EUROPEAN COMMISSION

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SENSITIVE[*]: *COMP Operations*

Subject: State Aid SA. 62067(2021/N) – *Spain* - COVID-19- Recapitalisation Fund for certain enterprises affected by the COVID-19 outbreak

Excellency,

The European Commission ("the Commission") wishes to inform the Kingdom of Spain that, having examined the information supplied by your authorities on the State aid referred to above, it has decided not to raise any objections, as it is compatible with the internal market pursuant to Article 107(3)(b) of the Treaty on the Functioning of the European Union ("TFEU").

1. PROCEDURE

(1) By electronic notification of 29 June 2021[1], Spain notified an aid scheme to be implemented through a Recapitalisation Fund for enterprises affected by the COVID outbreak ("the Fund") under the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (the "Temporary Framework").[2]

[*] Handling instructions for SENSITIVE information are given at https://europa.eu/!db43PX

[1] The notification followed preliminary exchanges between the Spanish authorities and the Commission services, which started on 23 February 2021 with the submission of a pre-notification from the Spanish authorities. Those pre-notification contacts consisted of two videoconferences between the Spanish authorities and the Commission services held to discuss the draft submissions of the Spanish authorities, notably the draft legal basis, as well as working documents and follow-up e-mails, etc. The Commission's services sent a request for information on 5 March 2021 to which the Spanish authorities replied on 17 May 2021. On 21 May 2021, the Commission services sent an additional clarification request to the Spanish authorities that replied on 10 June 2021. A final clarification request was submitted on 15 June 2021 and answered on 17 June 2021.

[2] Communication from the Commission - Temporary framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ C 91I, 20.3.2020, p. 1), as amended by Commission Communications C(2020) 2215 (OJ C 112I, 4.4.2020, p. 1), C(2020) 3156 (OJ C 164, 13.5.2020, p. 3), C(2020) 4509 (OJ C 218, 2.7.2020, p. 3), C(2020) 7127 (OJ C 340I, 13.10.2020, p. 1) and C(2021) 564 (OJ C 34, 1.2.2021, p. 6).

Excma. Sr. D.[a] Arancha González Laya
Ministra de Asuntos Exteriores y de Cooperación
Plaza de la Provincia 1
E-28012 MADRID

(2) Spain exceptionally agrees to waive its rights deriving from Article 342 of the Treaty on the Functioning of the European Union ("TFEU"), in conjunction with Article 3 of Regulation 1/1958[3] and to have this Decision adopted and notified in English.

2. DESCRIPTION OF THE MEASURE

(3) Spain considers that the COVID-19 outbreak affects the real economy. The aid scheme forms part of an overall package of measures and aims to ensure that sufficient liquidity remains available in the market, to counter the liquidity shortage faced by undertakings because of the outbreak, to ensure that the disruptions caused by the outbreak do not undermine the viability of the undertakings and thereby to preserve the continuity of economic activity during and after the outbreak.

(4) According to the Spanish authorities, the purpose of the aid scheme is to support the solvency of viable companies experiencing temporary difficulties due to the impact of the COVID-19 outbreak. Spain considers the aid scheme to be compatible with the internal market on the basis of Article 107(3)(b) TFEU, in the light of the Temporary Framework and in particular its section 3.11.

2.1. The nature and form of aid

(5) The aid scheme involves the creation of a Fund, without legal personality, within the Spanish State General Administration, attached to the Ministry of Industry, Trade and Tourism. It will provide financing in the form of recapitalisation measures (equity or hybrid instruments) to non-financial companies based and active in Spain suffering temporary financial difficulties due to the COVID-19 pandemic but viable in the medium and long term.

(6) In addition the Fund may also provide public support through other debt or loan instruments under the conditions set out in Commission Decision C(2020) 2154 final of 2 April 2020 in case SA.56851 (2020/N) Spain COVID-19- Umbrella Scheme, as amended[4]. Since that latter scheme has already been approved, the present decision does not cover support through debt or loan instruments that the Fund may provide.

2.2. Legal basis

(7) The legal basis establishing the aid scheme is the Royal Decree-Law 5/2021 of 12 March 2021 on urgent Measures to support business solvency in response to the COVID outbreak ("RDL")[5] and the Agreement in Council of Ministers ("ACM")

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[3] Regulation No 1 determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, p. 385.

[4] OJ C 144 of 30.04.2020, p. 1.

[5] Real Decreto-ley 5/2021, de 12 de marzo, de medidas extraordinarias de apoyo a la solvencia empresarial en respuesta a la pandemia de la COVID-19. BOE 13 March 2021.Num.62, Secc. I. Page 29126 https://www.boe.es/eli/es/rdl/2021/03/12/5/dof/spa/pdf.

on the functioning of the Recapitalisation Fund for enterprises affected by the COVID outbreak, adopted by Resolution of 15 June 2021[6].

2.3. Administration of the aid scheme

(8) The granting authority is the Ministry of Industry, Trade and Tourism (MITT). The management of the Fund is entrusted to Compañía Española de Financiación del Desarrollo (COFIDES), acting in its own name on behalf of the Spanish State General Administration. COFIDES is a Spanish corporation belonging to the Spanish public sector as the majority of its share capital is held by entities of the State General Administration. As the Fund Manager, COFIDES will assess the applications for the support from the Fund with the assistance of independent experts[7].

