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Subject: **State Aid SA.57659(2020/N) - Spain**
COVID 19 - Recapitalisation fund

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) Following prenotification contacts[1], by electronic notification of 20 July 2020, completed on 23, 27 and 30 July 2020 Spain notified an aid scheme to be implemented through a new Solvency Support Fund for Strategic Enterprises ("the Fund") under the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, as amended ("Temporary Framework")[2].

[1] The prenotification contacts started on 19 June 2020 and consisted of five videoconferences between the Spanish authorities and the Commission services held to discuss the draft submissions of the Spanish authorities, notably the draft legal basis, working documents, follow-up e-mails etc.

[2] Communication from the Commission - Temporary framework for State aid measures to support the economy in the current COVID-19 outbreak, 19 March 2020, OJ C 91I, 20.3.2020, p. 1, as amended by Communication from the Commission C(2020) 2215 final of 3 April 2020 on the Amendment of the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, OJ C 112I , 4.4.2020, p. 1, and Communications from the Commission C(2020) 3156 final of 8 May 2020 and C(2020) 4509 final of 29 June 2020 on the 2nd and 3rd Amendment of the

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

(3) Spain confirms that the notification does not contain confidential information.

2. DESCRIPTION OF THE MEASURES

(4) Spain considers that the COVID-19 outbreak has affected its economy. The aid scheme forms part of an overall package and aims to ensure that sufficient finance remains available in the market, to counter the liquidity shortage faced by undertakings because of the COVID-19 outbreak, to ensure that the disruptions caused by that outbreak do not undermine the viability and solvency of the undertakings, which were not considered to be in difficulty before the outbreak, and thereby to preserve the continuity of economic activity during and after the outbreak.

(5) 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 sections 3.3 and 3.11.

2.1. The nature form and scope of aid

(6) The aid scheme involves the creation of a Fund that will provide financing in the form of the purchase of financial instruments and securities issued by non-financial undertakings in Spain, without limitation as to size or economic sector.

2.2. Legal basis

(7) The legal basis establishing the aid scheme are the Royal Decree-Law 25/2020 of 3 July 2020 on urgent measures to support economic recovery and employment ("RDL") and the Agreement in Council of Ministers ("ACM") on the functioning of the Solvency Support Fund for strategic enterprises, without legal personality, adopted on 21 July 2020.

2.3. Administration of the Measures

(8) The Fund is managed by a Management Board that will decide by Resolution on the applications and set out the terms of the public funding in an Agreement on Temporary Public Financial Support entered into with the beneficiary. The Sociedad Española de Participaciones Industriales, a public holding which manages the shareholdings of the Spanish State, will assess the applications, use the funds, register the titles acquired, and charge its costs in a specific and registered account to the resources of the Fund.

Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, OJ C 164, 13.5.2020, p. 3. and OJ C 218, 2.7.2020, p. 3.

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

(9) The Management Board of the Fund is an interministerial committee chaired by the President of the Sociedad Española de Participaciones Industriales, with representation of the Ministries of Economy, Finance, Industry and Energy. The Board will bring decisions on Agreements on Temporary Public Financial Support to the Council of Ministers for approval[4].

2.4. Basic elements of the Measures

2.4.1. Eligibility criteria for the beneficiaries and support award decisions

(10) Temporary support operations financed by the Fund may be granted until 30 June 2021 to non financial undertakings established in Spain. The public support through recapitalisation aims at adressing situations where loans or liquidity support do not suffice to guarantee the continuation of the activity of undertakings which face severe difficulties of a temporary nature as a result of the COVID-19 outbreak. The public support is therefore a measure of last resort and temporary to be granted upon request of the beneficiary undertakings[5]. Such undertakings must, after verification, be found to meet *inter alia* the following cumulative conditions[6]:

a) have a systemic or strategic importance due to the sector of activity, in terms of links with public health and safety or because of their influence over the whole economy, their innovation, the essential nature of the services they provide or their role in achieving the medium-term objectives of ecological transition, digitalisation, increased productivity and human capital (letter (m) of ACM, Annex II.2); concerning the mentioned role in achieving the medium-tern objectives, Spain explains the determination of eligible beneficiaries will also be aimed at contributing and closely related to the objectives set out by the European Union in the area of the twin digital and ecological transition;

