

Royal Decree-law 34/2020, of 17 November, on urgent measures to support business solvency and the energy sector, and in relation to tax matters.

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On 18 November 2020, Royal Decree-law 34/2020 of 17 November, on urgent measures to support business solvency and the energy sector, and in relation to tax matters (“**RDL 34/2020**”), was published in the Official State Bulletin.

RDL 34/2020 includes measures relating to foreign investment, finance, insolvency, corporate matters, energy and tax, which extend and develop those already adopted through the Royal Decree-laws previously approved to deal with the economic and social impact of COVID-19.

1. MEASURES RELATING TO FOREIGN INVESTMENT

RDL 34/2020 amends Article 7 bis of Law 19/2003 of 4 July on the legal regime of the movement of capital and economic transactions abroad, which was introduced by Royal Decree-law 8/2020, of 17 March, on extraordinary urgent measures to address the economic and social impact of COVID-19 (“**RDL 8/2020**”) and 11/2020 of 31 March, adopting additional urgent social and economic measures to deal with COVID-19 (“**RDL 11/2020**”). In particular, the changes introduced are as follows:

A. Definition of foreign direct investment

The definition of foreign direct investment - beyond holding more than 10% of the share capital of a Spanish company - has been amended and (i) legal acts or corporate transactions as a result of which one “effectively participates in the management” of the Spanish company in question are removed from the scope of the regulation; and (ii) it is clarified that the definition and criteria established by Article 7.2 of Law 15/2007, of 3 July, on the Defence of Competition¹ must be used in order to determine what is to be understood by “control”.

B. Sectors affected

Changes are included in some of the sectors affected by the restrictions on foreign direct investment, and especially the following:

- (i) **Critical and dual-use technologies:** the reference to Article 2, section 1, of Council Regulation (EC) No 428/2009 has been removed and replaced with a specific reference to “key technologies for industrial leadership and capability, and technologies developed under programmes and projects of particular interest to Spain, including telecommunications, [...] advanced materials and advanced manufacturing systems”.

¹ “For the above purposes, control is the result of contracts, rights or any other means which, having regard to the considerations of fact and law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by means of:

(a) rights of ownership or use of all or part of the assets of an undertaking,

(b) contracts, rights or any other means of exerting a decisive influence on the composition, deliberations or decisions of the management bodies of the undertaking.

In any case, this control will be considered to exist if the situations provided for in Article 4 of Law 24/1988, of 28 July, on Capital Markets, occur.”

- (ii) **Provision of critical inputs:** “strategic connectivity services” have been added to the existing wording.
- (iii) **Media outlets:** it clarifies that the restriction in the sector will be “without prejudice to the fact that audiovisual communication services in the terms defined in General Law 7/2010, of 31 March, on Audiovisual Communication, will be governed by the provisions of said Law”.

C. Subjective scope of application of the regulation

Two of the three situations of the subjective scope of application of the above-mentioned regulation have been amended:

- (i) **Investors controlled by the government of a third country:** the previous reference to the definition of “control”, in accordance with the provisions of Article 42 of the Commercial Code, is replaced by the reference to Article 7.2 of Law 15/2007, of 3 July, on the Defence of Competition, mentioned above when discussing the amendments to the definition of foreign direct investment.
- (ii) **Administrative or judicial proceedings initiated against a foreign investor:** the reference to administrative or judicial proceedings initiated against a foreign investor in another Member State or in the home state or a third state for carrying out criminal or illegal activities has been removed and replaced by the - more restrictive - situation in which there is a serious risk that the foreign investor in question will carry out criminal or illegal activities affecting public security, public order or public health in Spain.

D. Exemptions from the prior authorisation regime

A new section 6 is included in Article 7 bis which regulates that the Government can establish by regulation categories of transactions or amounts below which foreign direct investment transactions will be exempt from prior authorisation (on the basis that they have little or no impact on the legal assets protected by Article 7 bis itself). It also clarifies that the definition of the sectors affected by the rule may be restricted by regulation.

E. Transitional provision

RDL 34/2020 includes a transitional provision to establish that the regime of suspension of the liberalisation of certain foreign direct investments (sections 2 - sectors affected - and 5 - need for prior authorisation - of Article 7 bis) will also apply, until 30 June 2021, to foreign direct investments made in listed Spanish companies (those whose shares are listed on an official Spanish secondary market and have their registered office in Spain) and unlisted Spanish companies, if the value of the investment exceeds EUR 500 million and is made by residents of other EU or EFTA countries.

It clarifies that the restriction will also apply to investors resident in Spain whose real ownership (more than 25% of the capital or voting rights, direct or indirect, or the exercise of control by any other means) is not Spanish.

2. FINANCIAL MEASURES

RDL 34/2020 introduces the following changes:

A. The extension of the maturity and grace periods of loans for self-employed individuals and companies that received a state-backed guarantee under the ICO's scheme

- (i) **The extension of the maturity of the guarantees granted under Royal Decree-law 8/2020 of 17 March:** the new law establishes that this period may be extended by an additional period of three years. The total maturity of the guaranteed loan, once the extension has been applied, may not exceed eight years from the initial arrangement of the loan. The extension of the maturity of the guarantee will correspond to the extension of the maturity of the guaranteed loan. In addition, the borrower must comply with the limits set out in the European Union's State aid rules.
- (ii) **Extension of the grace period:** credit institutions, financial credit institutions, electronic money institutions and payment institutions operating under the guarantee facilities approved by RDL 8/2020 and Royal Decree-law 25/2020 of 3 July may extend the grace period of the guaranteed loan by an additional twelve months, provided that the total grace period, including the extension, does not exceed twenty-four months. The amount accumulated as a result of the grace period may, subject to agreement between the parties, be paid as a balloon payment, pro-rata to all the fees or a combination of both. In the absence of agreement between the parties, the pro-rata system will be applied.
- (iii) **No change to the amount of the facilities:** the limits of the working capital facilities granted to all borrowers who have been granted a guaranteed loan under either RDL 8/2020 or Royal Decree-law 25/2020 of 3 July must be maintained until 30 June 2021.

In order for the borrower to benefit from these measures, the following requirements must be met:

- the extension of the maturity and grace period must have been expressly requested by the borrower before 15 May 2021 and the guaranteed financing must have been arranged before the date of publication of RDL 34/2020 (namely, 17 November 2020);

- the guaranteed loan cannot be in arrears (i.e. unpaid for more than ninety (90) days), nor can any of the remaining financing granted by the financial institution to the same borrower be in arrears;
- the borrower may not be in a state of default when querying the records of the Central Risk Information of the Banco de España (CIRBE) on the date of the arrangement of the extension. For this purpose, RDL 34/2020 makes access to the CIRBE by ICO (*Instituto de Crédito Oficial*) lenders more flexible;
- the financial institution must not have notified the guarantor of any default on the guaranteed transaction with the borrower on the date of the arrangement of the extension; and
- the borrower must not be subject to insolvency proceedings.

If the borrower applicant complies with these requirements, financial institutions must apply the measures requested and must also comply with the following obligations:

- Apply best banking practices for the benefit of borrowers. In particular, they may not make the application of these measures conditional on the borrower buying any other products from the financial institution in question;
- not to increase the costs associated with borrowing except to reflect an increase in the cost of the guarantee;
- highlight in their accounting and risk management systems any changes to the terms of these loans and, where appropriate, the new conditions; and
- decide on the borrower's request within a maximum of 30 calendar days. In the event that the request is accepted, the ICO must be notified of the request to amend the terms of the guarantee. Requests to amend the terms of the guarantee may be communicated to the ICO until 1 June 2021.

Furthermore, RDL 34/2020 provides for reductions in notary fees in the event that the extension of the maturity of the guarantees and the grace period must be documented in a policy or deed. Also, where there is a registrable security, the deeds in which it is documented will be exempt from the incremental borrowing rate of notarial documents within the scope of Stamp Duty.

B. Extension of the period for granting ICO guarantees

RDL 34/2020 extends the deadline for applications for ICO guarantees to 30 June 2020 (the current deadline is 31 December 2020).

C. Expansion of the scope of guarantees for promissory notes included in the MARF

In addition, the new law expands the scope of the guarantees for promissory notes included in the MARF (*Mercado Alternativo de Renta Fija*), expressly establishing that their use may also be linked to the performance of investment deals, and not only to meet liquidity needs.

3. MEASURES RELATING TO INSOLVENCY

RDL 34/2020 extends the periods of protection granted to debtors:

A. Deadlines for the obligation to file for insolvency and for admission to processing of compulsory insolvency proceedings

The exemption from the obligation to file for insolvency and the suspension of the admission to processing of compulsory insolvency proceedings has been extended until 14 March 2021.

B. With regard to the amendment of composition agreements

The following cases are provided for:

Date of application for a declaration of a breach	Deadline for submitting the proposal for amendment
Until 30 October 2020	The insolvent entity has until 31 January 2021 to submit a proposal to amend the composition agreement
Between 31 October 2020 and 19 November 2020 (admitted for processing)	The proceedings must be suspended for a period of three months, during which the debtor may submit the proposal for amendment, in which case the application for a declaration of a breach is shelved
Between 31 October 2020 and 31 January 2021 (not admitted for processing)	The insolvent entity will have until 30 April 2021 to submit a proposal to amend the composition agreement

In these situations, proposals for amendment are processed in preference to the application for a declaration of a breach.

C. With regard to the amendment of refinancing agreements

The following cases are provided for:

Date of application for a declaration of a breach	Deadline for submitting the proposal for amendment
Until 30 October 2020	The debtor has until 30 November 2020 to notify the Court of the intention to modify the agreement and three additional months from the date of the notification to achieve it
Between 31 October 2020 and 31 January 2021	The debtor has until 28 February 2021 to notify the Court of the intention to modify the agreement and three additional months from the date of the notification to achieve it

4. MEASURES RELATING TO LEGAL ENTITIES GOVERNED BY PRIVATE LAW

RDL 8/2020 and RDL 11/2020 established the possibility that, during 2020, legal entities governed by private law could hold the shareholders' meetings, as well as other meetings or assemblies, by videoconference or multiple telephone conference (even if this possibility was not included in the by-laws) provided that all those attending had the necessary means, the secretary recognised their identity and included this information in the minutes, which would be sent immediately to the corresponding email addresses. RDL 34/2020 extends the period of application of this extraordinary rule for limited liability companies (*sociedades de responsabilidad limitada*) and partnerships limited by shares (*sociedad comanditaria por acciones*) to which it will continue to apply during 2021.

Likewise, for listed companies, it had been established that, during 2020, the board of directors could, in the call for the general meeting, provide for attendance by electronic means and remote voting, as well as for the meeting being held anywhere in Spain, even if this had not been provided for in the by-laws. RDL 34/2020 provides that any S.A. corporation (whether listed or unlisted) may make use of this possibility during 2021.

5. MEASURES RELATING TO SECURITIES MARKETS

With regard to measures relating to the securities market, there are two main amendments: an increase in the threshold for applying for compulsory incorporation into an official secondary market by companies listed on alternative markets for SMEs, and an extension of the mandate of executive positions at the National Securities Market Commission ("CNMV") until the appointment of their replacements.

Two articles of Royal Legislative Decree 4/2015 of 23 October, approving the revised text of the Securities Market Law, have been amended. In particular:

- (i) **Departure of the Chairperson, Vice-Chairperson and board members (of the CNMV):** it is clarified that in the event of the departure of the Chairperson, Vice-Chairperson or board members appointed by the Minister of Economy and Competitiveness due to the period for which they were appointed ending, they will continue to carry out their role until their replacements are appointed.
- (ii) **Special details regarding the admission to trading on an official secondary market from a multilateral trading facility:** the threshold for the capitalisation of shares that

are traded exclusively in a multilateral trading facility for a continuous period of more than 6 months, which requires the issuer to apply for admission to trading on a regulated market within 9 months, is amended from 500 million euros to 1 billion euros.

6. TAX MEASURES

RDL 34/2020 includes a series of tax measures in Chapter III and in the first, fifth and eighth final provisions. These measures are as follows:

A. Reduction of VAT rates on certain medical devices

Articles 6 and 7 of RDL 34/2020 introduce two measures concerning value added tax (“VAT”), in order to reduce the tax cost of certain medical devices needed to combat COVID-19. These measures are as follows:

- (i) The application of a 0% rate on the supply, import and intra-Community acquisition of certain medical devices such as masks, gloves, goggles, thermometers, ventilators and various types of personal protective equipment, referred to in the Annex to RDL 34/2020, for which the recipients are public law entities, clinics or hospital centres, or private social organisations, is extended, with retroactive effect from 1 November 2020 and until 30 April 2021. These transactions will be documented on the invoices as being exempt from VAT.
- (ii) The VAT applicable to supplies, imports and intra-Community acquisitions of disposable surgical masks² for recipients other than those referred to above is reduced from 21% to 4%. This reduction will be in force until 31 December 2021.

B. Changes to Corporate Income Tax

RDL 34/2020 amends Law 27/2014, of 27 November, on Corporate Income Tax (“LIS”) in order to adapt the regulatory text to current European legislation. The amendments made are the following:

- (i) **Deduction for investments in foreign productions of feature films or audiovisual works:** Article 36.2 of the LIS has been amended, with effect in tax periods starting from 1 January 2020, to adapt the deduction to the European Commission's Communication on State aid to cinema and other audiovisual productions.

The amendment incorporates the application of the incentive for animation productions and maintains it for carrying out the part of international productions related to visual effects in Spain, provided that the amount of this deduction does

² The application of this super-reduced VAT rate refers only to the masks included in the Resolution of 13 November 2020, of the Directorate-General for the Common Portfolio of Services of the National Health and Pharmacy System, which publishes the Agreement of the Interministerial Commission on the Price of Medicines, of 12 November 2020, revising the maximum amounts for the sale of certain medical devices to the public.

not exceed the amount established in Commission Regulation (EU) 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.

- (ii) **Freedom to depreciate investments made in the value chain of electric, sustainable or connected mobility:** the sixteenth additional provision of the LIS has been amended to extend its effects to investments made in tax periods ending between 2 April 2020 and 30 June 2021, in line with what was agreed in the National Temporary Framework regarding aid measures to support the economy in the context of the current outbreak of COVID-19.
- (iii) **Increase of the deduction for technological innovation activities of production processes in the automotive industry value chain:** in order to adapt the deduction to the provisions 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 on the Functioning of the EU, the percentage deduction provided for in section c) of Article 35.2 of the LIS (originally 12%) has been increased for expenditure incurred by certain taxpayers on projects started as from 25 June 2020:
 - For taxpayers considered as small and medium-sized enterprises (“SMEs”), the applicable percentage deduction will be 50%.
 - For taxpayers who are not considered to be SMEs, the percentage deduction applicable will be 15% provided that they effectively collaborate with an SME in carrying out the activities and that the SMEs with which they collaborate assume at least 30% of the project costs.

This measure applies to the financial years 2020 and 2021.

In addition, limits on the deduction have been set so that the amount of the deduction, together with the other aid received by the taxpayer, may not exceed 50% of the cost of the project that has been subsidised, or 15% in the case of taxpayers that are not considered SMEs. In addition, the amount of the deduction corresponding to the planned increase may not exceed EUR 7.5 million for each project carried out by the taxpayer.

C. Amendment of the Economic and Tax Regime of the Canary Islands

RDL 34/2020 introduces a specific amendment to the Economic and Tax Regime of the Canary Islands regulated by Law 19/1994, of 6 July, amending the Economic and Tax Regime of the Canary Islands, with the aim of adapting it to the Community provisions regarding the extension of the regional aid guidelines for 2014-2020, extending until 31 December 2021 the time references provided for in the reserve for investments in the Canary Islands and for the registration in the Official Register of Canary Islands Special Zone Entities.

7. MEASURES RELATING TO ENERGY

RDL 34/2020 (i) incorporates a series of energy-related measures in order to transpose the amendments introduced by Directive (EU) 2019/692 of the European Parliament and of the Council, of 17 April 2019, amending Directive 2009/73/EC concerning common rules for the internal market in natural gas (“**Directive 2019/692**”) into Spanish law. In this way, it seeks to improve the applicability of Community rules with the aim of achieving full completion of the internal market in natural gas; (ii) introduces a series of measures designed to mitigate the effects of the estimated regulated revenues and costs in the electricity sector as a result of the COVID-19 pandemic; and (iii) amends Law 34/1998, of 7 October, on the hydrocarbons sector (the “**LSH**”), in its second final provision.

In this respect, the following measures have been included:

A. Temporary exemptions for transportation pipelines to or from countries outside the European Union.

Article 4 of RDL 34/2020 exempts the Medgaz and Maghreb-Europe gas transportation pipelines from compliance with the conditions relating to the separation of ownership of transportation and marketing activities, as well as regulated access to facilities, which are required by the LSH. This exemption is temporary and will last for fourteen months from 24 May 2020, a period which may be extended by order of the Minister for Ecological Transition and Demographic Challenge, following a reasoned request from the owner or owners of the gas pipeline at least six months before the end of the temporary exemption period granted.

B. Revenue from the auctioning of greenhouse gas emission allowances for 2020.

The measures introduced by Article 5 of RDL 34/2020 aim to alleviate the effects that the COVID-19 crisis is having on electricity demand and prices. In this regard, there has been a significant reduction in the regulated revenue from the electricity system. Any regulatory development in this area must be in line with the ecological transition agenda, which requires measures to be adopted to reduce greenhouse gas emissions.

For this reason, and with the primary objective of avoiding the adverse effects that the COVID-19 crisis may have on the liquidity of those subject to the electricity settlement system and on electricity consumers, the following measures have been adopted, which are exclusively valid for the General State Budget for 2020:

- (i) The maximum limit for transfers to the electricity system from the revenue from the auctioning of greenhouse gas emission allowances has been increased, with limits of ninety per cent of the total collection and up to a maximum of one billion euros.
- (ii) The maximum limit for transfers to climate change actions from the revenue of the auctioning of greenhouse gas emission allowances has been increased, with limits of ten per cent of the total collection and up to a maximum of one hundred million euros.

- (iii) The authorisations of credit generation resulting from the provisions of the previous sections and the corresponding credit supplements in the budget of the National Commission on Markets and Competition (“CNMC”), will be carried out by agreement of the Minister for Finance during the 2020 financial year.