(9) After the assessment of applications, COFIDES will submit the applications considered eligible under the aid scheme for the approval of the Technical Investment Committee of the Fund ("TIC", Comité Técnico de Inversiones). TIC is an inter-ministerial body attached to the MITT. TIC evaluates and approves the operations carried out through the Fund to ensure the proper functioning and compliance with the objectives for which it has been created. In this regard, it supervises and monitors the operations carried out by COFIDES, being informed and approving certain implementation operations[8].

(10) Once TIC approves the support, COFIDES will formalise the public support by means of an Agreement with the beneficiary that it will sign and execute in its name on behalf of the Spanish State General Administration[9].

2.4. Budget and duration of the aid scheme

(11) The budget of the Fund is EUR 1 billion, financed by the State budget.

(12) Support from the Fund may be granted as from the notification of the Commission's approval until 31 December 2021.

2.5. Beneficiaries

(13) The Fund is focused on the Spanish middle market. The final beneficiaries of the aid scheme are companies established and active in the whole territory of Spain, other than financial institutions, with total net revenues between EUR 15 million and EUR 400 million on a consolidated basis, which suffer temporary financial difficulties due to the COVID-19 pandemic but are viable in the medium and long term.

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6 Resolución de 15 de junio de 2021, de la Secretaria de Estado de Comercio, por la que se publica el Acuerdo del Consejo de Ministros de 15 de junio de 2021, por el que se establece el funcionamiento del Fondo de recapitalización de empresas afectadas por la COVID-19, F.C.P.J. BOE 16 June 2021. Num.143, Secc. I, Page 73329. https://www.boe.es/boe/dias/2021/06/16/pdfs/BOE-A-2021-10027.pdf

7 ACM, Annex III.

8 ACM, 1.b Annex III and Annex IV, 3.

9 ACM, 1.c Annex III.

(14) Support from the Fund may not be granted to medium[10] and large enterprises that were already in difficulty within the meaning of the General Block Exemption Regulation ("GBER")[11] on 31 December 2019.

(15) Support from the Fund may not be granted to enterprises that have received support through the Solvency Fund for Strategic Enterprises created by the Royal-Decree Law 25/2020 of 3 July and approved by the Commission in Decision C(2020) 5414 final of 31 July 2020 in case SA.57659 (2020/N) -Spain- COVID 19-Recapitalisation fund, as amended[12].

2.6. Basic elements of the aid scheme

2.6.1 Eligibility criteria for the beneficiaries and support award decisions

(16) The support operations financed by the Fund may be granted by 31 December 2021 at the latest to viable non-financial undertakings established in Spain that are facing solvency difficulties of a temporary nature due to the COVID-19 outbreak[13]. Such undertakings must, after verification, be found to meet *inter alia* the following conditions[14]:

a) Be a company established and active in Spain with total net revenues between EUR 15 million and EUR 400 million according to audited annual financial sstatements as of 31 December 2019.

b) Demonstrate that without the State intervention the beneficiary would go out of business or would face serious difficulties to maintain its operations. Such difficulties may be shown by deterioration of, in particular, the beneficiary's debt-to-equity ratio or similar indicators.

c) The support must be justified by the necessity to avoid social hardship and market failure due to significant loss of employment at national or regional level, the exit of an innovative company, the risk of disruption to an important service for the functioning of the whole economy or markets in which it operates, the role of the company or its sector of activity in the

[10] As defined in Annex I to Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.

[11] As defined in Article 2(18) of Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1[Article 2(14) of Commission Regulation (EU) No 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 193, 1.7.2014, p. 1, and Article 3(5) of Commission Regulation (EU) No 1388/2014 of 16 December 2014 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 369, 24.12.2014, p. 37.]

[12] OJ C 269, 14.8.2020, p. 1.

[13] RDL 5/2021 of 12 March 2021, Tit III.

[14] ACM 3.1, Annex II.

economy at national or regional level, or their role in achieving the medium–term objectives of ecological transition, digitalisation, increased productivity and human capital.

d) The beneficiary is not able to find financing on the markets at affordable terms and the horizontal measures existing in Spain to cover liquidity needs are insufficient to ensure its viability.

e) The beneficiary must not have been an undertaking in difficulty on 31 December 2019, as defined in Article 2(18) of the GBER.

f) Establish its medium- to long-term viability as demonstrated in the application by a viability plan to overcome the crisis situation and describing the planned use of the public support provided through the Fund, the experience and technical capacity, the environmental risks and the actions planned to address them as well as the energy strategy.

g) Demonstrate that the debt structure is sustainable with the support requested from the Fund. For that purpose, the prior viability and risk analysis to which the granting of public support is subject will assess any debt restructuring that the potential beneficiary company has carried out to the extent that it improves its risk profile and contributes to its viability.

h) Present a planned schedule of reimbursement of the nominal investment of the State and payment of the remuneration together with the measures that would be adopted to ensure that the schedule of the plan for reimbursement of the State support will be met.

(17) The ACM also requires the beneficiary to not have tax residence in a country or territory classified as a tax haven[15], not have been condemned by a final judgment to the penalty of losing the possibility of obtaining subsidies or public aid or for crimes of prevarication, bribery, embezzlement of public funds, fraud and illegal exactions or urban or environmental crimes, be up to date with the payment of obligations for the reimbursement of subsidies or public aid and be up to date in compliance with tax and Social Security obligations.

(18) Spain confirms that the aid under the aid scheme is not conditioned on the relocation of a production activity or of another activity of the beneficiary from another country within the EEA to the territory of the Member State granting the aid. This is irrespective of the number of job losses actually occurred in the initial establishment of the beneficiary in the EEA.