b) risk ceasing operations or having serious difficulties to remain in business in the absence of temporary public support, as demonstrated in particular by the deterioration of the beneficiary’s debt-to-equity ratio or similar indicators; (letter (d) of ACM, Annex II.2)[7];

c) demonstrate that a forced cessation of activity would have a high negative impact on economic activity or employment at national or regional level, as compared with the situation of the undertaking by the end of 2019 (letter (e) of ACM, Annex II.2); the Spanish authorities have confirmed that, in order to assess the social hardship or the market failure that would ensue from recapitalisation support not being available, the Management Board of the Fund will assess whether the loss of the financial stability or market exit of the beneficiary may lead to significant loss of employment, loss of innovative or systemically important beneneficiaries or disrupt the provision of an important service;

4 ACM Annex III, Articles 1, 3 and 4.
5 RDL I, Title II.
6 RDL 2.2, ACM Annex II, 2.
7 Serious financial or equity difficulties will be proved in the application by the deterioration of the debt to equity ratio or by other indicators, such as credit rating downgrades, corporate bond yields and relevant liquidity indicators.

d) establish 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 environmental risks and the actions planned to face them as well as the energy strategy; (letter (f) of ACM, Annex II.2) Spain explains that the viability plan may include obligations in connection with environmental, digitalisation, productivity and human capital objectives only to the extent that these obligations also aim at the overarching objective of return to viability of the beneficiary;

e) 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; (letter (g) of ACM, Annex II.2);

f) not constitute an undertaking in difficulty on 31 December 2019, as defined in Article 2(18) of Commission Regulation (EU) No 651/2014 of 17 June declaring certain categories of aid compatible with the internal market pursuant to Articles 107 and 108 of the Treaty[8] (letter (b) of ACM, Annex II.2).

(11) Spain explains that the applicant will need to provide adequate evidence that other private funding sources coming from banks and financial markets, are either not available or available at costs that would prevent the company from becoming viable. The company will also need to show that other available public means, namely public guarantees, are not available, as banks do not provide sufficient funding even supported by State. This evidence will be duly analysed by the Management Board in charge of deciding whether to grant the aid, with additional clarifications and reports from the beneficiary being requested if necessary.

(12) 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. The grant or disbursement of the public support will be awarded by Resolution of the Management Board of the Fund subject to approval by the competent bodies of the beneficiary entering into an Agreement on Temporary Public Financial Support and a Shareholder Agreement or a Management Agreement with the beneficiary, as appropriate, to be established in each case in the Resolution of the Management Board[9]. The Management Board of the Fund will adopt resolutions within six-months of the application of the beneficiary[10].

(13) The Spanish authorities emphasize that all applicants, not only those that receive more than 25% of equity, 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. Additionally, the beneficiaries must submit in their application, and not 12 months later, a forecast of the repayment of the State recapitalisation with a timetable and remuneration scheme. This 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 the funds

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8 OJ L 187, 26.6.2014, p.1.

9 ACM Annex II, 1.1 and 1.2.

10 RDL I, 7.

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.

(14) Only in exceptional and duly justified cases will interventions below EUR 25 million per beneficiary be granted[11]. Support interventions in excess of EUR 250 million per beneficiary will be individually notified to the Commission[12]. In these cases, the Spanish authorities will join to the notification evidence of the written request for the aid by the beneficiary undertaking, together with the information necessary for the Commission to assess wheter the support intervention is in line with the requirements of the Temporary Framework.

2.4.2. Description of the Measures

(15) Temporary public support operations financed from the Fund may take the form of the granting of participating loans or convertible debt ("hybrid capital instruments"), subscription to shares ("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[13].

2.4.2.1. Characteristics of the recapitalisation instruments

(16) The rules governing the Fund do not exclude specific types of recapitalisation instruments available in Spain. The Spanish authorities specify that the scheme will provide hybrid or equity financing, which can be combined with debt.

