Pérez-Llorca

Legal Briefing
May 2021

MOST SIGNIFICANT ASPECTS AND DEVELOPMENTS IN RELATION TO BOTH THE CODE OF BEST PRACTICE AND THE AGREEMENT OF THE COUNCIL OF MINISTERS ON THE CONDITIONS AND COLLECTION SYSTEM FOR COVID-19 GUARANTEES

1. Introduction

The following agreements were published on 13 May: (i) the Agreement of the Council of Ministers of 11 May 2021[1], approving the Code of Best Practice for the renegotiation framework for clients with guaranteed financing (the "**Code of Best Practice**") provided for in Royal Decree-law 5/2021, of 12 March, on extraordinary measures to support business solvency in response to the COVID-19 pandemic ("**Royal Decree-law 5/2021**") and (ii) the Agreement of the Council of Ministers of 11 May 2021, extending the application deadline and adapting the conditions of the guarantees regulated by Royal Decree-laws 8/2020, of 17 March, and 25/2020, of 3 July, and developing the system for the collection of enforced guarantees established in Article 16 of Royal Decree-law 5/2021[2] (the "**Agreement of the Council of Ministers on the conditions and collection system for COVID-19 guarantees**").

Title II of Royal Decree-law 5/2021 contains a set of measures aimed at strengthening the solvency of companies and self-employed persons who, despite having viable businesses, have seen their financial situation deteriorate as a result of COVID-19. The proposed measures are intended to alleviate the financial burden on these companies, and they will be implemented within a framework of collaboration between the financial institutions that granted the financing with public guarantee or cover and the State. Therefore, an essential component of this set of measures is the Code of Best Practice, which entities wishing to cooperate with the State in establishing measures that contribute to the formation of a more resilient business ecosystem and to the economic recovery of the country will be able to sign up to on a voluntary basis.

Article 16 of Royal Decree-law 5/2021 also sets out in detail the procedure for the recovery of the guarantees released under Royal Decree-laws 8/2020, of 17 March, and 25/2020, of 3 July ("**Royal Decree-laws 8/2020 and 25/2020**"), which could ultimately be enforced. The Agreement of the

---

[1] Resolution of 12 May 2021, of the Secretary of State for the Economy and Business Support, publishing the Agreement of the Council of Ministers of 11 May 2021, approving the Code of Best Practice for the renegotiation framework for clients with guaranteed financing provided for in Royal Decree-law 5/2021 (the "**Agreement of the Council of Ministers on the Code of Best Practice**").

[2] Resolution of 12 May 2021, of the Secretary of State for the Economy and Business Support, publishing the Agreement of the Council of Ministers of 11 May 2021, extending the application period and adapting the conditions of the guarantees regulated by Royal Decree-laws 8/2020, of 17 March, and 25/2020, of 3 July, and developing the system for the collection of enforced guarantees, established in Article 16 of Royal Decree-law 5/2021.

Council of Ministers on the conditions and collection system for COVID-19 guarantees develops the provisions on this matter that had previously been regulated in the aforementioned Article 16 of Royal Decree-law 5/2021 in a broader and more specific way. In addition, the Agreement extends the application deadline for COVID-19 guarantees and establishes certain measures regarding the distribution and adjustment of these guarantees.

This Briefing analyses the most relevant aspects of and developments included in both the Code of Best Practice and the Agreement of the Council of Ministers on the conditions and collection system for COVID-19 guarantees.

2. Code of Best Practice

This section addresses (i) the content and significance of the Code of Best Practice; and (ii) the measures envisaged under the Code of Best Practice.

A. General aspects

(i) **Voluntary participation:** Mutual guarantee companies, credit institutions and financial institutions supervised by the Bank of Spain may sign up on a voluntary basis.

(ii) **Communication deadline:** The Code of Best Practice foresees that financial institutions that have channelled or have benefited from guarantees released under: (a) Royal Decree-laws 8/2020 and 25/2020; or (b) CESCE's insurance cover for working capital facilities on behalf of the State (Covid I and Covid II facilities), under Royal Decree-law 8/2020, of 17 March, and the Agreement of the Government Delegate Commission for Economic Affairs of 23 October 2020, will have a maximum period of one month to notify in writing whether or not they wish to sign up.

