Recent key developments in the area of Spanish financial regulation

Prepared by the Regulation and Research Department of the Spanish Confederation of Savings Banks (CECA)

Royal Decree-law on extraordinary measures in support of company solvency in response to the COVID-19 pandemic (Royal Decree-law 5/2021, published in Spain's *Official State Journal* on March 13th, 2021)

The key financial measures implemented via Royal Decree-law 5/2021, which took effect on the day of its publication, are summed up below:

Three funds have been created to help viable companies whose solvency has been impaired as a result of the pandemic. The funds have a total size of 11 billion euros. The recipients of those funds must meet certain requirements at the time of application (*e.g.* not having been disbarred from applying for public grants or aid, being current on the servicing of any other public grants or aid received, *etc.*) and assume a series of commitments (*e.g.* remaining in business until June 30th, 2022).

There are also penalties for anyone who avails of the aid without meeting the above requirements.

I. COVID-19 direct aid for companies and the self-employed

This facility has an envelope size of 7 billion euros and is designed to enable the regional governments to extend aid directly to non-financial businesses and professionals from the sectors most affected by the pandemic.

This aid will go to companies or professionals in those sectors where business volumes contracted by over 30% year-on-year in 2020, and companies or professionals that pay personal income tax (PIT) under the objective estimation regime. Companies and professionals are ineligible for aid if their 2019 PIT return showed a loss or presented a tax loss for corporate income tax or non-resident income tax purposes (before application of the capitalisation reserve and the offset of tax losses).

The funds are for servicing debt and settling payments that are outstanding with suppliers and other creditors, financial or otherwise, and for covering fixed costs incurred, so long as they accrued between March 1st, 2020, and May 31st, 2021, and derive under contracts entered into prior to the effectiveness of Royal Decree-law 5/2021. Beneficiaries must use the funds to satisfy supplier payments, prioritised by the length of time outstanding, and then, if applicable, to reduce the face value of bank debt, prioritising the repayment of debt secured by state guarantees.

This facility will have two tranches:

- A first tranche endowed with 5 billion euros to be allocated to all of the regional governments and the cities of Ceuta and Melilla, except for the Balearic Islands and the Canary Islands.
- A second tranche sized at 2 billion euros to be earmarked specifically to the Balearic Islands and Canary Islands.

The criteria for allocating the funds per recipient are framed by the following ceilings:

- 3,000 euros in the case of companies or professionals that pay their PIT under the objective estimation regime.
- When annual turnover has contracted by more than 30% in 2020 with respect to 2019, the maximum amount of aid will be:

- 40% of the amount by which the decline in turnover in 2020 compared to 2019 exceeds the 30% threshold in the case of companies or professionals that pay PIT using the direct assessment method and entities or permanent establishments with no more than 10 employees.

- 20% of the amount by which the decline in turnover in 2020 compared to 2019 exceeds the 30% threshold in the case of entities, companies, professionals or permanent establishments with more than 10 employees.

The deadline for awarding the funds to companies is December 31st 2021.

II. COVID-19 debt restructuring facility

These funds are for companies or professionals that have arranged financing secured by state guarantees that were granted by banks between March 17th, 2020, and the date of publication of this Royal Decree-law; and, to financing transactions awarded between March 17th, 2020, and the date of publication of this Royal Decree-law which have been counter guaranteed by Compañía Española de Reafianzamiento, S.A.

That facility has an envelope size of 3 billion euros and the funds are to be provided to cover the expenses derived from the debt reduction measures. It has the following characteristics:

- The maturity date of the guarantees can be extended further.

- The state guarantees will be left in place for financing transactions that have already been awarded such a public guarantee and are converted into profit-participating loans.

- A Code of Good Practices will be approved for voluntary adoption by the banks.

- Spain's Ministry of Economic Affairs and Digital Transition may make transfers to companies and professionals that meet the requirements stipulated in the Code of Good Practices with the sole purpose of reducing the outstanding principal on their loans.

