

## European recovery funds: the new legal framework for its governance and management

Royal Decree-Law 36/2020, of 30th December, approving urgent measures for the modernisation of the public administration and for the implementation of the Recovery, Transformation and Resilience Plan (BOE No. 341, of 31st December), is the first legislative measure to define the implementation model for the new EU Next Generation Recovery Instrument. The Royal Decree-Law defines the principles, basic rules and facilitation measures to be assumed by Public Administrations and Bodies with the aim of distributing the funds as soon as possible and with guarantees. This new provision represents the beginning of the end of the period of pre-existing legal uncertainty to date, by clarifying essential aspects of how the funds will be managed and making it possible to open a new phase

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To tackle the economic and social adversities caused by the deep economic recession that has accompanied the state of global pandemics due to SARS-COV-2 (COVID-19), the European Union adopted a Recovery Plan in July 2020, based on a dual approach:

- A. Next Generation EU: new recovery facility with EUR 750 billion (period 2021-2024)
- B. The "Multiannual Financial Framework" for the period 2021-2027, for which the budget has been reinforced with 1.1 trillion euros.

According to the political agreement reached, Spain would receive a total of 140 billion euros. Of this, 72.7 billion euros will be distributed in the form of direct aid and the rest in the form of repayable loans. According to the European Commission's forecasts, implementation of the initiative will begin in 2021, following the relevant legislative procedures and the drawing up by each Member State of its 'Recovery and Resilience Plan'.

The implementation of the Recovery and Resilience Plan will be a real challenge, given the volume of economic resources and the ambitious timeframe for their distribution, given the aim of making the funds contribute to accelerating economic recovery. Therefore, legislative measures were needed to define as soon as possible the governance model for the implementation of the new funds (defining their management bodies and the rules for their distribution), to adopt reforms to improve the agility of project implementation and, while respecting legal guarantees, to simplify procedures.

On 31st December 2020, Royal Decree Law 36/2020 of 30th December was published, approving urgent measures for the modernisation of the public administration and for the implementation of the Recovery, Transformation and Resilience Plan ("RDL 36/2020"), which constitutes the regulation that establishes the principles and basic rules for the programming, budgeting, management and implementation of the new European funds.



Of the new Royal Decree-Law, the following aspects should be highlighted as having a relevant impact on management:

### *1.- Management principles and guidelines*

There are two essential principles which, among others that are more common (accountability in management, efficiency, effective control of public expenditure or effective prevention of fraud, conflicts of interest and irregularities), stand out from the text of the new RDL 36/2020: the need to guarantee agility and cooperation in the management of funds (inter-administrative, but also between the public and private sectors), with the aim of achieving maximum efficiency and speed, but also legal certainty.

The need to achieve the greatest agility, speed, simplicity and clarity in the processes and execution of tasks is essentially specified in the application of urgent or simplified procedures generally for the execution of actions financed by the new funds (both for the operation of the managing bodies and for the subsequent execution and justification of expenditure) and, likewise, in the general reduction of the time periods for which the Royal Decree-Law is opting.

Regarding the forms of collaboration, the new Royal Decree-Law opts to establish specific cooperation, coordination and control bodies which will also offer technical assistance to the fund management bodies (with the aim of ensuring unity of criteria and facilitating their work, preventing possible incidents in the implementation of projects).

### *2.- The Recovery, Transformation and Resilience Plan*

The Recovery, Transformation and Resilience Plan is the guiding instrument that will define the strategic objectives and the reforms and investments linked to the Recovery and Resilience Mechanism (the main instrument of the new Next Generation funds). Its cross-cutting themes will be ecological transition, digital transformation, gender equality and social, economic and territorial cohesion.

Its approval corresponds to the Council of Ministers, although it is planned that the Autonomous Communities and Local Bodies, as well as the most representative business and trade union organisations, will be heard in its preparation, with the process already being carried out in practice being regulated by law.

### *3.- New forms of public-private partnership*

The Royal Decree-Law recognises, under the name of "Strategic Projects for Economic Recovery and Transformation" (PERTE), the relevance of all projects of a strategic nature that really have a great capacity to drive economic growth, employment and competitiveness in the Spanish economy for which a specific regime is established, in consideration of their impact.



The declaration of a project as a PERTE will be made by agreement of the Council of Ministers, on the proposal of the head of the department responsible for the matter, for which it must be accompanied by an explanatory report on its details (planning, support measures and public-private collaboration, possible interested parties, etc.). This declaration, although subject to the exclusive decision of the Council of Ministers, can only be made after the project has been assessed in the light of certain assessment criteria defined in the Royal Decree-Law itself, and must therefore be duly justified.