(19) The initiation of the procedure for the use of the Fund is subject to the prior express request in writing of the legal representatives of the undertaking, within the time-limits and in accordance with the conditions laid down in the RDL and the ACM.

[15] In Spain, tax havens are defined and updated by regulation. Royal Decree 1080/1991 5 July. https://www.boe.es/buscar/act.php?id=BOE-A-1991-18119&p=20030201&tn=1#aunico.

(20) The Spanish authorities emphasize that each applicant must demonstrate its medium and long-term viability by submitting in its application a viability plan, describing the expected use of the public support requested under the Fund. In addition, the beneficiary must attach to its application file a forecast of the repayment of the State recapitalisation with a timetable and remuneration scheme. That exit strategy for the participation of the Fund should be credible and lay out (a) the plan of the beneficiary on the continuation of its activity and the use of funds invested by the State, including a payment schedule of the remuneration and of the redemption of the State investment, and (b) the measures that the beneficiary and the State will take to abide by the repayment schedule[16].

2.6.2 Description of the Measures

(21) Operations financed from the Fund may take the form of participating loans or convertible bonds ("hybrid capital instruments"), subscription to shares/ participations ("equity instruments") or subordinated loans. The instruments used ("the Measures" when jointly referred to), will have to be the most appropriate to accommodate the beneficiary's recapitalisation needs whilst at the same time being the least distortive of competition[17].

2.6.2.1 Characteristics of the Measures

(22) The legal rules governing the Fund do not exclude specific types of recapitalisation instruments available in Spain. In any case, the beneficiary will need to prove it is not able to find financing on the markets at affordable terms and the horizontal measures existing in Spain concerned to cover liquidity needs are insufficient to ensure its viability. The Spanish authorities specify that the scheme will provide hybrid or equity financing[18].

(23) Hybrid capital instruments will have a maximum maturity of eight years, which is in line with the expected duration of the Fund.

(24) The Spanish authorities will in each case determine and adapt the duration of the instrument to the shortest possible time-frame in light of restauration of the viability of the beneficiary. Hybrid capital instruments will always bear interest, rank as debt for accounting purposes (both IFRS and Spanish GAAP), and include as follows:

a) Participating loans: those loans provide a variable remuneration linked to the company's performance (e.g. profit, sales, cash flow) plus a fixed interest rate. Remuneration is usually capped while ensuring a minimum rate; the remuneration only benefits from the upside of the company's performance. Participating loans enjoy seniority of repayment over equity in going concern and gone concern scenarios. Under the Spanish legal framework, participating

[16] While Recital 81 of the Temporary Framework requires the submission of the exit strategy to the Member State within 12 months after aid is granted to be endorsed, the ACM requires this submission with the application as an eligibility condition (Annex II, point 3).

[17] ACM Annex II, 2.2

[18] ACM Annex II, 2.

loans are considered as part of the issuer's equity for corporate law purposes, for instance in case of share capital reduction.

b) Convertible bonds: such bonds provide a fixed interest rate. The conversion into equity is at the discretion of the Fund, provided that this conversion does not constitute State aid. The conversion-triggering conditions will be decided on a case-by-case basis and may include an evaluation of the ratio of debt/equity, the ratio of own resources to equity and the interest coverage ratio, among others, as well as other indicators of the beneficiary's financial and economic situation.

(25) Equity instruments will mainly consist of ordinary shares in limited liability companies or participations, in the case of companies incorporated in other forms. Preferred sharing offerings are excluded from the scheme. When acquiring shares, the State may enjoy veto rights on some structural or strategic decisions of the beneficiary to ensure proper use of public resources and the fulfilment of the requirements and conditions attached to public support. Such veto rights will be decided on a case-by-case basis.

(26) If support granted in the form of subordinated debt exceeds the limits in point 27bis of the Temporary Framework, the provisions on hybrid instruments will apply. The Fund may finance other credit facilities under the conditions set out by Commission Decision of 2 April 2020 SA.56851 (2020/N) - Spain COVID-19 Umbrella Scheme[19], as amended, including subordinated debt. However, in the event that those credits or debt instruments are ultimately capitalized under the aid scheme, the provisions relating to hybrid instruments will apply[20].

2.6.2.2 Maximum amount of the Measures

(27) The support granted through the Fund is limited between EUR 4 million and EUR 25 million per beneficiary for large companies. In the case of medium enterprises, the maximum amounts will be between EUR 3 million and EUR 15 million[21].

(28) In any case, the amount of support from the Fund will not exceed the minimum necessary to restore the viability of the beneficiary and will not lead to increasing its equity above that recorded on 31 December 2019. When analysing the proportionality of the public support, account will also be taken of any State aid through other forms such as loan guarantees provided to support the beneficiary, or planned[22].

(29) In that respect, the Spanish authorities explain that the relevant indicators to be taken into account will be, among others, equity assets ratio and subscribed capital stock, debt to EBITDA ratio, debt to equity ratio, debt service coverage ratio and the liquidity ratio, or, if the beneficiary presents cash flow financial

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19 OJ C 144, 30.04.2020, p. 1.

20 Annex 1 attached to the notification form, p. 12c.

21 ACM Annex II, 4.1.1.

22 ACM, Annex II, 4.1.3.

statements, the operating cash flow and the free cash flow to debt service, the EBITDA and the net result, among others.

(30) Moreover, the Spanish authorities explain that the maximum amount to be granted shall be the minimum necessary to ensure the viability of the beneficiary and may not involve an improvement in the capital structure of the company compared with the recorded one as of 31 December 2019.

