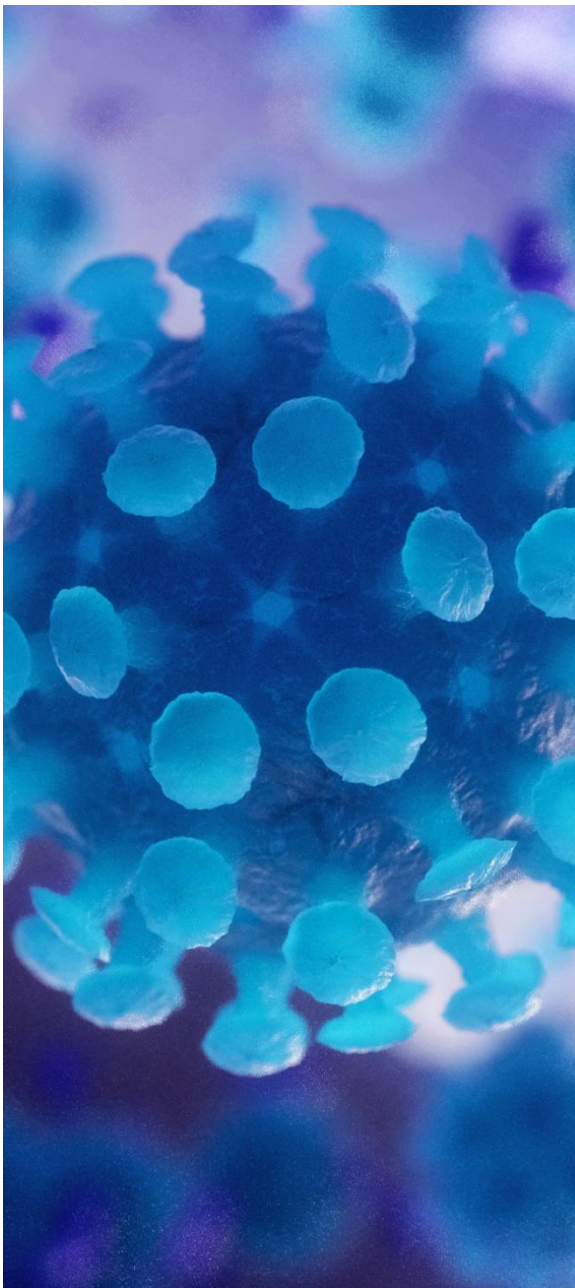

Royal Decree-Law 5/2021: main legal consequences for businesses

Legal flash

March 17, 2021

The Official Gazette of the Spanish State of March 13, 2021, published Royal Decree-Law 5/2021, of March 12, on urgent measures to support business solvency in response to the pandemic ("[RDL 5/2021](#)"), which came into force on the same day it was published (March 13, 2021).



Key aspects

- > **New COVID-19 direct aid facility** with a purpose-determined nature (payment to suppliers, creditors and fixed costs) for businesses whose activity is listed in the Annex to RDL 5/2021, and which will be managed by the autonomous regions.
- > Measures for making **loans with a public guarantee more flexible** (extending the terms or converting them into participating loans retaining the public guarantee) and financial aid to reduce the principal, the requirements for which will be established by resolution of the Council of Ministers.
- > **New company recapitalization fund** managed by the Spanish Development Finance Institution ("COFIDES") for medium-sized enterprises.
- > Companies benefiting from the aid **cannot distribute dividends** in 2021 or 2022, or increase the remuneration of senior management for two years.
- > Among other **insolvency measures**, the suspension of the obligation to file for bankruptcy is extended until December 31, 2021, and amendments to court-sanctioned refinancing agreements is allowed until December 31, 2021, even if a year has not yet passed since they were approved.
- > Public limited companies can hold **shareholders meeting exclusively online** throughout the whole of 2021.



COVID-19 direct aid facility

RDL 5/2021 has created the COVID-19 direct aid facility for the self-employed and businesses, aimed at supporting business solvency and reducing debt in the private sector.

The law considers that non-financial companies fulfilling the following requirements are eligible for this aid:

- They are tax resident in Spain or operate in the country through a permanent establishment.
- Their annual turnover in VAT (or equivalent indirect tax) fell by more than 30% in 2020 compared to 2019.
- They are associated with the sectors defined in a broad, heterogeneous list of Spanish National Classification of Economic Activities (CNAE) codes included in Annex I to the law. This list includes activities within the restaurant and hotel, food and beverage, textile and footwear industries; graphic arts, transport, performing arts and sports sectors; and the wholesale and retail sale of certain goods.