The Royal Decree-Law does not predetermine who may be the promoters of the PERTE, nor does it establish that they must have a minimum budget; the figure will obviously be of interest to large companies but, equally, the new Regulation makes it clear that the PERTE may consist not only of a single, clearly defined project, but also of an integrated project based on a set of projects within a common structure, work plan or programme (sharing the same objective and based on a coherent approach).

In this way, it is still possible to declare as PERTE projects promoted by a group of companies and/or entities that, without being Large Companies, join efforts, means and projects) or, if appropriate, from a Sector. These groups, at a given time, will also have the participation or collaboration of public entities in accordance with the Royal Decree-Law.

In relation to the declaration and implementation of the PERTE, several rules are established:

- i) A State Register of entities interested in the PERTE is created, after accreditation of such interest, in which all entities linked to the development of an PERTE must be registered, regardless of their legal or private nature or their form of incorporation. Registration in the Register will allow accreditation that the registered entity has carried out activities linked to the public interest embodied in the PERTE.

The Register will be subject to regulatory development by the Ministry of Finance, regarding its operation and structure (which must take place within a maximum period of three months from the entry into force of the Royal Decree-Law). Likewise, the Ministers responsible for the matter in relation to each of the PERTE are empowered to develop regulations for an additional differentiated section of the Register for these PERTE, which will define the requirements for registration, the legal nature of the registered entities and the procedure for access.

- ii) The registration in the State Register of entities interested in the PERTE does not, in principle and, grant a right to the direct awarding of funds but may be considered a necessary requirement to be a beneficiary, when so provided in the regulatory bases or calls for tender. In any case, inclusion in the Register as a necessary requirement for being a beneficiary of the aid is an exceptional measure, which must be justified and can only be adopted when there are no less restrictive measures.



iii) The implementation of the PERTE may be carried out through any mechanisms provided for in the Order but it is expressly established that the principles of equality, non-discrimination and competition, publicity, transparency and proportionality must be respected and, of course, competition in the markets may not be distorted (it could not be otherwise, given the general principles that govern the management of public expenditure and, specifically, the execution of the European Union budget).

(iv) The regulatory provision approved by PERTE, in addition to clearly defining it, must contain the basic rules of operation; these include the procedure for applying for accreditation as an interested party and the requirements (quantitative and qualitative) to be accredited and their assessment criteria.

#### *4.- Governance and Coordination Structures*

For the direction and coordination of the Recovery, Transformation and Resilience Plan, as well as to guarantee adequate collaboration and coordination between all the administrations and public bodies involved in the management of the projects financed with the new funds (among which will be the General State Administration, the Autonomous Administration and, the Local Administration which cannot be ruled out).

Within this structure of governance and, likewise, to ensure the intended coordination, different collegiate bodies are created:

- The "Commission for Recovery, Transformation and Resilience", which is responsible for establishing the general policy guidelines for the development and implementation of the Recovery, Transformation and Resilience Plan, as well as for its strategic monitoring. Its composition is essentially made up of representatives of the Government and Ministerial Departments.
- The "Technical Committee for the Recovery, Transformation and Resilience Plan", the assistance and technical support body of the previous Commission (its work, among other functions, includes carrying out studies, reports or analyses; the approval of guidelines, procedural manuals and standard models of documents - applications, calls, agreements, etc.). Its composition will be determined by the "Commission for Recovery, Transformation and Resilience" but, in principle, it will have to be integrated with technical profiles with specific skills and/or knowledge in the management of European funds and aid.
- The "Sectoral Conference of the Recovery, Transformation and Resilience Plan", which will be made up of the Minister of Finance, the corresponding Councillors of the Autonomous Communities and Autonomous Cities, as well as representatives of the Local Administration (in a number yet to be determined), who will be called to its meetings and who have been previously appointed by the Spanish Federation of Municipalities and Provinces. Its creation is intended to serve the establishment of mechanisms and channels of cooperation and coordination in the implementation of the Plan, although its functions are not completely



detailed (in any case, it will have a relevant role in the distribution of funds to the Autonomous Communities, given that in its context the criteria according to which such distribution will be made will be definitively approved).

It also provides for the existence of "Participation Forums" and "High Level Groups", of a horizontal and transversal nature, which contribute to the dialogue and favour governance, as well as the creation of a specific dialogue forum with employers' organisations and trade unions (although their functions and operating regime are not yet detailed).

Finally, to guarantee the governance and correct execution of the funds, the Royal Decree-Law recognises the essential role in the management of the management centre of the Ministry of Finance with responsibility for European funds (Directorate General for Community Funds) and of the General Intervention of the State Administration (IGAE) as the Control Authority. It also specifically recognises the role that the National Anti-Fraud Service will have to play in the prevention, detection and investigation of fraud. Thus, the Royal Decree-Law acknowledges the extraordinary knowledge and practical experience of such management centres in the management of European funds -a matter subject to specific rules whose detailed knowledge is indispensable to prevent incidents-.