(iii) **Extension of the deadline for signing up:** After the period for signing up has expired, the General Secretariat of the Treasury and International Financing may authorise the opening of new periods for signing up.

(iv) **Application:** The measures contained in the Code of Best Practice will be applied at the request of the debtor, on one occasion or successively. In any event:

- Extension of the maturity of guarantees: It is mandatory for debtors who apply for it and meet the eligibility requirements (set out in section B below); and

- Conversion of (guaranteed) loans into convertible loans and reduction of nominal value: The conversion of the publicly guaranteed loan into a profit participating loan or transfers to reduce the nominal value of the publicly

guaranteed loan will have to take place within the framework of a debt renegotiation agreement.

(v) **Notification to clients:** Participating financial institutions must notify their clients: (a) whether they have signed up or not; and (b) the possibility of availing themselves of the provisions of the Code of Best Practice.

(vi) **Maximum time limit for notification of the implementation of the measures**: The financial institutions must inform ICO, CESCE or the *Compañía Española de Reafianzamiento* (**"CERSA"**) of the agreement entered into with the eligible company or self-employed person:

- Extension of maturity of guarantees and conversion of (guaranteed) loans into convertible loans: until 1 December 2021; and

- Debt reduction: until 1 December 2022, in connection with the debt reduction measures provided for in Article 9 of Royal Decree-law 5/2021.

B. Commitments undertaken by the participating entities

In the event that any of the measures are adopted, the main commitments assumed by the financial institutions that have signed up to the Code of Best Practice, in relation to financing transactions set out in Article 12 of Royal Decree-law 5/2021, are as follows:

(i) Common aspects of the measures: institutions must take into consideration all of the debtor's debt, both guaranteed and non-guaranteed, generated between 17 March 2020 and the date of publication of Royal Decree-law 5/2021, and try to make the terms of non-guaranteed financing transactions more flexible.

(ii) Preservation of working capital facilities until (at least) 31 December 2022.

(iii) Prohibition of marketing pacts for additional products.

(iv) Prohibition of cost increases, except for necessary adjustments in the event of conversion of the financial transaction into a profit participating loan.

(v) Approval of the transaction in accordance with its internal procedures and its lending and risk policies, except in relation to maturity extensions requested by eligible borrowers.

(vi) Appropriate evaluation criteria.

(vii) Recording of transactions by institutions in their accounting and risk management systems, and entering this information in the Central Credit Register of the Banco de España.

(viii) Collaboration between entities.

(ix) Prohibition of early maturity.

C. Application requirements – Approval of measures

The main general aspects in relation to the application requirements and the effects of the adoption of the agreements by the financial institutions are as follows:

(i) **Sworn statement**: in cases other than a debtor's request for the extension of maturity, institutions must request to be sent a sworn statement showing the debtor's financial transactions with the other financial institutions.

(ii) **Addressee of the application**: the debtor must submit the application to the participating financial institution with which it has the greatest overall public guaranteed debt, taking into account the amount of outstanding guaranteed financing.

(iii) **Agent institution**: the financial institution that is the largest public guarantee lender with respect to the debtor will assume the task of coordinating and informing the other lender institutions.

(iv) **Deadline for responding to the application**: the financial institution that is the largest public guarantee lender will have a period of one month from receipt of all the necessary documentation from the debtor to inform the other creditors of the application and to make a proposal on the measures that could be applied to the financing transactions, with or without guarantee, entered into by the debtor between 17 March 2020 and the date of publication of Royal Decree-law 5/2021.

(v) **Effect of the decision of the institutions with guaranteed debt**: the decision will be binding on all participating lenders exclusively in relation to the guaranteed financing, with the agreement of the lender(s) they represent:

- Guaranteed loans convertible into profit participating loans: more than 50 % of the outstanding amount of the debtor's guaranteed transactions.

- Carrying out a transfer to reduce the principal: 66%.

If the debtor is an SME or a self-employed person and the above percentages are not reached, it would be sufficient for the renegotiation agreement relating to measures (a) and (b) above to be binding on all the entities with which the decision is adopted:

a) Guaranteed loans convertible into profit participating loans: by two participating lenders with the largest share of the debtor's outstanding guaranteed debt.

b) Carrying out a transfer to reduce the principal: by three participating lenders with the largest share of the debtor's outstanding guaranteed debt.