(17) Hybrid capital instruments will have a maximum maturity of seven years. Spain will separately notify to the Commission for prior approval any planned intervention of the Fund if the maturity of the hybrid capital instruments was to be longer than seven years.

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

a) Participating loans: such 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 performance. Participating loans enjoy seniority of repayment over equity in going and gone concern. Participating loans are considered as part of

[11] ACM, Annex II, 4.1.
[12] ACM 3.
[13] ACM Annex II, 3.1 and 3.3.

the issuer equity for corporate law purposes, for instance in cases of share capital reduction[14].

b) Convertible bonds: such bonds provide a fixed interest rate. The conversion into equity is at the discretion of the Fund's Management Board. The support decision may envisage either the conditions for conversion or the trigger for such a decision at a later stage. The Spanish authorities clarify that the Agreement on Temporary Public Support will always contain precise conditions determined ex ante for the trigger. 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.

(19) Equity instruments mainly consist of shares in limited liability companies or participations, in the case of companies incorporated in other forms. Preferred shares offering e.g. priority on or higher dividends or lower voting rights than ordinary shares are excluded from the scheme.

(20) When acquiring shares, the State will enjoy veto rights on some strategic decisions of the beneficiary to ensure proper use of public resources and the fulfilment of requirements and conditions attached to public support. The exercise of such veto rights will be strictly limited to the overarching objective of return to viability of the beneficiary of the public support and in connection with matters governed by administrative authorization in areas such as, amongst others, the dismissal of workers, choice of less polluting production methods, and to solutions more oriented towards digitalisation.

(21) The Management Board will decide in each case the scope of the corporate decisions subject to prior authorization, which will be included in the Agreement on Temporary Public Financial Support.

(22) The Fund may also provide public support through other debt or loan instruments, with or without State guarantees, under the conditions set out in Commission Decision of 2 April 2020 SA.56851 (2020/N)- Spain COVID-19 –Umbrella Scheme[15]. In the case of subordinated debt, the minimum remuneration will be that specified in the Commission decision of 2 April 2020 plus 200 basis points for large entreprises and 150 basis points for small and medium-sized enterprises. However, should such debt instruments be converted into hybrid instruments, they will be governed by the rules applicable to hybrid capital instruments under the scheme. Likewise, if the amount of subordinated debt exceeds two-thirds of the annual wage bill and 8.4% of the turnover of the beneficiary in 2019, the conditions applicable to hybrid instruments set out in recitals (23) to (39) will also apply[16].

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[14] Participating loans are defined in Article 20 of Royal Law-Decree 7/1996 of 7 June, on urgent fiscal, development and liberalisation measures for economic activity. They are widely available in the financial market.

[15] OJ C 144 of 30.4.2020, p.1.

[16] ACM Annex II, 3.1.

2.4.2.2. Maximum amount of the Measures

(23) The amount of temporary public support 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. The viability of the beneficiary will be assessed by reference to its return on capital and credit worthiness. 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[17].

(24) Given the purpose of strictly restoring the viability of the company at the moment of the intervention, without going any further, the Spanish authorities explain that the State support will never improve the debt to equity situation of the company compared to 31 December 2019 and on the other hand, in case the financial situation of the company would have been above the viability limits on 31 December 2019, the State will only ensure the viability, without fully going back to the situation at the end of 2019.

(25) 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. In this sense, as pointed out in the ACM, the indicators which Spain will use to measure the viability of the company will be return on capital employed ("ROCE") and the credit worthiness of the company. Both indicators will be compared between 31 December 2019 and their assumed evolution. The Spanish authorities explain that the time span of (3-4) years horizon used as reference aims at providing visibility on the financial and operational trajectory of the beneficiary and not at compensating planned or uncertain losses over the reference period. In other words, the aid amount will not be determined so as to cover e.g. sustained operating losses due the fourth year after the application for public temporary support.