#### *5.- Public management tools: planning and resourcing*

The Royal Decree-Law recognises, of course, the complexity that will be involved in implementing the funds and the effort it will entail for the public sector. To improve management, various measures are included.

Firstly, it establishes that the Ministerial Departments responsible for managing projects under the Recovery, Transformation and Resilience Plan must, within a maximum of two months from the entry into force of the Royal Decree-Law, draw up a Strategic Planning Instrument for management, which includes the essential aspects that will be required to implement the projects financed with the new funds (among others: necessary investments and expenditure; objectives, tasks and workloads; proposed reorganisation and needs; training).

Secondly, different guidelines, principles and rules of action are envisaged for the key aspects related to the implementation of the funds (organisation, provision of human resources, training, digitalisation and material means), ensuring that the necessary means are rapidly made available for the implementation of the co-financed projects.

As a measure to ensure the digitalisation of management, the processing of applications for participation in the calls for the implementation of the Recovery, Transformation and Resilience Plan should be carried out through the Electronic Headquarters of the Ministries and competent bodies.



## *6.- Specialities in budgetary management and control*

Budgetary management is one of the most complex areas of public sector activity, given the numerous procedures and controls it entails. To make management more flexible, the Royal Decree-Law establishes exceptions to the general regime for expenditure on actions and projects financed with the new Funds of the Recovery and Resilience Plan.

Some of these exceptions or measures include:

- The appropriations for expenditure relating to the funds will be linked at the level of the budget department and may be distributed among the various items of the budget.
- The number of annual payments is increased and the acquisition of expenditure commitments to be met in subsequent years is authorised, up to the maximum provided for in European regulations for the implementation of the projects financed.
- The incorporation of the remaining appropriations, which cover the commitments of expenses incurred, is permitted, and these will not be deducted from the appropriations of the following financial year.
- The possibility is established of proceeding with the early processing of expenditure files from subsequent years linked to budgetary amendments, with the possibility of going as far as the formalisation of the commitment of expenditure.
- The possibility of making advance payments of committed funds, prior to the implementation and justification of the planned services, is made more flexible, up to 50% of the total amount to be received.

It is foreseen that the Council of Ministers may agree on the implementation of permanent financial control, replacing the financial control function.

## *7.- Implications in the processing of administrative procedures*

Again, with the aim of speeding up the implementation of projects financed with the new funds, the Royal Decree-Law establishes two specific measures in order to reduce the administrative processing times:

- The application of the emergency procedure provided for in Law 50/1997 of 27th November 1997 of the Government for the approval of the rules adopted in the framework of the implementation of the European funds for the Recovery, Transformation and Resilience Plan is declared, and the deadlines are reduced accordingly.
- The application of the emergency procedure and the priority dispatch, as provided for in Law 39/2015, of 1st October, on the Common Administrative Procedure (LPAC), of the



administrative procedures involving the execution of expenditure from European funds, within the Recovery, Transformation and Resilience Plan, is declared.

However, it is rightly foreseen that the reduction of deadlines cannot affect the submission of applications and appeals (both procedures are obviously essential to ensure compliance with the requirements of management of public funds).

#### *8.- Recruitment implications*

RDL 36/2020 introduces specialities in matters of contracting, with respect to the general regime envisaged in Law 9/2017 of 8th November on Public Sector Contracts ("LCSP") for those contracts which are financed with funds from the Recovery, Transformation and Resilience Plan; among these, worth highlighting are:

- The conclusion of contracts and framework agreements financed with European funds from the Recovery, Transformation and Resilience Plan by public sector bodies that are the Awarding Authority does not require the authorisation of the Council of Ministers.
- In the case of contracts to be financed with funds from the Recovery, Transformation and Resilience Plan, the contracting bodies must examine whether the urgency prevents the ordinary processing of the tendering procedures. In this case, the urgent processing of the file will apply, with the consequent reduction of deadlines and speeding up of the procedure. Again, preferential treatment is provided for. Despite the reduction in time limits, guarantees are provided for the deadlines for the submission of applications, which are not subject to a general time reduction.
- The economic thresholds envisaged in the LCSP for resorting to the simplified, ordinary and abbreviated open procedures are raised so that they can be applied to a greater number of contracts.
- The period of validity of energy supply and service contracts is extended to ten (10) years, if this is required by the period of recovery of the investments directly related to the contract and that these are not susceptible to being used in the contractor's productive activity (or are uneconomic), when amortisation is a relevant cost in the provision of the supply or service. In any case, these circumstances must be duly justified in the contracting file.
- The promotion of the preparation of standard specifications for technical and administrative clauses corresponding to the contracts to be signed for the management of the funds of the Recovery, Transformation and Resilience Plan is envisaged, incorporating the green, digital, innovation, SME promotion and social responsibility criteria considered necessary and covered by a legal regulation.
- The time limit for lodging the special appeal on procurement matters is reduced to 10 calendar days, to speed up its resolution. At the same time, with the same aim of speeding



up the process, a new section has been set up in the Central Administrative Tribunal for Contractual Appeals.