- The late-payment interest applicable from when a borrower asks its bank to apply any of the measures encompassed by the Code of Good Practices, having certified qualification, shall not exceed the sum of the ordinary interest as per the loan agreement and 1% of the outstanding principal.

III. Recapitalisation fund for companies affected by COVID-19

This fund is sized at 1 billion euros and its purpose is to provide temporary public support for business solvency. This aid will take the form of debt, equity or hybrid financial instruments, or a combination thereof, in viable non-financial entities that specifically apply for the aid and are experiencing temporary difficulties on account of COVID-19.

The obligation to present a public tender offer will not apply to the acquisition of equity interests via this fund.

In addition to the creation of the three funds itemised above, Royal Decree-law 5/2021 amends the following pieces of legislation:

- The Securities Market Act (Legislative Royal Decree 4/2015): establishing the mechanisms necessary so that the regulator —the CNMV— can regulate the advertising of crypto assets or other assets or instruments presented as investment assets.

- Royal Decree-law 8/2020: extension of the deadline for granting public guarantees under the ICO scheme to December 31st, 2021.

- Royal Decree-law 11/2020: in relation to the loans awarded by SME General Secretariat, clarification that: (i) the application must be presented at least two months before the first maturity of the loan the applicant is looking to refinance;

and, (ii) the presentation of a refinancing application does not imply the suspension of the loan maturities.

- Royal Decree-law 25/2020: extension until December 31st, 2021 of the deadline for awarding guarantees under the Facility for the coverage by the Spanish state of financing extended by supervised financial institutions to companies and professionals with the main aim of financing investments.

- Royal Decree-law 34/2020: giving joint-stock companies that have not yet been able to amend their bylaws the legal possibility of continuing to hold their annual general meetings remotely in 2021, so long as they can guarantee authentication of shareholders casting votes and offer shareholders a number of methods for participating in those meetings.

Law amending the consolidated text of the Corporate Enterprises Act in order to encourage long-term shareholder engagement at listed companies (Spanish Law 5/2021, Spain's *Official State Journal* on April 13th, 2021)

The purpose of Law 5/2021 is to transpose Directive (EU) 2017/828 of the European Parliament and of the Council of May 17th, 2017, amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, into Spanish law. It will take effect 20 days after its publication in the official state journal.

In broad terms, and in relation to the transposition to the aforementioned Directive, the new legislation establishes the following:

- It newly obliges collective investment undertaking management companies, private equity firms and closed-end collective investment undertakings to draw up and publish an engagement policy, in which they itemise, among other things, how they integrate shareholder engagement into their investment policies and provide a general description of their voting behaviour and an explanation of the most significant votes and the use of proxy advisor services.

- The definition of asset managers is expanded to include investment firms that provide portfolio management services to investors.

- When management companies provide asset management services to insurance firms or pension funds, they must inform the entities with which they have entered into such arrangements as to how their investment strategy is consistent with the profile and duration of their liabilities, and how they contribute to the medium- to long-term performance of their assets.

- Companies are entitled to insist on the identification of beneficial owners in addition to the formal shareholders.

- The figure of the proxy advisor is added and defined as a legal person that analyses, on a professional and commercial basis, the corporate disclosure and, where relevant, other information of listed companies with a view to informing investors' voting decisions by providing research, advice or voting recommendations that relate to the exercise of voting rights. The law itemises the obligations of these proxy advisors.

- In relation to related-party transactions, it is worth highlighting the following:

  - The definition of related-party transaction is adapted to match that provided in IFRS 24 of Commission Regulation (EC) No. 1126/2008.

  - It independently regulates the regime for publicly announcing and approving related party transactions and the exceptions thereto.

  - It introduces the obligation to publish information about material transactions that exceed certain quantitative thresholds, accompanied by a report drawn up by the audit committee by the

time of the conclusion of the transaction at the latest.

- Related-party transactions must continue to be approved at the general meeting.

