that may have occurred, as well as all expenses generated by the application of these measures, without prejudice to any other liabilities to which the conduct of the borrower may give rise (e.g. criminal liability). The amount of damages and expenses imposed in such circumstances may not be less than the benefit unduly obtained by the borrower as a result of the improper application of the legislation.

B. Extraordinary system of financing projects for the digital transformation and innovation of the tourism sector

Articles 11 and the subsequent articles of RDL 25/2020 establish the regulatory basis for an extraordinary financing facility, aimed at granting financial support to private companies and self-employed individuals in the tourism sector that have been affected by economic losses arising from COVID-19, through the implementation of digital transformation and innovation projects.

This extraordinary financing facility, whose budget allocation will be EUR 216 million for the financial year 2020, will apply to projects or activities carried out in any part of Spain and will cover the investment needs of tourism companies affected by the COVID-19 crisis in relation to digital transformation and innovation.

This extraordinary financing system is established under the Temporary Framework and the Resolutions of the Government's Delegate Committee for Economic Affairs dated 26 March and 17 April 2020, which approved the communication to the European Commission of the Temporary National Framework I and II.

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Self-employed individuals and companies with their own legal personality, legally incorporated in Spain and not belonging to the public sector, which have been affected by economic losses arising from the outbreak of COVID-19, and which operate a business in the tourism sector, are eligible for the financing established in these frameworks.

The projects eligible for this funding are as follows:

- (i) projects that promote the digital transformation of businesses; or
- (ii) tourism research, development, and innovation projects, provided that they do not involve the simple application of research, development, or innovation already carried out.

The following items are eligible for funding: staff costs, costs of equipment and materials that can be inventoried, costs of contractual research, technical knowledge and patents acquired or licensed from external sources under fully competitive conditions, and additional overheads.

The minimum eligible budget will be EUR 50,000 and investments and expenditure made from 1 February 2020 until 31 December 2020 will be eligible. As an exception, for projects started before 1 February 2020, only the necessary actions carried out from that date to accelerate or extend the scope of the project may be financed.

C. Measures to support the extension of the period of employment of workers on discontinuous fixed contracts in the tourism sector, and hospitality sectors linked to tourism activity

The fourth additional provision of RDL 25/2020 provides that companies engaged in activities in the tourism sector, and hotel and restaurant sectors which are linked to the tourism sector, that (i) generate productive activity in the months of July, August, September and October 2020; and that (ii) start or maintain in employment during said months workers with discontinuous fixed contracts, may apply a reduction in said months of 50 percent of the business contributions to Social Security for common contingencies, as well as for the items of joint collection of Unemployment, FOGASA and Professional Training of said workers.

The contribution reductions will be applied by the General Treasury of Social Security at the request of the company, after communicating the identity of the workers, and after the presentation of a statement of compliance, with respect to each contribution account code and month of accrual, regarding their link to the tourism sector. These rebates will be compatible with the exemptions from company Social Security contributions. The amount

resulting from the application of the exemptions and these allowances may not, in any case, exceed 100% of the business contribution that would have been due.

D. Sustainable Tourism Plans in Destinations

RDL 25/2020 also creates an instrument called "Sustainable Tourism Plans in Destinations", to provide the Secretariat of State for Tourism with support for investment in actions to promote, adapt and improve tourism destinations in order to increase their sustainability.

4. Other measures: suspension of the right of separation

The fourth final provision amends Article 40.8 of RDL 8/2020.

Until now, this article established the suspension of the right of separation of the shareholders of corporations, even if there were legal or statutory reasons, until the state of alarm and its subsequent extensions ended. Now, once these terms have expired, the new paragraph of Article 40.8 suspends until 31 December 2020 the right of separation provided for in sections 1 and 4 of Article 348 *bis* of the consolidated text of the Companies Act, approved by Royal Legislative Decree 1/2010, of 2 July regarding the right of separation in the event of non-distribution of dividends.

The information contained in this Information Briefing is of a general nature and does not constitute legal advice. This document was prepared on 8 July 2020 and Pérez-Llorca does not assume any commitment to update or revise its contents.