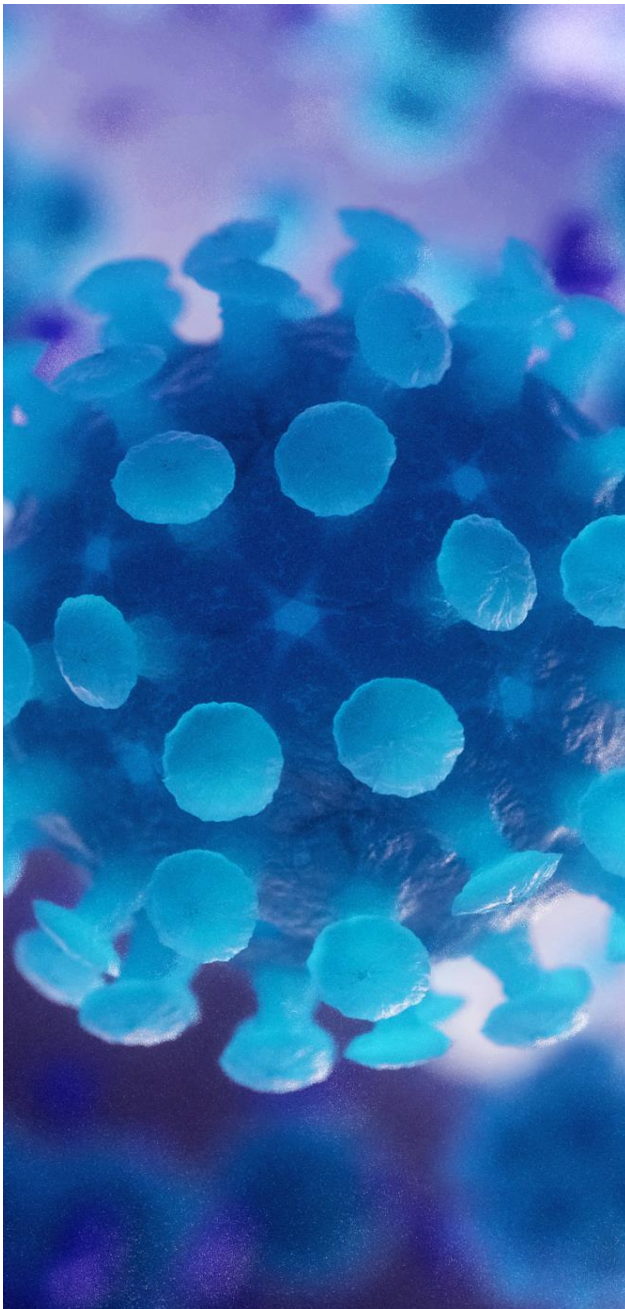

Royal Decree-Law 34/2020: main legal consequences for businesses

Legal flash

November 18, 2020

The Spanish Council of Ministers has approved Royal Decree-Law 34/2020, of November 17, on urgent measures to support business solvency and the energy sector, and on tax-related measures, to tackle the health crisis caused by COVID-19 ("[RDL 34/2020](#)"), which enters into force on November 19.



Key aspects

- > Measures adopted until now have been reinforced to support the liquidity and solvency of companies by extending the period for granting the two **guarantee facilities managed by the Spanish State Finance Agency (*Instituto Oficial de Crédito* or "ICO")**, and the maturity date and grace period of previously guaranteed transactions.
- > With regard to insolvency, RDL 34/2020 extends the **suspension of the obligation to file for insolvency proceedings** until March 14, 2021, and increases the temporary scope of measures on the non-admission of applications for non-performance of composition agreements and refinancing agreements.
- > It also amends the **system for the liberalization of foreign direct investments**, e.g., among other requirements, until June 30, 2021, authorization will be required for investments carried out by EU or EFTA residents in listed companies, and unlisted companies if the value of the investment exceeds €500 million.
- > Extension until December 31, 2021, of **remote attendance at general meetings**.
- > In terms of **tax-related developments**, zero-rated VAT on specific healthcare materials for certain recipients has been extended until April 30, 2021, and VAT on disposable surgical face masks has dropped to 4%.



EXTENSION OF ICO GUARANTEE FACILITIES

Owing to the ongoing effects of the COVID-19 crisis, RDL 34/2020 extends the temporary and objective scope of the two guarantee facilities managed by ICO, namely (i) the facility to meet liquidity needs, approved under [RDL 8/2020](#) (the “**Liquidity Facility**”); and (ii) the facility to carry out investment and liquidity projects, approved under [RDL 25/2020](#) (the “**Investment Facility**”). Below is a list of the measures adopted:

- > **Extension of the period for granting guarantees:** RDL 34/2020 extends the period for granting the guarantees within the scope of the two guarantee facilities managed by ICO until June 30, 2021.
- > **Extension of the period for working capital:** Financial institutions that have provided loans backed by ICO guarantee facilities must maintain until June 30, 2021, the working capital facilities granted to clients that fulfill the eligibility requirements set out in RDL 34/2020.
- > **Extension of the maturity date of financing transactions backed by a Liquidity Facility:** At the debtor’s request, the maturity date of ICO-backed financing transactions entered into before November 18, 2020, under the Liquidity Facility will be extended by up to three years (added to the current five-year term). This measure will bring the maturity date of financing transactions backed by either ICO facility into line, up to a term of eight years. The extended maturity date of the guarantee will be the same as the extended maturity date of the guaranteed loan.
- > **Extension of grace periods of ICO-backed financing transactions:** Debtors can also request an additional 12-month grace period (as long as the aggregate grace period does not exceed 24 months) to repay the principal of financing granted before November 18, 2020, that are backed by either ICO guarantee facility.