Consolidated groups will be considered to be a single taxpayer for eligibility and transfers.

RDL 5/2021 excludes taxpayers that in the 2019 financial year corporation tax declaration had a negative tax base before applying the capitalization reserve and offsetting negative tax bases.

This is aid of a purpose-determined nature that must be used to pay debt and payments to suppliers and other financial or non-financial creditors, along with fixed costs incurred that became due between March 1, 2020, and May 31, 2021, and arise from contracts entered into before March 13, 2021. The law also provides that the aid must first be used to pay suppliers, in order of due date, and if appropriate, to reduce bank debt, prioritizing the reduction of debts with a public guarantee.

Receipt of the aid involves a commitment to stay in business until June 30, 2022. After this date, beneficiaries must provide proof to the granting body or, in the event of non-compliance, repay the aid.

The territorial distribution of the aid, allotted €7 billion, has been structured into two tranches:



- A tranche of €2 billion for the Balearic and Canary Islands, which will be distributed proportionally considering the weight of each autonomous region with regard to the fall in the number of workers registered with the social security system in 2020, excluding the effect of the temporary redundancy plans (ERTE).
- A second tranche of €5 billion for the remaining autonomous regions, and Ceuta and Melilla, which will be distributed proportionally, considering the assignment of REACT EU, based on income, unemployment and youth unemployment rates.

The autonomous regions and Ceuta and Melilla must define the aid allocation processes, handle the aid and carry out controls before and after payment. The deadline for granting the aid is December 31, 2021.

Each autonomous region, and Ceuta and Melilla, will establish the criteria for determining the amount of aid extended, although the law imposes maximum limits. Thus, in the case of entrepreneurs or professionals whose annual turnover in VAT (or equivalent indirect tax) fell by more than 30% in 2020 compared to 2019:

- 40% of the decrease in turnover in 2020 compared to 2019 that exceeds that 30%, in the case of entities and permanent establishments with up to 10 employees.
- 20% of the amount of the decrease in turnover in 2020 compared to 2019 that exceeds that 30%, in the case of entities and permanent establishments with over 10 employees.

In any event, the aid granted must be between €4,000 and €200,000. The maximum limits may be increased in the Balearic and Canary Islands.

Rules are established to be eligible to apply for aid granted by the different autonomous regions. A deciding factor will be whether the turnover exceeded €10 million in 2020.



Greater flexibility of financial debt guaranteed by the state and new financing facility

Measures for making loans with a public guarantee more flexible

RDL 5/2021 introduces measures giving greater flexibility to restructuring the debt of companies with a registered office in Spain that were granted financing with a public guarantee between March 17, 2020, and March 13, 2021, or that have a second guarantee granted by the Spanish Refinancing Company (CERSA). The applicable conditions and requirements to benefit from these guarantees will be established by resolution of the Council of Ministers. Therefore, RDL 5/2021 states that the parties concerned are required to have requested the extension of deadlines and any grace period for that financing under Royal Decree-Law 34/2020 (under which the term ends on May 15, 2021).

To do so, three possible levels of action are covered, aimed at facilitating the restructuring of the finance guaranteed by the state, thus allowing the financing to be included in refinancing and restructuring processes agreed between the banks and their customers to ensure the solvency of feasible businesses impaired as a result of COVID-19:

- **1. Extension of the maturity date.** The new law introduces the possibility of postponing the guarantees' maturity date to a later date, to be set by resolution of the Council of Ministers, in such a way that the financing guaranteed can be extended for the same period.
- **2. Conversion into participating loans.** The public guarantee will be maintained for financing transactions that are converted into participating loans, in the terms set by resolution of the Council of Ministers.
- **3. Debt reduction or write-down.** As a last option, after implementing other measures to help solvency, the state may exceptionally make transfers through the financial institution granting the financing guaranteed to the companies, which must be used to reduce the outstanding principal (including, as appropriate, the capital due, unpaid or with an enforced guarantee). Crediting financial institutions will take on the part that falls to them of this reduction as provided by resolution of the Council of Ministers. Therefore, a **new line** is created, funded with up to €3 billion, the terms and requirements for which will be specified by resolution of the Council of Ministers.