(31) Apart from restoring the viability of the company at the moment of the State intervention, the Spanish authorities explain that the goal is to ensure that the company will remain viable in the medium term. For that purpose, as pointed out in the ACM[23] COFIDES will perform a risk analysis of the beneficiary, which will lead to a credit rating, which will allow it to foresee the reimbursement or recovery of the public support granted and identify the mitigating factors for potential risks. In any case, COFIDES, in the prior feasibility and risk analysis, will also assess any debt restructurings which the beneficiary may have undergone to the extent that they improve its risk profile and contribute to its viability.

2.6.2.3 Remuneration of the Measures

(32) Hybrid capital instruments may be remunerated by one or more elements that measure the economic performance of the undertaking, such as turnover, plus a fixed or variable interest, so that, taken as a whole, the remuneration for those instruments reflects their characteristics, risk profile of the instrument and of the beneficiary and market interest rates. The minimum remuneration will be the EURIBOR 12 months plus margins as follows[24]:

Table 1:

Type of beneficiary	***1st year***	***2nd and 3rd year***	***4th and 5thd year***	***6th and 7th Year***	***Year 8***
SMEs	*225 bp*	*325 bp*	*450 bp*	*600 bp*	*800 bp*
Large enterprises	*250 bp*	*350 bp*	*500 bp*	*700 bp*	*950*

(33) The agreements referred to in recital (10) will lay down the level of remuneration, as well as the schedule of repayment of the instruments. The conversion of hybrid capital instruments will be made at a level of less than 5 % of the theoretical ex rights price at the time of conversion. If the State intervention is maintained after two years following the conversion, the amount of repayment corresponding to the beneficiary's buy-back of the share capital provided by the Fund will be increased by no less than 10 % payable as debt or equivalent instrument[25].

[23] ACM, Annex II, 3.2.

[24] ACM, Annex II, 4.2.3.

[25] ACM Annex II, 4.2.4

(34) Contributions of the Fund to the share capital of the beneficiary will be provided at a price no higher than the average price of its shares during the 15 days before the beneficiary's application. In the case of non-listed undertakings, an independent expert will establish the market value according to established methods and professional practices and the transaction will proceed at a price not higher than that value[26].

(35) For participation in share capital, the amount to be reimbursed to the Fund will be increased by no less than 10 % in debt or equivalent instruments if five years have elapsed since the capital injection, and the initial shareholding has not been reduced by at least 40 %. If a contribution from the Fund is maintained after seven years from the capital injection, the repayment amount will be increased again by at least 10% of the outstanding participation at that moment, through debt or equivalent instrument. For listed companies, the increments to the reimbursement will apply after four and six years respectively, under the specific conditions applicable in each case[27]. The value of the shareholding still outstanding at each relevant year for listed or non-listed companies will thus constitute the nominal amount of the debt or equivalent instrument.

(36) The pricing and conditions of debt instruments remunerating shareholdings held by the Fund, whether after direct purchase of shares or after conversion of hybrid capital instruments into shares, will take into account the seniority of the debt and the risk profile of the beneficiary, so that they will not offer more favorable conditions than the same or similar debt instruments issued by the beneficiary and/ or still outstanding. COFIDES will examine recently issued debt instruments issued by the beneficiary or still outstanding used for comparison for their pricing, whether at issue if recently issued or whether as recent trading value on the secondary market for earlier instruments still outstanding[28].

(37) The beneficiary will at all times be able to buy back the stake in the capital which the State has acquired and receive the corresponding remuneration under conditions to be determined in each case. In the granting decision, TIC will set out the repayment schedule taking into account the path of recovery and stabilisation of the economy, as well as the situation and prospects of the market in which the beneficiary operates[29].

(38) The beneficiary will reimburse the shareholding acquired through the Fund at a buy-back price which is the highest of either:

a) the market price at the time of repayment;

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26 ACM Annex II, 4.2.5

27 ACM Annex II, 5.3.

28 In other words, if a company issued bonds with five-year maturity and three years elapsed after issuance when the step-up debt instrument is to be priced, the comparison would be made with e.g. the bond spread over sovereign bonds at the moment of pricing and not the bond spread at issuance three years earlier.

29 ACM Annex II, 5.1.

b) the nominal investment from the Fund increased by an annual remuneration as from the moment when the State acquires its stake, equaling the sum of 200 basis points, except in the eighth year, on top of the minimum remuneration referred to in the Table 1[30].

(39) Alternatively, the TIC may freely give its approval to transfer to a third party the titles and rights of the operations financed from the Fund, by means of an open procedure ensuring equal treatment to potential buyers, or by sale on the stock exchange. The TIC may, if appropriate, offer a preference to existing shareholders for the acquisition of the shares. If the State sells its shares at a price below the one set in line with recital (38), the rules described in recitals (40) to (44) will apply for a period of four years after the granting of State support[31].

2.6.2.4 Governance, avoidance of undue distortions of competitions and exceptions

(40) The beneficiary must maintain its activity until the final repayment of the support received from the Fund. In case of early repayment before 30 June 2022, the beneficiary must maintain its activity at least until that date[32].

(41) Until the beneficiary definitively reimburses the support received under the Fund, the beneficiary will *inter alia* be subject to the following restrictions and make sure that they are duly complied with by amending, if necessary, its internal corporate agreements or by-laws[33]:

a) Prohibition to announce for commercial purposes the status of a beneficiary.

b) In order to avoid undue distortions of competition, not to engage in aggressive commercial expansion financed with State aid or to take excessive risks.

c) As long as at least 75 % of the recapitalisation measures in the context of COVID-19 have not been repaid, the beneficiary will be prevented from acquiring shares in excess of 10 % of undertakings active in the same sector or upstream or downstream markets, except where the beneficiary does not have the status of a large enterprise, unless the Commission approves it on request from the TIC.

d) Integrated undertakings will establish a separation of accounts to ensure that the support received under the Fund does not result in support for activities that were in difficulties on 31 December 2019.