(vi) **Effect of the decision of the institutions with non-guaranteed debt**: for non-guaranteed debt, it will only be mandatory to apply the measures if 100 % of the participating lenders agree to them.

(vii) **Transactions secured by collateral**: the application of the above coordination rules is excluded. In order to apply the agreed measures to transactions involving co-obligors, guarantors, sureties or other guarantors of any kind, it will also be necessary for them to expressly ratify the continuation of their obligations.

(viii) **Effectiveness of the measures**: in order for the following measures to be effective: (i) guaranteed loans convertible into profit participating loans; and (ii) carrying out a transfer to reduce the principal, it will be necessary for all institutions to enter into a renegotiation agreement with the debtor for the corresponding guaranteed debt.

(ix) **Notification of the measures adopted**: the measures adopted that are agreed within the framework of the renegotiation agreement (indicated in the previous section), must be correctly communicated by each corresponding entity to ICO, CESCE or CERSA, as appropriate. Communications relating to the extension of maturity should be sent by each institution in respect of the guaranteed transactions that the client has with the institution.

D. Measures envisaged under the Code of Best Practice

The Code of Best Practice provides for the following measures:

(i) Extend the maturity of financing transactions that have received a public guarantee.

(ii) Convert publicly guaranteed financing transactions into non-convertible profit participating loans.

(iii) Reduce the outstanding principal of financing transactions with public guarantees.

These three measures will only apply to financial institutions that have signed up to the Code of Best Practice.

Before analysing the nature of these measures, it is worth classifying them as "voluntary" or "mandatory". In this regard, it will be "mandatory" for financial institutions to extend the maturity of financing transactions with public guarantees, provided that the eligibility requirements detailed below are met. On the other hand, the application of the measures to convert into profit participating loans and reduce the principal will be voluntary for financial institutions. In other words, if the eligibility requirements are met, the financial institution will be responsible for deciding on the applicability of the measure in the framework of a renegotiation agreement.

(i) **Extension of the maturity of financing transactions that have received a public guarantee**

The Agreement of the Council of Ministers on the Code of Best Practice foresees different possible extension periods depending on: (i) the total amount of public aid received; or (ii) whether an extension was granted previously under Royal Decree-law 34/2020, of 17 November. The two tables below detail the maximum extension period according to the two aforementioned criteria:

(a) With prior extension under Royal Decree-law 34/2020

Amount of public aid	Maximum extension of maturity
▪ Equal to or less than EUR 1,800,000 ▪ Equal to or less than EUR 270,000 (fisheries or aquaculture sector) ▪ Equal to or greater than EUR 225,000 (agricultural sector)	Two years provided they do not exceed ten years from the initial date of execution.
▪ Greater than EUR 1,800,000 ▪ Greater than EUR 270,000 (fisheries or aquaculture sector) ▪ Greater than EUR 225,000 (agricultural sector)	Two years provided they do not exceed ten years from the initial date of execution.

(b) Without prior extension under Royal Decree-law 34/2020

Amount of public aid	Maximum extension of maturity
▪ Equal to or less than EUR 1,800,000 ▪ Equal to or less than EUR 270,000 (fisheries or aquaculture sector) ▪ Equal to or greater than EUR 225,000 (agricultural sector)	Five years provided they do not exceed ten years from the initial date of execution.
▪ Greater than EUR 1,800,000 ▪ Greater than EUR 270,000 (fisheries or aquaculture sector) ▪ Greater than EUR 225,000 (agricultural sector)	Five years provided they do not exceed eight years from the initial date of execution.

As was to be expected, the remuneration applicable to guarantees has also been updated according to the size and characteristics of the guaranteed company.

The financial institutions will have a maximum of 45 calendar days to respond to the debtor's application and, if the application is accepted, to notify ICO, CERSA or CESCE of the request to modify the terms of the guarantee. It will be possible to notify ICO, CERSA or CESCE of one or more applications to amend the terms of the guarantee until 1 December 2021.

This notification must be made in accordance with the procedure established by ICO, CERSA and CESCE and communicated to the financial institutions.

(ii) **Conversion of publicly guaranteed financing transactions into non-convertible profit participating loans**

At the request of the debtor, the financial institution and the debtor may agree, within the framework of a renegotiation agreement, to convert the guaranteed financing transactions into non-convertible loans.