(26) In terms of the specification, the ROCE will be compared against the weighted average cost of capital of the company, also taking into account the level of the indicator in other companies belonging to the same sector. As for the credit worthiness, the intervention should restore credit worthiness and not go beyond what is needed for the beneficiary accessing market finance at affordable conditions in a reasonable time horizon (3-4 years)[18]. The examination of each application will be carried out in line with the objective of preserving the viability of the beneficiary whilst keeping the amount of support to the minimum necessary, thus avoding any mechanical application of the indicators.

2.4.2.3. Remuneration of the Measures

(27) Hybrid capital instruments will be remunerated either with an effective annual rate or in net present value. With interest equivalence in net present value, if the beneficiary is unable to pay the whole of the remuneration one year, this amount would be transferred to the following years in a way that the net present value of

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17 ACM Annex II, 4.2.

18 Several indicators could be taken into consideration, provided they do not yield abnormal results or cannot be applied, such as a net debt to EBITDA ratio of 3.5, an equity to assets ratio at around 15%, assets to liabilities around 1.5 and equity to liabilities around 0.4-0.6.

the remuneration and the net present value of the remuneration effectively payed are the same. Such instruments may be remunerated by one or more elements that measure the economic performance of the undertaking, such as profit or 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:[19]

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

(28) Each Agreement on Temporary Public Financial Support with the beneficiary will lay down the level of remuneration, as well as the schedule of repayment of the instruments. The conversion for hybrid capital instruments will be made at a level of 5 % below 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 amount that the beneficiary pays to buy-back of the share capital provided by the Fund will be increased by no less than 10 % payable as debt or equivalent instrument[20]. The value of the shareholding still outstanding will thus constitute the nominal amount of the debt or equivalent instrument.

(29) 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 appointed by the Management Board of the Fund 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[21].

(30) For participation in share capital, if five years have elapsed since the capital injection, and the initial shareholding has not been reduced by at least 40 %, the amount to be reimbursed to the Fund to remunerate the shareholding will be increased by no less than 10 % in debt or equivalent instrument. If a contribution from the Fund is maintained after seven years from the capital injection, the repayment amount will be increased by 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[22]. 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.

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19 ACM Annex II, 4.3. *Table as included in the ACM.
20 ACM Annex II, 4.4.
21 ACM Annex II, 4.5.
22 ACM Annex II, 5.3.

(31) 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 debt and the risk profile of the beneficiary, so that they will not offer more favourable conditions than the same or similar debt instruments recently issued by the beneficiary and/or still outstanding. Recently issued debt instruments issued by the beneficiary or still outstanding used for comparison would be examined for their pricing, whether at issue if recently issued or whether as recent trading value on the secondary market for earlier instruments still outstanding[23].

(32) The beneficiary will at all times be able to buy-back the stake in the capital which the State has acquired and the corresponding remuneration under conditions to be determined in each case. In the granting decision, the repayment schedule will be set out 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[24].

(33) The beneficiary will reimburse the shareholding acquired through the Fund at a buy-back price which is the highest between the following two:

a) the market price at the time of repayment;

b) the nominal investment increased by an annual remuneration as from the moment when the State acquires its stake, equalling the sum of 200 basis points, except in the eighth and following years, on top of the minimum remuneration referred to in the table at recital (27)[25].

(34) Alternatively, the Management Board of the Fund may freely agree 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 in an organised market. The Management Board of the Fund may, if appropriate, offer a preference for the acquisition of the shares to existing shareholders. If the State sells its shares at a price below the one set at recital (33), the rules described in recital (36) will apply for a period of four years after the granting of State support[26].

(35) The Spanish authorities will verify and make sure that sales of shares to third parties do not facilitate that the beneficiary repurchases those shares at a lower price than the nominal investment increased by an annual remuneration as from the moment when the State acquires its stake, equalling the sum of 200 basis points, except in the eighth and following years, on top of the minimum remuneration referred to in recital (27).

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23 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.