30 ACM Annex II, 5.2.

31 ACM Annex II, 5.4.

32 ACM Annex II, 6.1.

33 ACM Annex II, 6.3.1.

e) Prohibition of distribution of dividends, payment of non-mandatory coupons or acquisition of own shares until final repayment, other than those under State ownership through the Fund. That prohibition will apply in any case and at least during 2021 and 2022 even if the final repayment has taken place before the end of 2022.

f) Until 75 % of the support provided under the Fund is reimbursed and in any case at least for a period of two years from its granting, the remuneration of members of the Board of Directors, or those with the highest corporate responsibility in the undertaking, may not exceed the fixed part of their remuneration in force at the end of the financial year 2019. Managers or members of the Board of Directors who have been appointed at the time of the recapitalisation or thereafter will be remunerated in terms comparable to those with a similar level of responsibility. In no circumstances will bonuses or other variable or equivalent remuneration be paid.

g) Compliance with all the requirements laid down in the applicable labour law;

h) Compliance with the commitments included in the viability plan.

(42) Those restrictions on the beneficiary may be eased in cases where three circumstances are cumulatively met: i) the State or one of its bodies or entities has a participation in the beneficiary prior to intervention by the Fund and resorts to a capital increase under the same conditions as the other partners or shareholders, on a pro rata basis or at a rate less than their share, ii) the contribution of the private partners or shareholders in such an increase is significant and in any case where it exceeds 30 % and iii) the public contribution constitutes State aid in view of special circumstances or the simultaneous granting of other advantages in favour of the recipient. In any such case:

a) the increase in the amount to be reimbursed to the Fund (recital (35)) will not apply;

b) the prohibition from acquiring shares and paying dividends or other sums (recitals (41) and (42)c) and e)) will apply for a period of three years from the granting of the support; and

c) the prohibition on the distribution of dividends (recital (41)e)) from 2023 will not apply to holdings resulting from the increase in capital and to existing holdings provided that the percentage held by the shareholders after the increase is below 10 %; in other cases, that prohibition will be limited to a period of three years from the date on which the support was granted. In any event, the remuneration of debt or hybrid capital instruments provided through the Fund will be paid before any dividend[34].

(43) If six years after the capital injection through the Fund, the State intervention is not less than 15 % of the beneficiary's own funds, the State will submit to the

[34] ACM Annex II, 6.3.2.

Commission for approval a restructuring plan complying with the Guidelines for rescue and restructuring of non-financial undertakings[35].

(44) Finally, beneficiaries will report to COFIDES on the progress in the implementation of the repayment schedule.

2.6.2.5 Transparency and reporting obligations

(45) The Spanish State will make public the relevant information on each individual support provided by the Fund within the time limits and in the form laid down in the State aid rules applicable in each case, depending on the type of instrument used.

(46) In case of large enterprises and in order to ensure adequate transparency, the beneficiaries will make available on their corporate portals information on the use of the aid received within 12 months from the date on which the aid was granted and every 12 months thereafter, until the full repayment of the aid. That information will include how the use of the aid received supports their activities in line with the Union objectives and national obligations related to the ecological and digital transformation, including the Union's objective of achieving climate neutrality by 2050[36].

2.7. Cumulation

(47) The Spanish authorities confirm that aid granted under the aid scheme may be cumulated with aid under de minimis Regulations[37] or the General Block Exemption Regulation[38] provided the provisions and cumulation rules of those Regulations are respected.

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[35] ACM Annex II, 7.2. Communication from the Commission — Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ C 249, 31.7.2014, p. 1).

[36] ACM Annex II, 7.1.

[37] Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid (OJ L 352, 24.12.2013, p. 1), Commission Regulation (EU) No 1408/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid in the agriculture sector (OJ L 352, 24.12.2013 p. 9), Commission Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid in the fishery and aquaculture sector (OJ L 190, 28.6.2014, p. 45) and Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest (OJ L 114, 26.4.2012, p. 8).

[38] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1, Commission Regulation (EC) No 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union, OJ L 193, 1.7.2014, p. 1 and Commission Regulation (EU) No 1388/2014 of 16 December 2014 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union OJ L 369, 24.12.2014, p. 37.

(48) The Spanish authorities confirm that aid granted under the aid scheme may be cumulated with aid granted under other measures approved by the Commission under other sections of the Temporary Framework provided the provisions in those specific sections are respected.

2.8. Monitoring and reporting

(49) The Spanish authorities confirm that they will respect the monitoring and reporting obligations laid down in section 4 of the Temporary Framework (including the obligation to publish relevant information on each individual aid granted under the Measures on the comprehensive national State aid website or Commission's IT tool within 12 months from the moment of granting[39]).

(50) The Spanish authorities confirm that they will respect the monitoring and reporting obligations laid down in section 4 of the Temporary Framework (*e.g.*, by 31 December 2021, a list of measures put in place on the basis of schemes approved under the Temporary Framework must be provided to the Commission; detailed records regarding the granting of aid must be maintained for 10 years upon granting of the aid, etc.).

(51) The Spanish authorities commit to submitting annual reports in line with the requirements of Commission Regulation (EC) No 794/2004[40].