In order for the public guarantee to stand as collateral for the debt contracted with the financial institution, a number of requirements in addition to the general requirements set out in the Code of Best Practice must be met. Specifically, the following will be required: (i) that the conditions set out in the Fourth Additional Provision of Royal Decree-law 5/2021 are met; and (ii) that the debtor's profit and loss statement for 2020 shows negative profit after tax.

In addition, it is specified that the cost of the guarantee will be that applied to the financing transaction prior to the conversion to a profit participating loan.

The financial institutions will have a maximum of 45 calendar days to respond to the debtor's application and, if the application is accepted, to notify ICO, CERSA or CESCE of the request to modify the terms of the guarantee. It will be possible to notify ICO, CERSA or CESCE of one or more applications to amend the terms of the guarantee until 1 December 2021.

This notification must be made in accordance with the procedure established by ICO, CERSA and CESCE and communicated to the financial institutions.

(iii) **Reduction of the outstanding principal of financing transactions with public guarantees**

This option is based on Article 9 of Royal Decree-law 5/2021, which provides for measures to reduce the indebtedness of the self-employed and companies affected by COVID-19.

One such measure is the possibility of carrying out transfers to self-employed persons and companies to reduce the principal of the financing secured by public guarantee and contracted after 17 March 2020 and 11 May 2021. This measure is formulated on an exceptional basis and as a last resort.

This aid aimed at reducing debt will be financed by a new COVID-19 financial debt restructuring facility, initially endowed with a maximum of EUR 3 billion. This facility is aimed at reducing the amount of outstanding capital on loans taken out with financial institutions.

In general, transfers will not be able to exceed 50% of the outstanding guaranteed principal of each transaction. The transfer may be up to 75 % of that amount in cases where the fall in turnover is more than 70 %.

Payment of the aid will be limited by the exhaustion of the funds available for the payment thereof, set at EUR 3 billion by Article 10 of Royal Decree-law 5/2021.

The overall amount of transfers for transactions with guarantees managed by ICO, CESCE or CERSA will be as follows:

- EUR 2.75 billion for guarantees managed by ICO.
- EUR 100 million for guarantees managed by CESCE.
- EUR 150 million for guarantees managed by CERSA.

In order for this measure to be applied, a number of requirements in addition to the general requirements set out in the Code of Best Practice must be met. Specifically,

the following will be required: (i) that the conditions set out in the Fourth Additional Provision of Royal Decree-law 5/2021 are met; (ii) that the debtor's profit and loss statement for 2020 shows negative profit after tax; and (iii) that this measure is adopted in the context of an agreement to renegotiate the entirety of the debt.

(iv) **Debtor eligibility requirements**

In order for the above measures to be adopted, in addition to the fulfilment of the specific requirements for each of them mentioned above, the following common eligibility requirements must be met:

- That it is at the debtor's request.
- That the guaranteed loan is not in arrears (unpaid for more than ninety days), and neither is any of the remaining financing granted by the financial institution to the same client.
- That the borrower does not appear as in a state of default upon consultation of the records of the Central Credit Register of the Banco de España (CIRBE) on the date of the application for the extension.
- That the financial institution has not notified the guarantor of any default on the guaranteed transaction with the borrower on the date of the application for the extension.
- That the debtor is not undergoing insolvency proceedings.
- That the guaranteed financing was formalised before the date of adoption of this Agreement of the Council of Ministers.
- That the application by the debtor to the institution is made no later than 15 October 2021.
- That, in order to request the extension of the guarantee, the debtor complies with the limits established in the European Union's State aid regulations.
- That the debtor has not been convicted by a final judgement for offences against the Treasury and against the Social Security authorities, nor for the offences of obstructing the enforcement process, fraudulent insolvency or concealment in which one of the injured parties was the Treasury.
- That turnover, understood as the annual volume of transactions declared or verified by the Administration in the annual tax form corresponding to Value Added Tax or equivalent taxation, both for companies and for the self-

employed, in accordance with the regime applied, must have fallen by at least 30% in 2020 with respect to 2019.

3. Agreement of the Council of Ministers on the conditions and collection system for COVID-19 guarantees

The Agreement of the Council of Ministers on the conditions and collection system for COVID-19 guarantees, on the one hand, extends the application period for COVID-19 guarantees and approves certain measures in relation to the distribution and adjustment of these guarantees and, on the other, develops the system for collecting of enforced guarantees previously established in Article 16 of Royal Decree-law 5/2021.