24 ACM Annex II, 5.4 and 5.1.

25 ACM Annex II, 5.2.

26 ACM Annex II, 5.4.

2.4.2.4. Governance, avoidance of undue distortions of competition and exceptions

(36) Until the beneficiary definitively reimburses the temporary public support received under the Fund to strengthen its solvency, the beneficiary will *inter alia* be subject to restrictions and make sure that they are duly complied with by amending, if necessary, its internal corporate agreements or by-laws[27]. The Spanish authorities explain that proof of such amendments will be provided before the disbursement of any aid amount. The restrictions are the following:

a) Prohibition to announce for commercial purposes its quality of being 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 large enterprise, unless the Commission approves it on request from the Fund Management Board;

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

e) Prohibition of distribution of dividends, payment of non-mandatory coupons or acquisition of own shares, other than those under State ownership through the Fund.

f) Until 75 % of the temporary public support provided under the Fund is reimbursed, the remuneration of members of the Management Board, Administrators, 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. Persons acceding to these positions at the time of the recapitalisation or thereafter shall 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 the commitments included in the viability plan and in particular those relating to investment in productive capacity, innovation, ecological transition, digitalisation, increased productivity and human capital.

(37) Those restrictions on the beneficiary may be eased in cases where three circumstances are met: i) the State or one of its bodies or entities has a participation in the beneficiary prior to intervention under the Fund and resorts to

[27] ACM Annex II, 6.1.

a capital increase under the same conditions as the other partners or shareholders, on a pro rata basis or at a rate of less than their share, ii) the contribution of the private partners or shareholders in such increase is significant and in any case 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 such cases, the increase in the amount to be reimbursed to the Fund will not apply and the prohibition from acquiring shares and paying dividends or other sums or capping on the remuneration of the management will apply for a period of three years from the granting of the support. A prohibition on the distribution of dividends will not apply to shareholdings resulting from the increase in capital and to existing shareholdings provided that the percentage of shareholding 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[28].

(38) Likewise, another exception to the restrictions on the beneficiary is possible. That is the case where the State or any of its bodies or entities acquires a shareholding under the Fund or subscribes to a capital increase under the same conditions as the other investors or shareholders. Where, owing to special circumstances, the acquisition by the State constitutes State aid, and provided that the contribution of the private partners or shareholders in such increase is significant and in any event exceeds 30 %, the prohibition on the distribution of dividends will not be absolute. The prohibition will not apply to shareholdings resulting from the capital increase and to existing shareholdings provided that the percentage of those shareholdings after the capital increase is below 10%. In other cases, where the latter percentage is higher than 10%, 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[29].

(39) If after six years from the capital injection through the Fund, the ownership of the share capital is not less than 15 % of the beneficiary's own funds, the State will submit to the Commission for approval a restructuring plan complying with the Guidelines for rescue and restructuring non-financial undertakings[30].

2.4.2.5. Transparency and reporting obligations

(40) 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. For large undertakings, the 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[31].

[28] ACM Annex II, 6.2, .
[29] ACM Annex II, 6.3.
[30] 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).
[31] ACM Annex II, 7.1.

2.5. Budget and duration of the Measures

(41) The resources allocated to the Fund amount to EUR 10 billion of extraordinary credit financed by the State budget[32]. Until end 2020, the budget forecast sets up to EUR 3 billion of interventions through granting of loans or acquisition of securities[33]. The legal basis for implementation set out in the Agreement of the Council of Ministers entered into force upon publication in the Official Journal on 24 July 2020. Practical arrangements for its effective launching may take a maximum of 30 further days. Aid granting will not begin before the formal approval by the Commission and will extend until no later than 30 June 2021.

2.6. Cumulation

(42) The Spanish authorities confirm that aid granted under the measure 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.

(43) The Spanish authorities also confirm that if aid under the Temporary Framework is cumulated with de Minimis aid[34] and/or with aid under the General Block Exemption Regulation[35], the provisions of the relevant Regulations will be respected.

2.7. Monitoring and reporting

(44) 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 State aid website or Commission's IT tool within 12 months from the moment of granting[36].

(45) The Spanish authorities also commit to report to the Commission annually on the implementation of the repayment schedule and compliance with the conditions in section 3.11.6 of Temporary Framework. Where the beneficiary received a COVID-19 recapitalisation above EUR 250 million, the report shall include information on compliance with the conditions concerning the amount of the recapitalisation set in point 54 of the Temporary Framework.

