

Special Information Briefing COVID-19 (No. 29):

Order PCM/679/2020, of 23 July, publishing the Agreement of the Council of Ministers of 21 July 2020, which establishes the operation of the solvency support Fund for strategically important companies.

Index

1. Content of the Agreement of the Council of Ministers
2. Annex I
3. Annex II: Conditions applicable to transactions financed using the Fund
4. Annex III

Madrid, 27 July 2020

On 24 July 2020, Order PCM/679/2020, of 23 July, publishing the Agreement of the Council of Ministers of 21 July 2020, which establishes the operation of the solvency support Fund for strategically important companies (“**Order PCM 679/2020**”) was published in the Official State Bulletin. Order PCM 679/2020 establishes the set of requirements to be met by beneficiaries of transactions providing temporary public solvency support, which are financed using the Solvency Support Fund for Strategically Important Companies (the “**Fund**”).

The Fund was originally created via Royal Decree-law 25/2020, of 3 July, on urgent measures to support economic recovery and employment (“**Royal Decree-law 25/2020**”). Our briefing from 7 July 2020, in which we analysed the main aspects of the creation of the Fund, among other matters, is available [here](#).

In turn, both the Fund and the recent Order PCM 679/2020 must be considered in the context of the approval by the European Commission, on 8 May, of the Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, approved by the European Commission's Communication of 19 March 2020 (the “**Temporary Framework**”). The main development included in this amendment of 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 this scenario, Order PCM 679/2020 publishes the Agreement of the Council of Ministers establishing the operation of the Fund (the “**Agreement of the Council of Ministers**”), which, in turn, includes the following annexes: (i) Annex I, on the description of the operation, mobilisation and liquidation of the Fund, (ii) Annex II, on the conditions applicable to transactions financed using the Fund, and (iii) Annex III, on the composition and functions of the management board of the Fund.

We will briefly analyse the above points in this Special Information Briefing.

1. Content of the Agreement of the Council of Ministers

In compliance with the provisions of Royal Decree-law 25/2020, the Agreement of the Council of Ministers sets out the requirements to be met by the beneficiaries of transactions providing temporary public solvency support that are financed using the Fund. In accordance with the European Union State aid rules, these measures must ensure that the principles of proportionality, equal treatment and protection of the general interest are respected.

This general interest is, in the case of the Fund, in supporting sectors which are of strategic importance because of their contribution to national security or because they are at the forefront

of the economy, in terms of maintaining activity and employment, as well as contributing to medium-term objectives in the area of ecological transition, digitisation, boosting productivity and developing human capital. The State's contribution will be subject to the beneficiary company accepting the conditions to be included in a *Temporary Public Financial Support Agreement*, which must be adopted by its decision-making bodies.

The Agreement of the Council of Ministers states that the Administration will have special rights regarding strategic decisions aimed at ensuring the proper allocation of contributions from the Fund, as well as the fulfilment of the obligations and the protection of the general interest. These rights will be provided for in the corresponding *Shareholders' Agreements* or *Management Agreements with the Company*, as appropriate.

The third point of the Agreement establishes that these contributions are subject to the European Commission's prior declaration of compatibility with the internal market. In addition, interventions exceeding EUR 250 million must be notified individually under the Temporary Framework.

Temporary support transactions financed using the Fund may be granted up to 30 June 2021, or after this date if provided for by the Temporary Framework.

2. Annex I

The first Annex to the Agreement of the Council of Ministers describes the operation of the Fund, its mobilisation and liquidation by the State Company of Industrial Shareholdings (*Sociedad Estatal de Participaciones Industriales*, "SEPI"), establishing the conditions applicable to its accounting and to the internal management of the Fund by SEPI.

3. Annex II: Conditions applicable to transactions financed using the Fund

This Annex is divided into six sections, which provide for the requirements and elements with which transactions that are financed using the Fund must comply.

Section 1 provides for the initiation of the procedure being subject to an express request from the legal representatives of the applicant company.

It also states that the granting and disbursement of the public support will be conditional on the approval of the *Temporary Public Financial Support Agreement*, as well as the aforementioned *Shareholders' Agreements* or *Management Agreements with the Company* (as applicable), in which the strategic decisions of the company that are to become subject to prior authorisation by the management board will be determined.

It establishes that beneficiaries must pay all the credits in favour of the Fund within the time limits and under the conditions set by the Management Board in the *Temporary Public Financial Support Agreement*, and provides that beneficiaries will be able to pay these credits in advance at any

Pérez-Llorca

time, without prior authorisation. In terms of collection, the provisions on public law revenue in the budget rules will apply.

Eligibility criteria for beneficiary companies have also been established. A beneficiary company must meet the following conditions:

- It must be a non-financial company whose registered office and main work centres are located in Spain.
- It must not be a company that was in crisis on 31 December 2019, in accordance with Article 2 (18) of Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.
- It must not have filed for voluntary insolvency, have been declared insolvent in any proceedings, be undergoing insolvency proceedings unless it has acquired the effectiveness of an agreement, be subject to judicial intervention or have been disqualified in accordance with Act 22/2003, of 9 July, on Insolvency, before the end of the period of disqualification set out in the judgment classifying the insolvency proceedings. It may be possible to intervene using the fund in justified cases, on the basis that the declaration opening insolvency proceedings had not occurred before 31 December 2019.
- That, without support from the Fund, the beneficiary would have to cease to operate or face serious difficulties in remaining operational.
- It must demonstrate that a forced cessation of activity would have a major negative impact on economic activity or employment, at a national or regional level.
- It must demonstrate its medium- and long-term viability by submitting, along with its application, a Feasibility Plan as regards overcoming its crisis situation.
- It must present an outline for repayment of state support with an amortisation schedule for the State's nominal investment and the payment of remuneration and the measures to be taken to ensure compliance with the plan for repayment of state support.
- It must report on all the public support measures it has benefitted from over the past ten years in sufficient detail.
- It must not have been sentenced by means of a final judgment whereby the penalty was the loss of the possibility of obtaining subsidies or public aid or for the crimes of corruption, bribery, embezzlement of public funds, influence peddling, fraud and unlawful charges or city-planning crimes.