The measures which have been approved by the above-mentioned Agreement are detailed below:

A. Extension of the application deadline for guarantees granted under Royal Decree-laws 8/2020 and 25/2020

Firstly, the Agreement of the Council of Ministers on the collection system for COVID-19 guarantees agrees to instruct ICO and CERSA to extend the application period for guarantees granted to companies and self-employed persons under Royal Decree-laws 8/2020 and 25/2020, as well as the corresponding implementing Agreements of the Council of Ministers, until 1 December 2021.

B. Allocation and adaptations of the amounts of guarantees released under Royal Decree-laws 8/2020 and 25/2020

As regards the allocation and adjustment of the guarantees, the following measures have been adopted by the Agreement of the Council of Ministers on the collection system for COVID-19 guarantees:

(i) The distribution of the guarantee facilities made available by Royal Decree-law 8/2020, of 17 March, carried out in accordance with the criteria established by the Order of 2 April 2020 of the Minister for Economic Affairs and Digital Transformation, will be valid until 1 June 2021 inclusive. From this date onwards, the guarantee amounts allocated and not used by the institutions will be distributed on demand, i.e. by allocating the uncommitted amounts in the order requested by the financial institutions.

(ii) ICO may authorise the financial institutions granting the financing transactions guaranteed under Royal Decree-laws 8/2020 and 25/2020 to reallocate them between the SME and non-SME tranches, after adjusting the cost of the guarantee if it is higher, if an incorrect allocation was detected at the time of granting, without prejudice to full compliance with the eligibility criteria and other applicable conditions.

On the other hand, the Agreement makes a number of amendments to adapt the COVID-19 guarantees to developments in the Temporary Framework for State Aid. Specifically, (i) Annex I of the Agreement of the Council of Ministers of 24 November 2020[3] and (ii) Annex I of the Agreement of the Council of Ministers of 22 December 2020[4], have been amended as follows:

(i) Amendments to Annex I of the Agreement of the Council of Ministers of 24 November 2020:

- In the "*Guarantee remuneration*" section, the paragraph relating to the remuneration table applicable to the transactions granted after the extension of the deadline for applying for guarantees has been removed, given that these transactions will be governed by the extension for applying for guarantees established in this Agreement of the Council of Ministers.

- In the section on "*Analysis of compliance with eligibility conditions*", a specific regulation has been included in this respect for transactions that make use of extensions to the maturity of guarantees.

(ii) Amendments to Annex I of the Agreement of the Council of Ministers of 22 December 2020:

- The maximum reference amount per debtor for guaranteed transactions has been increased from EUR 800,000 to EUR 1,800,000.

- Similarly, the reference amount for determining the cost of the applicable guarantee has also been increased from EUR 800,000 to EUR 1,800,000.

The Agreement also expressly empowers the ICO to communicate or incorporate as addenda to the framework contracts with financial institutions the measures described above and set out in Annex I of the Agreement of the Council of Ministers on the conditions and collection system for COVID-19 guarantees.

---

[3] Resolution of 25 November 2020, of the Secretary of State for the Economy and Business Support, publishing the Agreement of the Council of Ministers of 24 November 2020, which instructs ICO and allows CERSA to extend the deadline for applying for guarantees until 1 June 2021 and to extend the maturity of the guarantees already released.

[4] Resolution of 22 December 2020, of the Secretary of State for the Economy and Business Support, publishing the Agreement of the Council of Ministers of 22 December 2020, which establishes the terms and conditions of the fourth and fifth tranche of the guarantee facilities approved by Royal Decree-law 25/2020, of 3 July, with the main purpose of financing investments by SMEs and self-employed persons in the tourism, hospitality and related activities sector, and to reinforce the guarantees granted by CERSA.

C. Collection system applicable to guarantees granted under Royal Decree-laws 8/2020 and 25/2020

The Agreement of the Council of Ministers on the conditions and collection system for COVID-19 guarantees sets out certain provisions in relation to the collection and recovery system applicable to COVID-19 guarantees in order to establish the criteria and procedures for relationships between financial institutions, the Ministry holding the guarantee and ICO, implementing the provisions set out in Article 16 of Royal Decree-law 5/2021. Consequently, before analysing this topic, it is worth recalling the regulation provided for in the aforementioned Article 16 of Royal Decree-law 5/2021.