- As for voting by shareholders involved in conflict situations, specific rules are established for listed companies and minority shareholder rights are reinforced.

In addition to transposing the Directive, the new Law introduces the following regulatory amendments in the areas of corporate governance and capital markets:

- Specifically, it introduces the following changes to the Corporate Enterprises Act:

  - It reinforces directors' due diligence requirements.

  - It requires listed company directors to be natural persons.

  - It introduces the 'loyalty voting share' concept: a company's bylaws may allow for the granting of additional votes to shares held by an owner on an uninterrupted basis for at least two years.

  - In relation to raising equity by listed companies and companies whose shares are admitted to trading on multilateral trading facilities, the new legislation: (i) shortens the minimum term for the exercise of preemptive subscription rights; and, (ii) introduces the requirement to produce an independent expert report when waiving preemptive subscription rights.

  - The regime of capital increases is modified to enable its use by smaller-sized companies whose shares are trading on multilateral trading facilities and for initial public offerings of shares, whether on regulated exchanges or the above-mentioned facilities.

  - The legislation clarifies the regime applicable to Spanish companies whose shares are traded on foreign securities markets only.

  - It regulates the arrangement of general meetings that are held 100% remotely.

  - It addresses the approval of intragroup transactions.

  - It stipulates that listed company directors must be remunerated unless stipulated otherwise in the bylaws.

  - It introduces a limit applicable to banks with respect to the delegation of the power to waive preemptive subscription rights when issuing convertible bonds.

- It introduces non-financial reporting obligations related with social and employee matters into the Commerce Code.

- In introduces the annual director remuneration report within the information itemised in Spain's Audit Act (Law 22/2015) that must be verified by the auditor.

- It introduces the following changes to the Securities Market Act:

  - The Securities Market Act is adapted to the Prospectus Regulation (Regulation (EU) No. 2017/1129) to raise the threshold for offers of securities to the public for which it is mandatory to draw up and publish a prospectus to 8 million euros, with the exception of credit institutions, for which the threshold remains at 5 million euros on account of the complexity of their business activities and their structure as issuers. The CNMV will be entitled to require a prospectus for issues below that threshold when it deems warranted on account of the complexity of the issuer of financial instruments in question.

  - It eliminates the requirement that companies whose shares are listed on a regulated market publish quarterly financial information.

  - It eliminates the significant shareholding disclosure requirement for directors in

keeping with the Market Abuse Regulation (Regulation (EU) No. 596/2014).

- It exempts issuers of securities that are not listed joint-stock companies from having to publish an annual corporate governance report.

Royal Decree-law passing complementary measures in support of companies and professionals affected by the COVID-19 pandemic (Royal Decree-law 6/2021, published in the *Official State Journal* on April 21st, 2021)

Royal Decree-law 6/2021, which took effect the day after its publication, enacts an exceptional and temporary procedure for 2021 and 2022 whereby the authorities can agree to the deferral and/or fractioning of the payment of debts of a public nature that are neither tax nor customs related and derive from the reimbursement and/or repayment of aid or loans awarded by the state government, along with a guarantee waiver. The idea is to provide the authorities with the documentation needed to analyse the transitory nature of the financial difficulties faced by companies and their future viability through the provision by the applicant of a viability or business plan. Specifically, the authorities can provide a grace period on all debt payments for up to two years from the maturity date and subsequent fractioning of the debt for another two years.

It also modifies the 'COVID-19 direct aid for self-employed and companies fund' contemplated in Royal Decree-law 5/2021 to channel aid to specific sectors in order to allow the possibility of adding other sectors that may have been affected by the pandemic at the regional level but have not met the thresholds established at the national level to receive the aid. To that end, Royal Decree-law 6/2021 empowers the regional governments and the cities of Ceuta and Melilla to earmark some of the COVID-19 funds allocated to each authority to additional sectors deemed to have been particularly affected by the pandemic within their geographical areas of purview.