3. ASSESSMENT

3.1. Lawfulness of the aid scheme

(52) By notifying the aid scheme before putting it into effect, the Spanish authorities have respected their obligations under Article 108(3) TFEU.

(53) As referred in recital (12), support from the Fund may be granted only as from the notification of the Commission's approval. The Royal Decree-Law 5/2021 of 12 March 2021 and the Agreement of Council of Ministers on the functioning of the Fund foreseen a standstill clause in that regard.[41]

3.2. Existence of State aid

(54) For a measure to be categorised as aid within the meaning of Article 107(1) TFEU, all the conditions set out in that provision must be fulfilled. First, the measure must be imputable to the State and financed through State resources. Second, it must confer an advantage on its recipients. Third, that advantage must

[39] Referring to information required in Annex III to Commission Regulation (EU) No 651/2014 and Annex III to Commission Regulation (EU) No 702/2014 and Annex III to Commission Regulation (EU) No 1388/2014. For repayable advances, guarantees, loans, equity and other forms of aid, the nominal value of the underlying instrument will be inserted per beneficiary.

[40] The Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 140, 30.4.2004, p. 1.

[41] ACM, Annex 0 and Royal Decree-Law 5/2021(Title III, Article 17.14)

be selective in nature. Fourth, the measure must distort or threaten to distort competition and affect trade between Member States.

(55) The aid scheme is imputable to the State, since the Fund is established by the Spanish State based on the Royal Decree Law and an Agreement of the Council of Ministers (recitals (5) and (7)). It is financed through State resources, since the Fund draws on resources from the budget of the State (recital (11)).

(56) The aid scheme provides equity and hybrid instruments to their beneficiaries at terms that they would not have otherwise been able to obtain on the market (recital (16) d)). The aid scheme thus confers an advantage on the beneficiaries that they would not have obtained under normal market conditions.

(57) The advantage granted by the aid scheme is selective since, *inter alia*, only companies established and active in Spain with total net revenues between EUR 15 million and EUR 400 million suffering temporary financial difficulties due to the COVID pandemic and viable in medium-long term can be eligible (recital (13)). Moreover, among undertakings active in all sectors of the economy, only those which complies with the eligibility criteria described in recital (16) can obtain public funding.

(58) The aid scheme is liable to distort competition, since it strengthens the competitive position of its beneficiaries, by providing funding which otherwise they could not have obtained at all or not at the same conditions. The aid scheme is also liable to affect trade between Member States, since beneficiaries may be active in sectors in which intra-Union trade exists.

(59) In view of the above, the Commission concludes that the aid scheme constitutes aid within the meaning of Article 107(1) TFEU. The Spanish authorities do not contest that conclusion.

3.3. Compatibility

(60) Since the aid scheme involve aid to beneficiaries within the meaning of Article 107(1) TFEU, it is necessary to consider whether it is compatible with the internal market.

(61) Pursuant to Article 107(3)(b) TFEU the Commission may declare compatible with the internal market aid "*to remedy a serious disturbance in the economy of a Member State*".

(62) By adopting the Temporary Framework on 19 March 2020, the Commission acknowledged (in section 2) that "*the COVID-19 outbreak affects all Member States and that the containment measures taken by Member States impact undertakings*". The Commission concluded that "*State aid is justified and can be declared compatible with the internal market on the basis of Article 107(3)(b) TFEU, for a limited period, to remedy the liquidity shortage faced by undertakings and ensure that the disruptions caused by the COVID-19 outbreak do not undermine their viability*".

(63) The aid scheme aims to facilitate the access of undertakings to external finance and restore their capital at a time when the normal functioning of credit and capital markets is severely disturbed by the COVID-19 outbreak and that

outbreak is affecting the wider economy and leading to severe disturbances of the real economy of Member States.

(64) The aid scheme is one of a series of measures conceived at national level by the Spanish authorities to remedy a serious disturbance in their economy. The Commission notes Spain's submission that the importance of the aid scheme to preserve employment and economic continuity is widely accepted by economic commentators and the aid scheme is of a scale which can be reasonably anticipated to produce effects across the entire economy.

(65) The Commission also notes that, in line with point 16ter of the Temporary Framework, recapitalisation measures will not be conditioned on the relocation of a production activity or of another activity of the beneficiary from another country within the EEA to the territory of Spain (recital (18)).

(66) The aid scheme has been designed to meet the requirements mentioned in point 27bis of section 3.3 of the Temporary Framework as regards subordinated debt which exceeds the ceilings mentioned in point 27bis i) and ii) of category of aid *("Recapitalisation Measures for non-financial undertakings")*, described in section 3.11. of the Temporary Framework.

(67) Therefore, the Commission will next assess whether the aid scheme meets the requirements of section 3.11 of the Temporary Framework.

(68) Equity and hybrid instruments are to be granted at the latest by 31 December 2021 (recital (12)). Therefore, the aid scheme complies with point 48 of the Temporary Framework.

(69) Equity and hybrid instruments are only provided to companies that would otherwise go out of business or would face serious difficulties to maintain their operations and showing deterioration of, in particular, the beneficiary's debt to equity ratio or similar indicators which will be checked by COFIDES before granting the aid (recital (16)b)). Therefore, the aid scheme complies with point 49(a) of the Temporary Framework.