As mentioned above, Royal Decree-law 5/2021 contains a set of measures aimed at strengthening the solvency and financial capacity of companies and self-employed persons which, although viable, have seen their financial situation deteriorate as a result of COVID-19. This regulation also sets out the details of the procedure for recovering the guarantees released under Royal Decree-laws 8/2020 and 25/2020, and which may ultimately be enforced.

In this respect, General Budgetary Law 47/2003, of 26 November 2003 (the "**General Budgetary Law**"), contains a supplementary legal regime applicable to guarantees granted by the State. This regime applies unless the law authorising the guarantees expressly provides for a different regime and establishes that, in the event of enforcement of the default, the State should take action to recover the amount guaranteed and paid to the financial institution.

Notwithstanding the above, within the framework of the exceptional nature of the situation that has given rise to all the regulations authorising the granting of COVID-19 guarantees, the legislator has considered it appropriate to repeal the application of the regime and procedures for the recovery and collection of enforced guarantees provided for in the General Budgetary Law, and to entrust the recovery procedures to the granting financial institutions.

In this context, Article 16 of Royal Decree-law 5/2021 introduced a specific collection system applicable to COVID-19 guarantees, the most decisive aspects of which were as follows:

(i) It was agreed that the legal regime for recovery and collection specified in this article will apply to COVID-19 guarantees.

(ii) In the event of enforcement of the guarantees, the same legal regime for recovery and collection will apply to the whole of the principal of the guaranteed transaction as corresponds to the part of the principal of the loan not guaranteed by the State, in accordance with the regulations and practices of financial institutions, and the

collection procedures and prerogatives provided for in the General Budgetary Law will not apply.

(iii) The financial institutions will be responsible for initiating extrajudicial claims or bringing legal action on behalf of and in the name of the State for the recovery of unpaid amounts of Treasury credits arising from the enforcement of these guarantees.

(iv) In the event that the guaranteed debtor is declared to be undergoing insolvency proceedings, the general rules of representation and defence in court established in Law 52/1997, of 27 November, on Legal Aid to the State and Public Institutions will apply and the claims derived from the enforcement of these guarantees may be affected by the out-of-court payment agreements and will be considered financial liabilities for the purposes of the homologation of the refinancing agreements.

(v) Treasury claims arising from the enforcement of COVID-19 guarantees will have the status of ordinary claims in the event of a declaration of insolvency of the guaranteed debtor.

The Agreement of the Council of Ministers on the collection system for COVID-19 guarantees is a more specific development of the previous provisions set out in Article 16 of Royal Decree-law 5/2021 in relation to the collection system applicable to guarantees granted under Royal Decree-laws 8/2020 and 25/2020. It does so through the following seven points:

(i) **Actions by financial institutions on behalf of ICO, within the terms and conditions governing COVID-19 guarantees**

Firstly, it is established that, in accordance with the provisions of Article 16, section 2, of Royal Decree-law 5/2021, it will not be necessary for ICO to grant powers of attorney before a notary public to financial institutions for the formulation of extrajudicial claims or the exercise of legal actions for the recovery and repayment of the credits of the Treasury derived from the enforcement of the guarantees of the relevant Ministry.

(ii) **General authorisations for the deferral of payments of debts incurred as a result of the enforcement of COVID-19 guarantees**

It has also been agreed that, before initiating legal action to claim the guaranteed and defaulted debt and guarantees enforced by the financial institutions, the latter may grant deferrals of payments up to a maximum of twelve months.

Likewise, once the judicial claim has been initiated and, where appropriate, the attachment has been recorded, at the institution's discretion and when

circumstances permit, an agreement or system for payment of the principal due may be established, regardless of whether or not the guarantees have been enforced.

(iii) **Insolvency of the guaranteed debtor and subrogation of the Ministry holding the guarantee managed by ICO**

Within the scope of insolvency proceedings, it has been agreed that the declaration of insolvency proceedings, regardless of whether or not enforcement of the guarantee has been initiated, will result in the subrogation of the Ministry of Economic Affairs and Digital Transformation in the financing transactions of the guarantees managed by ICO on its behalf and granted under Royal Decree-laws 8/2020 and 25/2020, for the part of the principal guaranteed, without prejudice to the preservation of all obligations corresponding to the financial institutions.