The capital corresponding to the installments due within the grace period will be fully repaid on paying the last installment of the loan, or prorated between the remaining installments, or a combination of both options, as agreed by the parties.

- > **Procedures and formalities for the extension of the maturity date and grace period of guaranteed financing transactions:** For debtors to be able to request the extension of the maturity date and grace period of guaranteed financing transactions, they must fulfill the requirements set out in RDL 34/2020 (e.g., they cannot be in arrears or in default, they cannot be in a situation of insolvency, and they must meet the thresholds established in the European Union State aid rules).



Financial institutions will have up to 30 calendar days to decide on debtors' requests, and until June 1, 2021, to inform the ICO of their decision.

RDL 34/2020 provides for a reduction of up to 50% on notarial and registry fees, and an exemption from stamp duty tax in cases involving the extension of the term of a financing transaction.

However, no guarantee will be granted or extended under RDL 34/2020 until the Spanish government has received authorization from the European Commission to do so.

- > **Promissory notes traded on the Spanish Alternative Fixed-Income Market:** Promissory notes traded on the Spanish Alternative Fixed-Income Market (MARF) can also benefit from the guarantees of the Investment Facility under the conditions established by Resolution of the Council of Ministers.

INSOLVENCY MEASURES

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

- > Suspension of the duty to file for insolvency. The suspension of insolvent debtors' obligation to file for insolvency has been suspended until March 14, 2021 (originally until December 31, 2020). Until this date, the courts will not process applications for mandatory insolvency submitted from March 14, 2020. Debtors' applications for voluntary insolvency proceedings filed before March 14, 2021, will be prioritized.
- > Breach of composition agreements. Applications for non-performance of composition agreements will be transferred to the insolvent debtor, but will not be admitted by the courts:
 - o until January 31, 2021, in the case of applications submitted before October 31, 2020 (period established under Act 3/2020);
 - o until April 30, 2021, in the case of applications submitted between October 31, 2020, and January 31, 2021; and
 - o the proceedings for applications submitted and admitted by the courts between October 31, 2020, and November 19, 2020, will be suspended for a period of three months from the date of suspension.
- > Breach of refinancing agreements. Likewise, applications for non-performance of refinancing agreement will be transferred to the insolvent debtor, but will not be admitted by the courts:
 - o until November 30, 2020, in the case of applications submitted before October 31, 2020 (period established under Act 3/2020); and



- until February 28, 2021, in the case of applications submitted between October 31, 2020, and January 31, 2021.

FOREIGN INVESTMENT

RDL 34/2020 introduces significant changes to the regime suspending the liberalization of foreign direct investments, also making reference to the lasting effects of the COVID-19 crisis. These changes affect the concept of foreign direct investment, as well as the sectors and investors obliged to seek authorization, as explained below, comparing the new system to the one in force until now. Additionally, as a temporary measure, certain investments from EU/EFTA countries other than Spain will also be required to obtain authorization.

New system for foreign direct investments

In sum, compared to the previous situation, these are the new developments:

- > To date, “foreign direct investment” has been defined as an investment in which the investor holds a share equal to or greater than 10% in the Spanish company’s capital or, when as a result of the transaction, the investor takes an active part in managing or controlling that company.
Now, RDL 34/2020 (a) maintains the rule on investors holding a stake equal to or greater than 10% of the share capital, (b) eliminates the requirement on “taking an active part in managing the company,” and (c) maintains the requirement for investors to control the company, although it has redefined “control” as “the possibility of exercising a decisive influence over the company” according to the terms of [article 7.2](#) of Act 15/2007, the Spanish Antitrust Act (which includes not only the control scenarios provided under article 42 of the Commercial Code, but also any means enabling a decisive influence).
- > Foreign direct investment will require prior authorization in both scenarios below:
 - Investor's profile: until now, it was necessary for the investor to (i) be controlled by a third-country government; (ii) participate in sectors affecting the public order, public security or public health of another Member State; and (iii) have had administrative or court proceedings brought against it in another Member State for exercising criminal or unlawful activities. Now, although requirements (i) and (ii) have not changed, the concept of requirement (i) has been amended to refer again to article 7.2 of the Spanish Antitrust Act, and the wording of requirement (iii) has been amended to there being a serious risk of the investor exercising criminal or unlawful activities that may affect public order, public security or public health.
 - The sector of the company in which the investment is made: the investment must be made in one of Spain’s “main strategic sectors,” i.e., sectors affecting public order, public security and public health: (i) critical infrastructures; (ii) critical technologies and dual-use goods; (iii) provision of fundamental inputs; (iv) sectors with access to sensitive data; and (v) media. The strategic sectors are the same, but the scope of three



of them has changed:

- The critical and dual-use technologies sector has been amended to include key technologies for leadership and industrial qualification, and technologies developed under programs and projects of particular interest to Spain. As well as the technologies included previously (artificial intelligence, robotics, semiconductors, cybersecurity, aerospace technology, defense technology, quantum and nuclear technologies, energy storage, nanotechnologies and biotechnologies), RDL 24/2020 now adds telecommunications, advanced materials and advanced manufacturing systems.
- The provision of fundamental inputs category (that already encompassed energy, raw materials, and food security) now includes strategic connectivity services.
- And, regarding media, RDL 34/2020 specifies that investments in audiovisual communication services will be governed by [Act 7/2010, the General Act on Audiovisual Communication](#).

Transitional regime for EU/EFTA investments

As a temporary measure, until June 30, 2021, foreign direct investments made by residents of EU/EFTA countries other than Spain or by residents in Spain with a beneficial owner in an EU/EFTA country will also be required to obtain authorization when these investments affect:

- > companies listed in Spain (companies whose securities are totally or partially admitted to trading on an official Spanish secondary market and whose registered office is in Spain), or
- > unlisted companies, if the value of the investment exceeds €500 million.

Therefore, from November 19, 2020, to June 20, 2021, any investments in the sectors mentioned above will also require authorization as established in Act 19/2003.

ONLINE MEETINGS

RDL 34/2020 extends the possibility for public limited companies (listed and unlisted) and private limited companies to hold general meetings online, even if not expressly provided in the corporate bylaws. The same applies to the meetings or assemblies of members or partners of all other legal entities governed by private law (associations, civil-law partnerships and cooperatives), and to the meetings of the board of trustees of foundations.



CAPITALIZATION THRESHOLD

To date, if a company's shares were traded exclusively on a multilateral trading facility (specifically, BME Growth, which is the new name given to the Spanish Alternative Stock Market or MAB since September 3, 2020), it had nine months to request admission to trading on a regulated market, such as the Stock Exchanges, if the capitalization of that company's shares exceeded €500 million for a continuous period of over six months.

That threshold has now risen to €1,000 million in an attempt to stimulate the depth and liquidity of expanding SME markets and to make them more attractive.

VAT ON MEDICAL SUPPLIES AND OTHER TAX MEASURES

- The **zero-rated VAT** on the delivery, import and intra-community acquisition of **certain medical supplies**, applied to transactions accrued between April 23, 2020, and October 31, 2020, will apply to the same transactions accruing between November 1, 2020, and April 30, 2021.

The list of medical supplies benefiting from this rate is attached as an annex to RDL 34/2020 and is almost identical to the list available since April 23, 2020. The recipients of these zero-rated transactions must be public law entities, clinics and hospital centers, or private social entities, in accordance with the requirements set out in the Spanish VAT Act.

If the recipients of any zero-rated transactions accruing between November 1 and November 18, 2020, have been charged VAT on these transactions, the supplier must correct the VAT amounts charged.

- As a complement to this measure, VAT on the delivery, import and intra-community acquisition of disposable surgical face masks has dropped to from 21% to 4%. The new rate applies to transactions accruing between November 19, 2020, and December 31, 2021, and is effective for transactions where the recipients are not the entities and hospital centers mentioned above.
- Certain amendments have been approved that affect the deduction on corporate income tax for investments in the production of films and audiovisual series. Specifically, the minimum amount of expenses incurred in Spanish territory has been reduced from €1 million to €200,000 for the production stage of animated films, and a 30% reduction on the deductible base has been established if the producer is responsible for providing the visual effects services and the expenses incurred in Spain are lower than €1 million. The amount of this reduction cannot exceed the threshold set by EC legislation for *de minimis* aid.



- > RDL 34/2020 also amends the freedom of amortization and deduction for technological innovation introduced on corporate income tax under RDL 23/2020 for companies in the automotive industry.
- > Finally, some measures affecting the tax and economic system of the Canary Islands have been extended from December 31, 2020, to December 31, 2021. More specifically, with regard to the Reserve for Investments in the Canary Islands, RDL 34/2020 enables allocations to materialize the reserve in the case of upfront investments to be charged against income obtained until December 31, 2021, and it broadens the possibility of registering companies on the Official Register of the Canary Islands Special Zone until December 31, 2021.

ENERGY-RELATED MEASURES

RDL 34/2020 has amended the Spanish Hydrocarbons Act to incorporate the changes set out in Directive (EU) 2019/692 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, with the aim of reducing the obstacles preventing the effective operation of the internal market in natural gas resulting from the non-application of the EU market rules to gas transmission lines to and from non-EU countries.

For additional information, please contact Cuatrecasas.

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