Pérez-Llorca

- It must not have given rise to, and been found to blame for, the final termination of any contract entered into with the Administration.
- It must be up to date with the payment obligations for the repayment of subsidies or public aid.
- It must have been up to date with the fulfilment of its tax or social security obligations, imposed by the provisions in force, on 31 December 2019.
- It must be able to show the systemic or strategic importance of the business sector or the company.

Section 3 of this Annex provides that support transactions may be carried out using any equity instrument and/or hybrid capital instruments. This section establishes specific rules regarding the use of certain instruments and their capitalisation.

Section 4 sets the minimum amount of these transactions at EUR 25 million per beneficiary, unless an exception is justified. The maximum amount will be the minimum amount necessary to restore the viability of the undertaking, without this leading to an improvement in the net worth of the company compared to that registered at 31 December 2019.

Section 4 also provides that the *Temporary Public Financial Support Agreement* will establish the applicable remuneration levels. Sections 4.3, 4.4 and 4.5 set out the main elements to be taken into account in their calculation.

Section 5 provides for the exit of the State from its stake, establishing that the repayment of the stake acquired by the Fund in the share capital is to be made by the beneficiary at a buy-back price which is the greater of (i) the market price at the time of the repayment, or (ii) the nominal investment by the Fund increased by an annual remuneration equal to the sum of 200 basis points (except in the eighth and subsequent years) and the minimum remuneration, counted from the acquisition of the stake by the State.

It also establishes that the repayment for the stake in share capital from the Fund will be increased by at least 10%, payable in debt or an equivalent instrument, if five years after the capital contribution, the initial stake has not been reduced by at least 40%, with progressive rules for longer-term scenarios provided for in section 5.3.

Beneficiaries can repurchase the stake acquired by the State at any time or make an early repayment of the loans and hybrid instruments granted by or entered into by the State, as well as the remuneration accrued under the terms determined in each case.

Pérez-Llorca

In addition, the Management Board may assign the titles and rights of transactions financed using the Fund to a third party, through open mechanisms that guarantee equal treatment, or through a sale in an organised market, and may offer preference to the company's partners or shareholders.

Section 6 regulates the governance rules which will govern the beneficiary company. First, it establishes that the beneficiary will be subject to the following main restrictions:

- It will be prohibited from advertising its status as beneficiary for commercial purposes.
- Beneficiaries are not allowed to engage in aggressive business expansion financed by state aid, or to take excessive risks.
- Until repayment of at least 75 % of the recapitalisation measures in the context of COVID-19 has been made, the beneficiary company will be prevented from acquiring shares of more than 10 % of companies that are active in the same sector or in upstream or downstream markets, unless the beneficiary does not have the status of a large enterprise, as provided for in Annex I of Commission Regulation (EU) No 651/2014, or has the required authorisation of the European Commission, at the request of the Fund's Managing Board.
- It must establish a separation of accounts to ensure that the support does not turn into support for activities in crisis situations as at 31 December 2019.
- It will be prohibited from distributing dividends, paying non-compulsory coupons or acquiring own shares, except those owned by the State via the Fund.
- Until repayment of 75% of the temporary public support from the Fund has been made, the remuneration of the members of the Board of Directors, the Directors, and those with the highest management responsibility in the company, may not exceed the fixed portion of their remuneration in force at the end of the 2019 financial year. Those who acquire such a status at or following the recapitalisation, will be paid in terms comparable to those with a similar level of responsibility. The payment of premiums or other variable remuneration elements will be prohibited.

To this end, the beneficiary must ensure the above requirements by means of the appropriate corporate resolutions or by-law amendments.

However, certain exceptions or a relaxation of the above measures are provided for, in cases where all the following circumstances are demonstrated: (i) that the State (or its agencies or entities) has a stake in the beneficiary before the intervention by the Fund, and approaches a capital increase under the same conditions as the other partners or shareholders, at a prorated or lower rate than its stake; (ii) that the contribution of private partners or shareholders in such increase is significant and, in any case, when it exceeds 30%; and (iii) that the public contribution

Pérez-Llorca

constitutes state aid because of its special circumstances, or the granting of other benefits in favour of the beneficiary.

Finally, section 7 sets out the duties of transparency and publicity of the transactions which must be ensured, and such duties are reinforced for large enterprises.

4. Annex III

Finally, Annex III lays down the rules for the composition and operation of the Management Board, as an inter-ministerial collegiate body attached to the Ministry of Finance, whose main function will be to manage the fund, as well as to adopt the main decisions affecting it.

The information contained in this Information Briefing is of a general nature and does not constitute legal advice. This Briefing was prepared on 27 July 2020 and Pérez-Llorca does not undertake any commitment whatsoever to update or review its content.