The subrogation will not entail any obligation on the part of ICO towards the debtor and the financial institutions will continue to manage the financial transaction as a whole, including the subrogated part of the principal, under the terms agreed in the framework contract signed by the institutions with ICO.

(iv) **Communication of the claim by the institutions to the insolvency administrator and coordination with the State Advocate's Office, ICO and the Spanish Tax Agency**

In the event of the guaranteed debtor undergoing insolvency proceedings, the notification of the claim to the insolvency administrator will be carried out by the financial institutions within the period established by the insolvency regulations, and must include a description of the transaction in its entirety. The institutions will be obliged to make this notification for all transactions affected by the insolvency proceedings, irrespective of the scales set out in their internal policies. ICO and the State Advocate's Office will be notified of this communication immediately, for their information and, where appropriate, for the latter to participate in the insolvency proceedings in accordance with the provisions of section 3 of Article 16 of Royal Decree-law 5/2021.

The financial institutions will be responsible for the analysis of the composition agreement proposals made within the insolvency proceedings, acting in coordination with the State Advocate's Office and, with unity of criteria in the decision-making process in insolvency proceedings, on the basis of the *pari passu* clause and in any case, subject to the specific conditions and requirements of these guarantees in accordance with the applicable regulations, and in particular with regard to the system of recoveries of the enforced guarantees, as well as, where applicable, the necessary authorisations from the Collection Department of the Spanish Tax Agency, under the terms set out in Article 16 of Royal Decree-law 5/2021.

(v) **Recoveries and *pari passu* ranking of enforced COVID-19 guarantees**

In general, and without prejudice to the existence of guarantees granted to these loans, shared *pari passu* between the financial institution and the Ministry holding the guarantee, the claim guaranteed by the Ministry will have at least the same rank in order of priority as the rights corresponding to the part of the principal not guaranteed.

(vi) **ICO's relationships with financial institutions and recoveries**

Financial relationships between ICO, financial institutions and the Ministry of Economic Affairs and Digital Transformation will be governed by the provisions of the successive Agreements of the Council of Ministers and specific regulations governing guarantees granted to companies and self-employed persons by virtue of Royal Decree-laws 8/2020 and 25/2020.

In this respect, ICO will pay the financial institutions the amounts corresponding to the enforced guarantees. The administrative management of the guarantee between ICO and the financial institution, and recoveries in the event of enforcement, will be carried out in accordance with the procedure established by ICO in the framework contract for guarantees with financial institutions.

The financial institutions will pay ICO the amounts derived from the remuneration of the guarantee and the percentage, *pari passu*, of the recoveries equivalent to the guaranteed risk which, where appropriate, they carry out in relation to the unpaid amounts.

(vii) **Authorisation to contract for the management and monitoring of recoveries of defaulted and enforced guarantees by means of technical assistance**

Lastly, ICO is authorised to contract, in one or several contracts, any external support services that may be necessary for the control and monitoring of the recovery and collection of these guarantees, as well as the resolution of incidents arising from the management thereof.

In addition to the measures explained above, it should be noted that the Agreement empowers ICO and CERSA, within the scope of their authority and through their competent bodies, to resolve any practical incidents that may arise in the application of this Agreement throughout the life of the transactions. In those matters that may have budgetary implications or implications for its financial equilibrium, ICO may make the corresponding proposals to the Government Delegate Commission for Economic Affairs for its consideration.

Lastly, the Agreement also stipulates that the measures included in the Agreement will be subject to EU State aid rules.

This Legal Briefing was prepared by Gonzalo Ávila and Antonio Castro, associates in the Banking and Finance practice, and by Gonzalo Fernández-Bravo, associate in the Litigation practice.

For more information,
please contact:

Ildefonso Arenas
Banking and Finance Partner
iarenas@perezllorca.com
T: + 34 91 423 66 84

Ander Valverde
Banking and Finance Partner
avalverde@perezllorca.com
T: + 34 91 423 67 25

Mónica de San Román
Banking and Finance Partner
mdesanroman@perezllorca.com
T: + 34 91 423 66 14

Juan Rodríguez Cárcamo
Public Law and Litigation Partner
jmrodriguez@perezllorca.com
T: + 34 91 436 04 32