(70) Equity and hybrid instruments will only be provided where it is in the common interest to intervene, as investments are only provided to companies whose failure would likely involve social hardship or market failure due to significant loss of employment, the exit of an innovative company, the risk of disruption to an important service or the role in achieving the medium-term objectives of ecological transition, digitalisation, increased productivity and human capital. In order to assess the social hardship or the market failure, COFIDES will assess whether the loss of the financial stability of the beneficiary may involve serious social difficulties or significant market failures, by using the criteria referred to in point 49(b) (recital (16)c)). Therefore, the aid scheme complies with point 49(b) of the Temporary Framework.

(71) Equity and hybrid instruments are provided to companies which have exhausted the possibilities of finding financing on the markets and the aid measures existing in Spain to help cover their liquidity needs are insufficient to ensure the survival of such enterprises (recital (16)d)). Therefore, the aid scheme complies with point 49(c) of the Temporary Framework.

(72) Undertakings already in difficulty on 31 December 2019 are excluded from benefitting from the aid scheme (recital (16)e)). Therefore, the aid scheme complies with point 49(d) of the Temporary Framework.

(73) Financing under the aid scheme will be granted only on the basis of the written request by the beneficiary and as a result of a positive assessment that the eligibility conditions are met (recitals (8), (9), (10) and (19)). Therefore, the aid schemes complies with point 50 of the Temporary Framework.

(74) A separate notification for individual aid above the threshold of EUR 250 million required by point 51 of the Temporary Framework is unnecessary as the maximum amount per beneficiary may not be higher than EUR 25 million.

(75) The financing under the aid scheme will be granted in the form of equity instruments and hybrid instruments (as described in recitals ((21) to (26)), which is in line with points 52 and 53 of the Temporary Framework.

(76) The financing under the aid scheme will not exceed the minimum needed to ensure the viability of the beneficiary, and will not go beyond restoring the capital structure of the beneficiary to that predating the COVID-19 outbreak. The cap for recapitalisation will be set at the differential between the capital structure of the beneficiary on 31 December 2019 and at the time of the application for aid. Moreover, the viability of the beneficiary and the restoration without improvement of the capital structure of the beneficiary will be assessed through relevant indicators. Moreover, in assessing the proportionality of the aid, State aid received or planned in the context of the COVID-19 outbreak will be taken into account (recitals (27) to (31)). Therefore, the aid scheme complies with point 54 of the Temporary Framework.

(77) A capital injection by COFIDES will be conducted at a price that does not exceed the average share price of the beneficiary over the 15 days preceding the request for the capital injection or an estimation of its market value by an independent expert if the beneficiary is not publicly listed, (recital (34)). Therefore, the aid scheme complies with point 60 of the Temporary Framework.

(78) Point 61 of the Temporary Framework requires that step-up mechanisms, which may be implemented through additional shares or other forms, increase the remuneration of the State up to a minimum of 10%. The aid scheme includes a step-up increase of at least 10% in remuneration in the form of debt or other instruments if the State has not sold a certain percentage of its shareholding (recitals (33) to (35)). Instead of shares, the Fund will be remunerated through debt. The debt instruments held by the Fund if the step-up mechanism is triggered will have to amount to 10% or more in debt principal of the corresponding value of the outstanding shareholding. An equivalence of amounts between remuneration in shares and remuneration in debt can be established[42]. The debt

[42] The indicative example in footnote 63 of the Temporary Framework regarding the grant of additional shares in remuneration for a State participation can extend to debt remuneration of the shareholding. An amount of debt corresponding to shares may be calculated as follows: **R**=**P***[((**Osh***1.1)***TS**-**OS**)/(1-(**Osh***1.1)]; where **R** is the remuneration of the step-up; **Osh** is the outstanding participation in percentage of shareholding; **TS** is the total number of shares; **OS** is the outstanding participation in number of shares and **P** is the current market value per share.

instrument held by the Fund will also be adequately remunerated with interest determined according to debt seniority and risk profile of the beneficiary (recital (36)). Therefore, the Commission considers that the remuneration of the shareholding held by the Fund with debt instruments, instead of additional shares, complies with point 61 of the Temporary Framework.

(79) The capital injection can be bought back by the beneficiary at any time, while making an appropriate remuneration (recitals (37) and (38)). Furthermore, COFIDES may sell at any time, previous approval of the TIC, its equity participation at market prices to purchasers other than the beneficiary, following an open and non-discriminatory consultation (recital (39)). Therefore, the aid scheme complies with points 63 and 64 of the Temporary Framework.

(80) The Commission notes that the conditions of the hybrid instruments notified by Spain embed limited risk characteristics (recitals (23) and (24)). Furthermore, the pricing of hybrid instruments takes into account not only the instrument-specific risk, in line with point 70 of the Temporary Framework, but also the beneficiary's risk profile (recital (32)). In that way, the pricing criteria of hybrid instruments are more fine-tuned and better suited to remunerate the State than pricing solely based on the instrument specific risk. The Commission considers therefore that it is appropriate to not require additional extra margins above the minimum rates reflected in the table included in point 66 of the Temporary Framework. The margins notified by Spain comply with the minimum remuneration of that table (recital (32)). Therefore, the aid scheme complies with the orientations on remuneration included in points 65 and 66 of the Temporary Framework.

(81) The conversion options for hybrid instruments are to be conducted at 5% or more below the theoretical ex-right price of the shares at the time of the conversion (recital (33)). Therefore, the aid scheme complies with point 67 of the Temporary Framework.

(82) After conversion of the hybrid instrument into equity, a step-up mechanism increases the remuneration of the Fund by 10% to incentivise beneficiaries to buy back the equity (recitals (33) and (79)) for the assessment, mutatis mutandis. Therefore, the aid scheme complies with point 68 of the Temporary Framework.