(46) Spain confirms that recapitalisation measures are 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 Spain, irrespective of the

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32 Article 46 of Law 6/2018 of 3 July of the State General Budget

33 RDL I, Annex I.

34 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).

35 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.

36 Referring to information required in Annex III to Commission Regulation (EU) No 651/2014, 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 valu of the underlying instrument will be inserted per beneficiary.

number of job losses actually occurred in the initial establishment of the beneficiary in the EEA.

3. ASSESSMENT

3.1. Lawfulness of the Measures

(47) By notifying the Measures before putting them into effect, the Spanish authorities have respected their obligations under Article 108(3) TFEU.

3.2. Existence of State aid

(48) For measures to be qualified as aid within the meaning of Article 107(1) TFEU, all the conditions set out in that provision must be fulfilled. First, the measures must be imputable to the State and financed through State resources. Second, it must confer an advantage on its recipients. Third, that advantage must be selective in nature. Fourth, the measures must distort or threaten to distort competition and affect trade between Member States.

(49) The Measures are imputable to the State, since the Fund is established by the Spanish State based on a Royal-Decree Law and an Agreement of the Council of Ministers (recital (7)). Moreover, decisions granting public funding will be taken by the Management Board of the Fund, which gathers officials from competent Ministries and are proposed and subject to the approval of the Council of Ministers (recitals (8), (9) and (12)). The Measures are financed through State resources, since the Fund draws on resources from the budget of the State (recital (41)).

(50) The Measures provide debt securities, equity and hybrid instruments to their beneficiaries at terms that they would not have otherwise been able to obtain on the market (recital (11)). The Measures thus confer an advantage on the beneficiaries that they would not have obtained under normal market conditions.

(51) The advantage granted by the Measures is selective since, inter alia, mainly large undertakings are likely to meet the conditions to apply. Moreover, among undertakings active in all sectors of the economy, only those having a systemic or strategic importance, for instance due to the sector of activity, being innovative or providing essential services are eligible to obtain public funding (recital (10) a)).

(52) The Measures are liable to distort competition since they strengthen the competitive position of their beneficiaries by providing funding which otherwise they could not have obtained at all or not at the same conditions. Furthermore, at least some of them are active on liberalised markets. The Measures are also liable to affect trade between Member States, since beneficiaries may be active in sectors in which intra-Union trade exists.

3.2.1. Conclusion on the existence of State aid

(53) In view of the above, the Commission concludes that the Measures constitute State aid within the meaning of Article 107(1) TFEU.

3.3. Compatibility

(54) Since the Measures involve State aid to the final beneficiaries within the meaning of Article 107(1) TFEU, it is necessary to consider whether these Measures are compatible with the internal market.

(55) 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".

(56) In section 2 of the Temporary Framework, the Commission acknowledges 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".

(57) The Measures aim 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.

(58) The Measures are 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 Measures to preserve employment and economic continuity is widely accepted by economic commentators and the Measures are of a scale which can be reasonably anticipated to produce effects across the entire economy.

(59) The Commission notes that the implementation of the scheme, in particular the exercise of the powers secured by the State, has also to comply with fundamental freedoms, in particular the free movement of capital and the freedom of establishment.

(60) 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 (46)). In that respect, the Commission also understands that the eligibility criteria to support through the Fund (recital (10) a)), especially as concerns strategic or systemic enterprises and the reference to companies having their main activity centers in Spain, cannot be construed or applied so as to make conditional the granting of aid on the relocation of activities to Spain.

(61) The Measures have 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 "Recapitalisation Measures for non-financial undertakings" described in section 3.11 of the Temporary Framework, which fully applies to subordinated debt which exceeds those ceilings.

(62) Therefore, the Commission will next assess whether the Measures meet the requirements of the Temporary Framework, in particular its section 3.11.

(63) Equity and hybrid instruments provided by the Fund are to be granted at the latest by 30 June 2021 (recital (10)). Therefore, the Measures comply with point 48 of the Temporary Framework.