As mentioned above, these measures will be implemented within the framework of debt



renegotiation agreements between debtors and the crediting financial institutions. A Code of Best Practices is introduced to coordinate these processes, the content of which will be approved by resolution of the Council of Ministers, and which financial institutions can adhere to voluntarily. Financial institutions must inform their customers about whether they adhere to the Code of Best Practices and about the possibility of benefiting from its provisions.

There is a reduction of up to 50% on the notarial and registration fees arising from formalizing and registering the refinancing transactions mentioned above. Deeds formalizing the extension of maturity dates will be exempt from stamp duty.

Default interest applicable from when the debtor requested the financial institution to apply any of the measures in the Code of Best Practices, and proves it is in that situation to the institution, cannot exceed the result of adding 1% of the outstanding principal of the loan to the remuneration interest agreed in the loan.

Recovery of ICO guarantees

Taking into account the exceptional situation, it is considered that the regime and ordinary proceedings for recovery and collection of public guarantees should not be applicable. Therefore, the following is established in relation to the system to recover ICO guarantees:

- The same procedure will be followed as for recovery of the part of the loan principal not guaranteed by the state, and the financial institutions will be responsible for recovery (so that the regime in the General Budget Act requiring application of public credit rules will not apply).
- Loan institutions cannot grant deferrals, installments or write-downs of the amounts claimed on behalf of the state without prior authorization from the collections department of the Spanish tax authorities.
- It is expected that, by resolution of the Council of Ministers, general authorizations may be given to grant deferrals and installments. General write-downs may be authorized by resolution of Royal Decree of the Council of Ministers, after consent from Council of State.
- Credits arising from enforcing the guarantees will be considered a financial liability for the purposes of approving refinancing agreements.



- In the case of insolvency of the guaranteed debtor, credits arising from enforcing the guarantees will be considered ordinary.

Extension of the period for granting guarantee facilities

The period for granting public guarantees of the guarantee facilities created under Royal Decree-Law 8/2020 and Royal Decree-Law 25/2020 is extended until December 31, 2021.

Recapitalization fund for businesses affected by COVID-19

A recapitalization fund is created for businesses affected by COVID-19, allocated €1 billion, which will be managed by COFIDES. Its purpose is to give temporary public aid to strengthen the solvency of non-financial companies with headquarters in Spain that request it, in the form of debt, capital, and hybrid capital instruments, or a combination of them.

The eligibility requirements and basic terms, conditions and requirements applicable will be determined by resolution of the Council of Ministers. In any event, this excludes companies that had feasibility problems before the COVID-19 crisis, or the future of which is considered unfeasible.

Access to this fund is incompatible with access to the fund aiding the solvency of strategic companies created by Royal Decree-Law 25/2020 and managed by the state-owned industrial holding company ("SEPI"). The law provides that SEPI must transfer to COFIDES any files it has opened that do not reach the minimum investment thresholds for the fund aiding the solvency of strategic companies.

During the process of reviewing applications from interested companies, an assessment will be made of the debt restructurings carried out in the framework of the measures approved by RDL 5/2021.

A tax exemption is established, as well as an exemption from paying notarial and registration fees for the transfers, company transactions and acts carried out for financial and asset capitalization or restructuring of the associate companies, which the fund will cover.



Requirements to access financial measures and limitations on the beneficiary companies

RDL 5/2021 includes a series of eligibility requirements (such as meeting tax and social security obligations, and not having been declared insolvent) to access the measures explained above on direct aid, financial debt restructuring and the recapitalization fund. It also sets out a series of limitations on companies benefiting from the aid, of which the following stand out:

- They must keep the business receiving the aid running until June 30, 2022.
- They cannot distribute dividends during 2021 and 2022.
- They cannot approve increases to senior management remuneration in the two years following the application of any of the measures.

The measures introduced by RDL 5/2021 require authorization from the European Commission.

Insolvency measures

The following terms, initially set out in Act 3/2020, have been extended:

- **Amendment and non-performance of composition agreements and out-of-court agreements for payment.** The term to submit amendments to the composition agreement being fulfilled has been extended to December 31, 2021.

Applications for non-performance of composition agreements and out-of-court agreements for payment will be transferred to the insolvent debtor, but will not be admitted by the courts during the following periods:

- Until December 31, 2021, in the case of applications submitted between January 31, 2021, and September 30, 2021.
- Until April 30, 2021, in the case of applications submitted between October 31, 2020, and January 31, 2021.
- The proceedings for applications submitted and admitted by the courts between January 31, 2021, and March 13, 2021, will be suspended until December 31, 2021.