(83) Beneficiaries are not allowed to take excessive risks and to engage in aggressive commercial expansion financed by State aid (recital (41)b)). Therefore, the aid scheme complies with point 71 of the Temporary Framework.

(84) Beneficiaries are not allowed to advertise the investment by the Fund for commercial purposes (recital (41)a)). Therefore, the aid scheme complies with point 73 of the Temporary Framework.

(85) Beneficiaries of the recapitalisation will be prohibited from carrying out mergers or acquisitions until the complete redemption of the Fund's recapitalisation. In exceptional circumstances, and without prejudice to merger control, beneficiaries may acquire a more than 10% stake in operators upstream or downstream in their area of operation or even competitors, only if the acquisition is necessary to maintain the beneficiary's viability and upon Commission's prior approval (recital (41)c)). Therefore, the aid scheme complies with points 74 and 75 of the Temporary Framework.

(86) Beneficiaries are prohibited from using the funds received via the recapitalisation to cross-subsidise other economic activities of integrated undertakings that were already in economic difficulties on 31 December 2019 and will introduce clear account separation to ensure no cross-subsidisation (recital (41)d)). Therefore, the aid scheme complies with point 76 of the Temporary Framework.

(87) As long as the investment of the Fund has not been fully repaid, beneficiaries cannot make dividend payments, or non-mandatory coupon payments, or buy back shares, other than in relation to the Fund (recital (41)e)). Therefore, the aid scheme complies with point 77 of the Temporary Framework.

(88) As long as the investment of the Fund has not been fully repaid, a cap on the remuneration of management is applied as envisaged in point 78 of the Temporary Framework (recital (41)f)). Therefore, the aid scheme complies with point 78 of the Temporary Framework.

(89) Restrictions related to the governance of the beneficiaries referred to in recital (41), as well as the obligation to increase the amount to be reimbursed to the Fund in accordance with point 61 and 62 of the Temporary Framework, are lifted in circumstances corresponding to those described in points 78bis and 78ter of the Temporary Framework (recital (42)). Therefore, the aid scheme comply with points 78bis and 78ter of the Temporary Framework.

(90) The exit strategy will be contained in the aid agreement between COFIDES and every beneficiary under the aid scheme, as an eligibility condition (recitals (16) h) and (20)). Spain will thus examine and agree the strategy before granting any support earlier than the twelve months referred to in point 79 of the Temporary Framework and irrespective of whether the State provides equity instruments or of the percentage of recapitalisation through equity. The exit strategy will lay out (i) the plan of the beneficiary on the continuation of its activity and the use of the funds invested by the State, including the repayment schedule, and (ii) the measures that the beneficiary and COFIDES will take to abide by the repayment schedule (recitals (16)h), (16)f) and (20). Therefore, the aid scheme complies with points 79 to 81 of the Temporary Framework.

(91) Beneficiaries of the recapitalisation will have to report to COFIDES on the progress in the implementation of the repayment schedule as well as compliance with the obligations described in recital (41). Therefore, the aid scheme complies with point 82 of the Temporary Framework.

(92) As long as the recapitalisation by the Fund has not been fully redeemed, beneficiaries of the recapitalisation, other than SMEs, will, within 12 months from the date of the granting of the aid and thereafter periodically every 12 months, publish information on the use of the aid received. In particular, such publications will include information on how their use of the aid received supports their activities in line with Union objectives and national obligations linked to the green and digital transformation, including the Union objective of climate neutrality by 2050 (recital (46)). Therefore, the aid scheme complies with point 83 of the Temporary Framework.

(93) Spain will report annually to the Commission regarding the Fund's activities, the implementation of the repayment schedules and compliance with the obligations

described in recitals (82) to (91). Therefore, the aid scheme complies with point 84 of the Temporary Framework.

(94) If after six years from a capital injection, the Fund's shareholding is not reduced below 15% of the beneficiary's equity, the beneficiary will have to submit a restructuring plan to the Fund Manager, which will be submitted to the Commission for approval, in accordance with the Rescue and Restructuring Guidelines (recital (43)). Therefore, the aid scheme complies with point 85 of the Temporary Framework.

(95) The Spanish authorities confirm that the monitoring and reporting rules laid down in section 4 of the Temporary Framework will be respected (recitals (49) to (51)). Therefore, the aid scheme complies with section 4 of the Temporary Framework.

(96) The Spanish authorities confirm that aid under the aid scheme may only be cumulated with other aid provided the specific provisions in the sections of the Temporary Framework are respected and the cumulation rules of the relevant Regulations are respected (recitals (47) and (48)). Therefore, the aid scheme complies with point 20 of the Temporary Framework.

(97) The Commission therefore considers that the aid scheme is necessary, appropriate and proportionate to remedy a serious disturbance in the economy of Spain pursuant to Article 107(3)(b) TFEU and meets all the relevant conditions of the Temporary Framework.

4. CONCLUSION

The Commission has accordingly decided not to raise objections to the aid provided through the Fund on the grounds that it is compatible with the internal market pursuant to Article 107(3)(b) of the Treaty on the Functioning of the European Union.

The decision is based on non-confidential information and is therefore published in full on the Internet site: http://ec.europa.eu/competition/elojade/isef/index.cfm.

Yours faithfully,

For the Commission

Margrethe VESTAGER
Executive Vice-President

CERTIFIED COPY
For the Secretary-General

Martine DEPREZ
Director
Decision-making & Collegiality
EUROPEAN COMMISSION