(64) Equity and hybrid instruments are only provided to beneficiaries 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 the Management Board of the Fund before granting the aid (recitals (10)b) and (12)). Therefore, the Measures comply with point 49(a) of the Temporary Framework.

(65) In order to assess the social hardship or the market failure that would ensue from recapitalisation support not being available, the Management Board of the Fund will assess whether the loss of the financial stability or market exit of the beneficiary may lead to significant loss of employment, loss of innovative or systemically important beneneficiaries or disrupt the provision of an important service. Social hardship or market failure will therefore be established, inter alia by using the criteria referred to in point 49(b) (recital (10) c)). Accordingly, equity and hybrid instruments will only be provided where it is in the common interest to intervene. Therefore, the Measures comply with point 49(b) of the Temporary Framework.

(66) The Fund will provide public support through equity and hybrid instruments only to beneficiaries which have exhausted the possibilities of finding financing on the markets and for which the aid measures existing in Spain to help cover their liquidity needs are insufficient to ensure survival (recital (10)). Therefore, the Measures comply with point 49(c) of the Temporary Framework.

(67) Undertakings already in difficulty on 31 December 2019 are excluded from benefitting from the Measures (recital (10) f)). Therefore, the Measures comply with point 49(d) of the Temporary Framework.

(68) The Management Board of the Fund will grant financing under the Measures only if the beneficiary files a written application and the assessement thereof concludes that the application meets the eligibility conditions (recital (12)). Therefore, the Measures comply with point 50 of the Temporary Framework.

(69) Spain will separately notify individual aid above the threshold of EUR 250 million (recital (13)). Therefore, the Measures comply with point 51 of the Temporary Framework.

(70) The financing will be granted in the form of equity and hybrid instruments (as described in recitals (16) to (22)), which is in line with points 52 and 53 of the Temporary Framework.

(71) The Measures will not exceed the minimum needed to ensure the viability of the beneficiary. They will not go beyond restoring its capital structure to that predating the COVID-19 outbreak. Recapitalisations will be capped at the differential between the capital structure of the beneficiary on 31 December 2019 and the capital structure at the time of the application for aid. Spain will also

assess the viability of the beneficiary and the restoration of its capital structure, without improvement thereof, with relevant indicators, with concrete specification. Moreover, in assessing the proportionality of the aid, Spain will take into account State aid received or planned in the context of the COVID-19 outbreak (recitals (23) to (26)). Therefore, the Measures comply with point 54 of the Temporary Framework.

(72) The Fund will inject capital at a price that does not exceed the average share price of the beneficiary over the 15 days preceding the application or for non-listed beneficiaries, at a price based on an estimation of market value by an independent expert (recital (29). Therefore, the Measures comply with point 60 of the Temporary Framework.

(73) Point 61 of the Temporary Framework requires that step-up mechanisms, which may be implemented through additional shares or other forms, be put in place and that such mechanisms increase the remuneration of the State shareholding still outstading up to a minimum of 10%. The Measures include 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 (recital (30)). 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[37]. The debt instrument held by the Fund will also be adequately remunerated with interest determined according to debt seniority and risk profile of the beneficiary (recital (31). 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.

(74) The beneficiary can buy back the capital injection at any time, while taking into account an appropriate remuneration (recitals (32) and (33)). Furthermore, the Management Board of the Fund may sell at any time its equity participation at market prices to purchasers other than the beneficiary, following an open and non-discriminatory consultation and, in case of a sale below the price set out in recital (33), rules referred to in recital (36) continue to apply (recital (34)). Therefore, the Measures comply with points 63 and 64 of the Temporary Framework. As noted at recital (35), the Spanish authorities will put in place a mechanism to avoid the beneficiary circumventing de facto this pricing through repurchases of shares held by the State.

(75) The conditions of the hybrid instruments embed limited risk characteristics: the maturity is limited to seven years, the interest or coupon payments are mandatory, and the Management Board of the Fund has a conversion option in case of certain predetermined events (recitals (17) and (18)). Furthermore, the pricing of hybrid capital instruments takes into account not only the instrument-specific risk, in line

[37] 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.

with point 70 of the Temporary Framework, but also the beneficiary's risk profile (recital (27)). In that way, the additional pricing criterion makes hybrid instruments better fine-tuned and 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 (27)). Therefore, the Measures comply with the orientations on remuneration included in points 65 and 66 of the Temporary Framework.