- > **Amendment of composition agreements (*reconvenio*).** The suspension of the obligation of debtors undergoing insolvency to file a request for liquidation if they are unable to fulfill the composition agreement approved to facilitate amendments (the so-called *reconvenio*) has been extended until December 31, 2021.
- > **Amendment and non-performance of refinancing agreements.** The possibility to amend court-sanctioned refinancing agreements, even if a year has not elapsed since the previous approval, has been extended until December 31, 2021.

Also, applications for non-performance of refinancing agreements will be transferred to the insolvent debtor, but will not be admitted by the courts:

- until February 28, 2021, in the case of applications submitted between October 31, 2020, and January 31, 2021;
 - until October 31, 2021, in the case of applications submitted between January 31, 2021, and September 30, 2021; and
 - the proceedings for applications submitted and admitted by the courts between January 31, 2021, and March 13, 2021, will be suspended, and the debtor has until October 31, 2021, to inform the court that it has opened negotiations to amend the agreement or reach a new one. The suspension will be lifted three months after notification has been given to the court if no amendment has been made or no agreement has been reached.
- > **Suspension of the duty to file for insolvency.** The suspension of insolvent debtors' obligation to file for insolvency has been extended until December 31, 2021. It is also specified that the two-month period computed to file for insolvency will begin on the day following that date.

Until December 31, 2021, the courts will not process applications for mandatory insolvency submitted from March 14, 2020. Debtors' applications for voluntary insolvency proceedings filed before December 31, 2021, will be prioritized, even if filed after the date on which the application for mandatory insolvency was filed.

- > **To speed up the procedural processing,** (i) preference is given to written processing, without a hearing, of incidental insolvency proceedings on clawback actions to restore the insolvency estate filed until December 31, 2021; (ii) the period in which preference is given to certain procedural issues is extended until December 31, 2021, including the acquisition of production units, amendments to composition agreements, and labor incidents; and (iii) in the case of insolvency declared until December 31, 2021, it will be



possible to dispose of the insolvency estate through any means allowed under the Consolidated Text of Spanish Insolvency Act, although preference is given to telematic means, even when the approved liquidation plan provides for a certain out-of-court auction, without it being necessary to amend the plan or request authorization from the court.

Deferral of tax debts

An amendment has been made to the payment deferral regime for tax debts not exceeding €30,000 approved under Royal Decree-Law 35/2020, for taxpayers with a turnover of less than €6,010,121.04 in 2020 and that correspond to tax declarations-assessments and self-assessments required to be submitted and paid by a deadline between April 1 and April 30, 2021, both dates inclusive.

Under the original wording, approved by Royal Decree-Law 35/2020, taxpayers were granted a six-month deferral without default interest accruing for the first three months. The newly approved wording extends the deferral period during which no default interest will accrue to four months. None of the other requirements have been changed.

Online shareholders meetings in public limited companies

Public limited companies (*Sociedad Anónima/S.A.*) can hold online shareholders meetings throughout the whole of 2021, even if not so provided in the bylaws.

If a company chooses to hold a shareholders meeting exclusively online, it must adopt adequate measures to ensure the identity of the individuals exercising their voting rights, and allow online attendance; proxy granted to the chairperson of the meeting through remote means of communication; and advance remote voting.

Note that Royal Decree-Law 34/2020 already allowed private limited companies (*Sociedad Limitada/S.L.*) to hold shareholders meeting exclusively online in 2021, but applied different rules to public limited companies. The amendment in Royal Decree-Law 5/2021 clarifies this situation.



Other relevant aspects

- Owing to the impact of the second state of emergency on the tourism industry, the suspension of interest payments and capital amortization on Emprendetur loans, granted by the General Secretary of Tourism in the framework of that program, has been extended an additional year.
- In proceedings involving support being granted to industrial projects in the field of the competence of the Directorate General of Industry and Small and Medium-Sized Enterprises that have already been granted an extension on the deadlines for enforcement, resolutions can be modified to extend the deadlines to carry out the activity and, if applicable, to justify and substantiate that enforcement in cases where the health crisis caused periods of inactivity, reduced the sales volume or interrupted the supply in the value chain.

©2021 CUATRECASAS

All rights reserved.

This document is a compilation of legal information prepared by Cuatrecasas. The information and comments included in it do not constitute legal advice.

Cuatrecasas owns the intellectual property rights over this document. Any reproduction, distribution, assignment or any other full or partial use of this legal flash is prohibited, unless with the consent of Cuatrecasas.



IS 713573