C. Second final provision

The **second final provision of RDL 34/2020** amends the LSH and introduces a number of significant changes, including the following:

- (i) It is envisaged that companies which own facilities in the gas pipeline backbone network that do not comply with the activity separation requirements set out in Article 63.3³ and which owned such facilities prior to 3 September 2009, as well as those which, prior to 23 May 2019, owned interconnection facilities with countries outside the European Union, may hand over the management of these facilities to an independent system operator.
- (ii) Exemption from the obligation of third-party access to all or part of the capacity of the new infrastructure, or of the existing infrastructure whose capacity is being increased, can be requested in accordance with Article 70.6 of the LSH⁴, provided that a number of requirements are met:
 - The investment must (i) strengthen competition in the supply of gas and enhance the security of the supply and (ii) entail a risk that means it would not be carried out if the exemption were not granted.
 - The infrastructure will be owned by a separate entity, at least in terms of legal personality, from the carriers on whose networks the infrastructure is built.
 - Fees will be charged to users of the infrastructure.
 - The exemption cannot be detrimental to competition in the relevant markets likely to be affected by the investment, to the effective functioning of the Union's internal market for natural gas, to the efficient operation of the regulated networks concerned or to the security of supply of natural gas within the Union.

³ Article 63.3 of the LSH establishes the obligation for companies that own facilities belonging to the gas pipeline backbone network to “operate and manage their own networks, or assign the management thereof to an independent network operator in the cases provided for in this Law”.

⁴ Article 70.6 of the LSH provides that, exceptionally, it is possible to “grant an exemption from the obligation of third party access for certain new facilities or modifications to existing facilities that involve a significant increase in capacity or that allow the development of new sources of gas supply which, require this due to their unique characteristics, in accordance with the procedure for authorising the exemption set out in Article 71 of this Law. (...) This exemption will mean that the facility will not be included in the remuneration scheme for the natural gas sector.”

To enforce this exemption, the owner of the facility must apply to the Ministry of Ecological Transition and Demographic Challenge, which will obtain a prior report from the CNMC. The CNMC will consult (i) potential users regarding their interest in contracting the new capacity, (ii) the national regulatory authorities of the Member States whose markets are likely to be affected by the new infrastructure and (iii) the competent authorities of third countries, where the infrastructure in question is connected to the European Union network under the jurisdiction of a Member State, and originates or terminates in one or more countries outside the European Union.

The Ministry will notify the European Commission of the exemption order, which will have to decide on it. RDL 34/2020 establishes two situations in which the European Commission's exemption decision will cease to have effect (after two and five years).

- (iii) Likewise, it provides for the possibility of the Ministry for Ecological Transition and Demographic Challenge, having obtained a report from the CNMC and at the request of the owner of the facility and under certain conditions, exempting gas transportation pipelines to or from countries outside the European Union where construction was completed prior to 23 May 2019 from the provisions of articles 63.3, 63 bis, 63 ter and 70 of the LSH⁵. This exemption will have a maximum duration of 20 years from 24 May 2020, with the possibility of extension in duly justified cases. The owners of these facilities must keep separate accounts for transport and marketing activities.
- (iv) A negotiation procedure between Spain and third countries regarding natural gas transmission networks, under the supervision of the European Commission, is regulated.

The information contained in this Information Briefing is of a general nature and does not constitute legal advice. This Briefing was prepared on 19 November 2020 and Pérez-Llorca does not undertake any commitment whatsoever to update or review its content.

⁵ Article 63 bis of the LSH provides that “commercial companies acting as transmission system operators or independent system operators shall be authorised and designated as such by the Minister for Industry, Energy and Tourism at the request of the interested parties.” To this end, transmission system operators “must first obtain certification of compliance with the requirements of separating activities from the National Commission for Markets and Competition (...). For their part, “companies that intend to operate a facility which is part of the backbone network must apply to the National Energy Commission for this certification. (...)”

When the certification concerns countries outside the European Union, Article 63 ter applies: “1. Where an application for certification is made by a company which is controlled by a person or persons from one or more countries outside the European Union, the National Energy Commission will notify the European Commission of this, along with any circumstances which may result in a person or persons from one or more third countries assuming control of part of the backbone network or of a transmission system operator.”

Finally, Article 70 of the LSH refers to the obligation to allow the transmission facilities to be used by “Direct Market Consumers and retailers who meet the required conditions”, with certain exceptions.