(76) The Fund will convert hybrid instruments into share capital at 5% or more below the theoretical ex-rights price of the shares at the time of the conversion (recital (28)). Therefore, the Measures comply with point 67 of the Temporary Framework.

(77) 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 (recital (28) and recital (73) for the assessment of the mechanism for equity instruments, *mutatis mutandis*). Therefore, the Measures comply with point 68 of the Temporary Framework.

(78) Beneficiaries of the Fund will not be allowed to take excessive risks and to engage in aggressive commercial expansion financed by State aid (recital (36) b)). Therefore, the Measures comply with point 71 of the Temporary Framework.

(79) Beneficiaries of the Fund will not be allowed to advertise the investment by the Fund for commercial purposes (recital (36) a)). Therefore, the Measures comply with point 73 of the Temporary Framework.

(80) Beneficiaries of the recapitalisation will be prohibited from carrying out certain mergers or acquisitions until the redemption of at least 75% of the Fund's recapitalisation. In exceptional circumstances, beneficiaries may acquire a 10% stake or more 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 (36)c)). Therefore, the Measures comply with points 74 and 75 of the Temporary Framework.

(81) Integrated undertakings that were already in economic difficulties on 31 December 2019 must not use the public funding to cross-subsidise other economic activities therein. Integrated undertakings will introduce clear accounting separation to avoid undue cross-subsidisation (recital (36) d)). Therefore, the Measures comply with point 76 of the Temporary Framework.

(82) 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 (36) e)). Therefore, the Measures comply with point 77 of the Temporary Framework.

(83) 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 (36) f)). Therefore, the Measures comply with point 78 of the Temporary Framework.

(84) Restrictions related to the governance of the beneficiaries referred to in recital (36), 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 (recitals (37) and (38)). Therefore, the Measures comply with points 78bis and 78ter of the Temporary Framework.

(85) The resolution of the Management Board of the Fund for every beneficiary will contain the exit strategy of the State presented in the application, as an eligibility condition (recitals (10)e), (12) and (13)). 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 and of the percentage of recapitalisation through equity contained therein, if any. 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 the Management Board of the Fund will take to abide to the repayment schedule (recitals (10)d) and e) and (13)). Therefore, the Measures comply with points 79 to 81 of the Temporary Framework.

(86) Beneficiaries will have to report to the Management Board of the Fund on the progress in the implementation of the repayment schedule as well as compliance with the other obligations to which the recapitalisation is subject (recital (36)g)). Therefore, the Measures comply with point 82 of the Temporary Framework.

(87) As long as beneficiaries other than SMEs do not redeem the recapitalisation, Spain 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, publications will include information on how the use of the aid supports 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 (40)). Therefore, the Measures comply with point 83 of the Temporary Framework.

(88) 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 (78) to ((86)). Where a beneficiary has received a recapitalisation above EUR 250 million, the report will include information on compliance with the conditions set in point 54 of the Temporary Framework (recital (45)). Therefore, the Measures comply with point 84 of the Temporary Framework.

(89) 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 Management Board of the Fund, which will be submitted to the Commission for approval, in accordance with the Rescue and Restructuring Guidelines (recital (39)). Therefore, the Measures comply with point 85 of the Temporary Framework.

(90) The Spanish authorities confirm that they will respect the monitoring and reporting rules laid down in section 4 of the Temporary Framework (recital (44)). Therefore, the Measures comply with section 4 of the Temporary Framework.

(91) The Spanish authorities confirm that aid under the Measures 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 (42) and (43)). Therefore, the Measures comply with point 20 of the Temporary Framework.

(92) The Commission therefore considers that the Measures are necessary, appropriate and proportionate to remedy a serious disturbance in the economy of the Kingdom of Spain pursuant to Article 107(3)(b) TFEU and meet 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 Solvency Support Fund for Strategic Enterprises 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,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION