

ROYAL DECREE-LAW 36/2020, OF 30 DECEMBER, APPROVING URGENT MEASURES FOR THE MODERNISATION OF PUBLIC ADMINISTRATION AND FOR THE IMPLEMENTATION OF THE RECOVERY, TRANSFORMATION AND RESILIENCE PLAN

On 31 December 2020, Royal Decree-law 36/2020 of 30 December, approving urgent measures for the modernisation of public administration and for the implementation of the recovery, transformation and resilience plan (“Royal Decree-law 36/2020”) was published in the Official State Bulletin (“BOE”).

The current crisis caused by the COVID-19 pandemic has led the European Union to approve a package of measures for the recovery of Member States. As such, on 21 July 2020, the European Council approved a series of measures, bringing together the enhanced future multiannual financial framework for 2021-2027 and the launch of a European Recovery Instrument (the “*Next Generation EU*”) worth €750 billion.

As stated in the recitals of Royal Decree-law 36/2020, the European Recovery Instrument will mean around €140 billion for Spain in the form of transfers and loans for the 2021-2026 period. The national instrument for the implementation and management of these funds will be the Recovery, Transformation and Resilience Plan (the “**Recovery Plan**”).

In this regard, the recitals of Royal Decree-law 36/2020 specify that “*the counter-cyclical nature of these instruments and the urgency of their implementation to promote economic recovery, mitigate the negative impacts of the COVID-19 pandemic and support the process of structural transformation defined, specifically, in the European agenda for the two-pronged green and digital transition, require particular agility in the implementation of the measures contained in the Recovery Plan, in order to begin its implementation in 2021 and achieve the desired impact from a macroeconomic and structural point of view. To this end, it is necessary to adapt the general rules governing the drafting of general provisions and administrative procedures and the conclusion of agreements for the implementation of European Recovery Instrument funds. All this must be done without undermining the guarantees which must necessarily surround public action and the due rigour of the process*”.

As such, Royal Decree-law 36/2020 sets out a number of urgent measures with the aim of establishing a more agile and efficient governance model for the selection, monitoring, evaluation and coordination of the different investment projects and programmes.

To this end, the Commission for Recovery, Transformation and Resilience, chaired by the President of the Government, was created as the body responsible for establishing the general policy guidelines for the development of the Recovery Plan, alongside a Technical Committee for the Recovery Plan, to support the aforementioned Commission, and a Sectoral Conference for the Recovery Plan, for cooperation between the State and the Autonomous Communities, as well as participation forums and high-level groups for collaboration between the Government and the main sectors involved in the Recovery Plan.

Additionally, Royal Decree-law 36/2020 sets out a series of urgent measures for the implementation of the Recovery Plan, which translate into the creation of new forms of public-private collaboration, with special provisions in terms of agreements, public procurement, subsidies and administrative procedures.

Additionally, certain general rules are amended in order to modernise public Administration.

Royal Decree-law 36/2020 entered into force on 1 January 2021.

The purpose of this Legal Briefing is to identify the main regulatory developments introduced by Royal Decree-law 36/2020.

1. Scope of application

Generally speaking, Royal Decree-law 36/2020 will be applied to entities in the public sector in accordance with the provisions of Article 2.1 of Law 40/2015, on the Legal System of the public sector.

Title I, Chapter III of Title III, and Chapters II, III, IV, V and VI of Title IV, as well as Article 46, shall apply to actions of any of the public sector entities for the management and implementation of projects and actions which are eligible for financing from the European funds of the European Recovery Instrument, the European Regional Development Fund, the European Social Fund Plus, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund.

Chapter II of Title III and Chapter VII of Title IV shall apply to the actions of any of the public sector entities in relation to the Recovery and Resilience Mechanism funds.

Chapter I of Title III and Chapter I of Title IV shall apply to actions of any of the public sector entities for the programming, budgeting, management, implementation and control of projects and actions which are eligible for funding from the European Recovery Instrument.

2. About public-private collaboration

Royal Decree-law 36/2020 introduces a new form of public-private collaboration: the Strategic Projects for the Recovery and Transformation of the Economy (“**PERTEs**”).

Any project of a strategic nature with a high capacity to drive economic growth, employment and competitiveness in the Spanish economy may be recognised as a PERTE. Specifically, PERTEs may consist of (i) a single project clearly defined in terms of objectives or manner of implementation; or (ii) an integrated project, i.e. a group of projects within a common structure, work plan or programme sharing the same objective and based on a coherent systemic approach.

The declaration of a project as PERTE will be made by a Council of Ministers’ Resolution, on a proposal from the head of the department responsible for the matter, on the basis of criteria relating to (i) the significant contribution which the project makes to economic growth, job creation and the competitiveness of industry and the economy; (ii) whether it makes it possible to remedy major market or systemic shortcomings and social challenges which could not be met otherwise; (iii) whether it is significantly innovative or adds significant value in terms of R&D&I; (iv) its quantitative or qualitative importance, if it is particularly large in size or scope or involves a very high level of technological or financial risk; (v) whether it promotes the integration and growth of small and medium-sized enterprises and fosters collaborative environments; and (vi) whether it makes a specific, clear and identifiable contribution to one or more objectives of the Recovery Plan.

In turn, a State Register of entities interested in the PERTEs will be created, in which all the entities linked to the development of an PERTE will be registered. An entry in this register may be considered a necessary requirement to become a beneficiary of aid.

The implementation of the PERTEs will be carried out through all the mechanisms provided for in the legal system and under no circumstances will the PERTEs distort effective competition in the markets, so that operators participating in the PERTEs will be fully subject to competition rules.

Furthermore, Royal Decree-law 36/2020 regulates the following public-private collaboration instruments for the implementation of the Recovery Plan:

- (i) Groups for the presentation of applications to calls for aid for activities linked to the aforementioned Plan: in these groups, the members must sign, prior to drafting the application, an internal agreement that regulates their operation, without it being necessary for them to be constituted in any legal form for this purpose and they will be considered jointly as beneficiaries of the subsidy, being jointly responsible for the subsidised activities to be carried out by the group.

- (ii) Special regime of consortiums for the implementation of the Recovery Plan: its main special provision is that the creation of these consortiums is not required by law, by exception to the provisions of Law 40/2015 of 1 October, on the Legal System of the Public Sector (“Law 40/2015”), but their creation will be authorised by the Recovery Plan Commission, following a favourable report from the Technical Committee.
- (iii) Implementation of the Recovery Plan through mixed economy companies: to this end, the current regulation on mixed economy companies contained in the legislation on contracts is adapted to the public-private collaborations to be created for the development of the Recovery Plan in order to speed up the selection of the private partner, but always respecting the limits set by European Union law.

In this respect, Royal Decree-law 36/2020 establishes that the performance of a works concession or service concession contract relating to a project under the Recovery Plan may be awarded directly to a mixed-economy company in which public and private capital are in the majority, provided that the following requirements are met:

- (a) that the choice of the private partner is made in accordance with the rules established in Law 9/2017 of 8 November on Public Sector Contracts or in Book I of Royal Decree-law 3/2020 of 4 February, as appropriate in each case, for the awarding of the relevant contract; and
- (b) that no changes are made to the purpose and conditions of the contract that were taken into account in the selection of the private partner.

3. Special provisions related to collaboration agreements

As an acceleration measure, provision is made for the simplification of the processing of administrative agreements.

Specifically, a series of special provisions have been introduced in relation to the processing of agreements entered into by the General State Administration, its public bodies and related or dependent public law entities for the implementation of projects with European funds provided for in the Recovery Plan, including the following:

- (i) There will be no obligation to provide any report in addition to the legal service’s report, with the exception of the authorisations of the Council of Ministers and the Ministry of Finance provided for in different rules.

- (ii) The validity period of these agreements may, exceptionally, be longer than that legally established, with a maximum limit of 6 years, with the possibility of an extension of up to 6 years.
- (iii) Early processing of these agreements is possible in cases where the processing of the files begins in the current financial year but the budget will not be implemented until the following financial year or subsequent financial years.
- (iv) The Administration's creditor, under the terms determined in the agreement, may be entitled to receive an advance for the preparatory operations that are necessary to carry out the financed actions of up to a maximum of 50% of the total amount to be received.

Likewise, a number of amendments are introduced to Law 40/2015, with the aim of speeding up, in general, the processing of agreements:

- (i) The time limit for registering agreements signed by the General State Administration or any of its public bodies or related or dependent public law entities in the State Electronic Register of Cooperation Bodies and Instruments is reduced to 5 working days. Likewise, a period of 10 working days is established for the publication of the agreements in the Spanish Official State Gazette following the date of their formalisation.
- (ii) A maximum period of 7 working days is set for the preparation of the legal service report and any other mandatory report established by the applicable regulations, as well as for the granting of prior authorisation from the Ministry of Finance for the signing, amendment, extension and termination by mutual agreement of the aforementioned agreements.

4. Special provisions related to public procurement

Royal Decree-law 36/2020 introduces a series of special provisions related to public procurement for contracts that will be financed using funds from the Recovery Plan, including the following:

- (i) Contracts and framework agreements that will be financed through these funds are exempt from the requirement to be authorised by the Council of Ministers which is set out in article 324 of Law 9/2017, of 8 November, on Public Sector Contracts (the “LCSP”).

- (ii) In the contracts and framework agreements that will be financed through funds from the Recovery Plan, the contracting bodies must examine whether the urgent situation prevents the ordinary processing of the tender procedures, proceeding to apply in these cases the duly justified urgent processing of the file provided for in the LCSP.
- (iii) Works contracts with an estimated value of less than €200,000 and supply and service contracts with an estimated value of less than €100,000 to be financed from the Recovery Plan, except for those intended to be used for intellectual services, may be subject to the simplified open procedure.
- (iv) The ordinary simplified open procedure may be used for the award of works, supply and service contracts may be used (i) in the case of contracts with an estimated value below the threshold laid down for contracts subject to harmonised regulation and (ii) where the award criteria set out in the contract documents do not include any criteria capable of being assessed on the basis of a value judgment or, where such criteria exist, their weighting does not exceed 25% of the total, except in the case of contracts for intellectual services, such as engineering and architectural services, where their weighting may not exceed 45% of the total.
- (v) The maximum duration of contracts for energy supplies and services to be financed from the Recovery Plan is extended from five to ten years.
- (vi) Contracting authorities and contracting entities may directly carry out the performance of works, supply, service, works concession and service concession contracts for the application of funds from the recovery plan, using their own resources, in return for tariff compensation.
- (vii) In the case of works concession and service concession contracts financed with funds from the Recovery Plan, the payback period will be calculated by discounting the cash flows expected by the concessionaire and the discount rate to be applied in these cases will be the average secondary market return on 30-year government debt plus a differential of up to 300 basis points.
- (viii) The contracts that are to be financed with funds from the Recovery Plan will be subject to special appeal in matters of contracting, in accordance with the provisions of Article 44 of the LCSP, although certain special provisions are established, including a 10 calendar day period for lodging an appeal.

It also introduces certain general amendments to contract law, the most significant of which is the reform of Article 208 on the suspension of contracts. Specifically, the amendment is

intended to remove the amount corresponding to 3% of the price of the services which should have been provided by the contractor during the period of suspension from the items payable to the contractor for the damage suffered.

5. Special provisions related to subsidies

The following special provisions related to the management of subsidies financed using European funds are introduced:

- (i) The processing of subsidies related to the use of European funds is simplified, eliminating certain reporting requirements and perceptive authorisations, including the authorisation of the Council of Ministers for the granting of subsidies exceeding €12 million; and the authorisation of the Council of Ministers for loans and advances at an interest rate lower than that of the debt issued by the State.
- (ii) As established in Law 38/2003, of 17 November, the General Law on Subsidies, provision is made for the regulatory bases for European-funded subsidies to incorporate the call for such subsidies, simplifying the internal requirements for their approval and the documentation to be presented by potential beneficiaries.
- (iii) In the case of subsidies whose purpose is to finance specific actions or situations that do not require a comparative evaluation with other proposals, the possibility of issuing award decisions by order of presentation of applications has been envisaged, once the existence of such a situation or eligible action and the fulfilment of the other requirements demanded have been verified, until the budgetary credit allocated in the request runs out.
- (iv) The documentation that beneficiaries of European-funded subsidiaries must present to justify their application is simplified.
- (v) Early processing without available credit is allowed for subsidies that can be financed with European funds, provided that it is proven that the necessary budgetary modification has been requested and the award is subject to the approval of this amendment.

6. Special provisions related to processing procedures

A series of special provisions for processing procedures related to the Recovery Plan is also established.

Thus, the procedure for drawing up the regulations adopted within the framework of the implementation of the Recovery Plan will be of an urgent nature for the purposes of and with the scope provided for in Article 27.2 of Law 50/1997, of 27 November, on the Government (“**Law 50/1997**”), reducing by half, unless otherwise established by the Organic Law, the time limits laid down in Article 26.5 of Law 50/1997.

Furthermore, it also declares the application of the urgency procedure and priority dispatch, under the terms provided for in Articles 33 and 71 respectively of Law 39/2015, of 1 October, on the Common Administrative Procedure of Public Administrations, of the administrative procedures involving the use of expenditure included in the Recovery Plan, without the need for the administrative body to give reasons for this urgency in the corresponding agreement to initiate the procedure.

7. Creation of the Ecological Restoration and Resilience Fund (FCPI) (FRER)

Royal Decree-law 36/2020 creates the Fund for Ecological Restoration and Resilience (FCPI) (“**FRER**”), a fund without legal personality which will be integrated into the Public Treasury system, and which will aim to implement those measures designed to support the achievement of the objectives for achieving the transition to a more ecological productive and social model of the Plan for Recovery, Transformation and Resilience under the Ministry for Ecological Transition and the Demographic Challenge, in the following areas:

- (i) Water and the public water domain.
- (ii) Coasts, protection and conservation of the sea and the maritime-terrestrial public domain.
- (iii) Climate change, its mitigation and adaptation and the strengthening of climate resilience.
- (iv) Pollution prevention, promotion of the use of clean technologies and more sustainable consumption habits, in accordance with the circular economy policy.
- (v) Protection of natural heritage, biodiversity and forests.
- (vi) Meteorology and climatology.
- (vii) Any other area of responsibility belonging to the Ministry through the Secretariat of State for the Environment and its public bodies.

The FRER, which will be provided with the operating and capital budget included in the General State Budgets, may finance actions of an annual and multiannual nature. It may also act as co-financing instrument to ensure territorial cohesion, and subsidies may also be awarded from the FRER that fall within its scope.

8. Other changes to regulations

Lastly, Royal Decree-law 36/2020 introduces a series of regulatory changes, including the amendment of Law 40/2015, which, in addition to the abovementioned amendments to agreements, introduces two additional provisions establishing that both the Institute for Diversification and Saving of Energy (IDAE) and ICEX Spain Export and Investment will retain their status as public business entities without having to meet the requirements of Article 103.1 and 107.3 Law 40/2015, exclusively with regard to majority financing with market income.

Likewise, Law 21/2013, of 9 December, on environmental assessment, has been amended, and environmental evaluation and strategic environmental assessment procedures have been amended. Specific provision is made for projects wholly or partially financed through the European Recovery Instrument to be excluded from the environmental impact assessment (i) when they are simply modernisations or improvements to existing installations, which do not involve the construction of new plant, an increase in the surface area concerned or the addition of new buildings nor do they have an impact on water resources and (ii) when their financing and approval incorporates the improvement of environmental conditions, such as energy efficiency or the use of natural resources, the reduction of their environmental impact or the improvement of the sustainability of the existing installation.

Likewise, the Third Final Provision of Royal Decree-law 36/2020 reduces the time it takes to process the ordinary strategic environmental assessment procedure for drafting the strategic environmental statement, the simplified strategic environmental assessment procedure for the issuance of the strategic environmental report, the ordinary environmental impact assessment procedure for drafting the environmental impact statement and the simplified environmental impact assessment procedure.

Lastly, and in the area of territorial and urban planning, the Eleventh Final Provision amends Law 13/2003, of 23 May, regulating the Public Works Concession Contract, to establish that if the competent administration in territorial or urban development matters does not have sufficient evidence to decide on the procedures for approval, amendment or revision of the territorial and urban plans, either because the corresponding reports have not been received or because, having received them, they are found to be insufficient for making a decision, it shall personally request the body hierarchically superior to the one that had to issue the report to order the competent body to issue the report within ten working days. That body must then deliver its report to the requesting Administration within ten working days.

This Briefing was prepared by the Public Law Department.

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