- The admissibility of the direct execution by contracting authorities and entities of services inherent to public contracts, in exchange for a consideration or fee, by means of orders placed with their own resources, is recognised. For such cases, the system of authorisations is made more flexible (the authorisation of the Council of Ministers will not be required) and the possibility of subcontracting with third parties is recognised.

#### *9.- Measures to speed up agreements eligible for financing from European funds*

The facilitation measures included in RDL 36/2020 on the administrative agreements linked or dependent on the execution of the different projects with funds from the Recovery, Transformation and Resilience Plan, consist of certain specialities with respect to the general regime of Law 40/2015, of 1st October, on the Legal Regime of the Public Sector ("LRJSP"). Highlighted are:

- No reports other than those of the Legal Service or the prior authorisation of the Ministry of Finance will be required for their signature, modification, extension and resolution by mutual agreement.
- Those foreseen in the Second Instruction of the Agreement of the Council of Ministers, dated 15th December 2017, which approves instructions for the processing of agreements, regarding the authorisation of the Council of Ministers, of agreements to be signed with Autonomous Communities or with their public bodies and public law entities, linked or dependent, shall not be applicable.
- The term of validity of this type of administrative agreement is extended to a maximum of six years, with the possibility of a further extension for up to six years. The need for such a duration must be justified in the file, with special mention being made of the fact that its extension or prolongation does not limit effective competition in the markets.
- This type of agreement is excluded from the authorisation of the Council of Ministers provided for in Article 74 of Law 47/2003 of 26th November, the General Budgetary Law, and from the authorisation of the Minister of Finance provided for in the budgetary regulations.
- In the agreements provided for, the creditor of the Administration shall be entitled (according to what is provided in the agreement) to receive an advance for the preparatory operations that are necessary to carry out the financed actions, up to a maximum limit of 50% of the total amount to be received.



#### 10.- Measures to speed up subsidies that can be financed with European funds

The Royal Decree-Law includes measures to simplify the granting of subsidies and aid to which Law 38/2003 of 17th November, the General Subsidies Act ("LGS"), applies, with the aim of simplifying their processing. In this respect:

- Neither the authorisation of the Council of Ministers nor the authorisation of the Ministry of Finance shall be required for the granting of loans and advances at an interest rate lower than that of the Debt issued by the State in instruments with a similar maturity.
- The Ministry of Finance's report will not be required for the award of grants where "*public, social, economic or humanitarian interest or other duly justified reasons make it difficult to award them publicly*" (however, it is envisaged that the Ministry of Finance will specify the points which, in this respect, must be accredited in the report justifying such circumstances).
- The processing of grants is simplified, with provision being made for the possible use of the emergency procedure, when reasons of public interest so require, while other mandatory reporting and authorisation requirements are eliminated. It is also provided that in the processing of the approval of the regulatory bases and the call for these subsidies, only the report of the Legal Services and the Delegated Intervention will be required.
- It is established that the regulatory bases of the subsidies that can be financed with European funds can include the call for such subsidies, simplifying the internal requirements for their approval, as well as the documentation that must be presented by those interested in becoming beneficiaries.
- The awarding of grants, on a non-competitive basis, is authorised for those grants whose purpose is to finance specific actions or situations that do not require a competitive assessment (so that applications will be evaluated and the decisions to award funds will be made in the order in which the applications are submitted).
- The process of justification of the subsidies by the beneficiaries, after the execution of the projects, is simplified, raising to 100,000 euros the economic threshold for the presentation of a simplified justification account and to 10,000 euros the limit for proving compliance with tax and social security obligations.
- Compensation will be allowed between the items budgeted by the interested parties in the reports they have submitted during the call for proposals procedure for the granting of funds, provided it is aimed at achieving the end of the subsidy.
- Early processing of grants is permitted even when no credit is available, provided that: (i) it is shown in the file that the budgetary amendment required for the provision of the credit has been requested; (ii) the grant is made conditional on the approval of such amendment.



## 11.- Public-private partnership instruments

The Royal Decree-Law recognises the need for the collaboration of the private sector if the Recovery, Transformation and Resilience Plan is to be implemented in an appropriate manner, to meet the ambitious deadlines set and to execute the full amount of European funds. It is decided that it should be given a clear impetus.

To this end, the new regulatory provision regulates three public-private partnership instruments:

- Groupings without legal personality, of natural or legal persons (public or private).

The new regulation encourages the use of this figure which was in fact already provided for in the LGS, authorising the Regulatory Bases of the calls for subsidies or grants to provide for this type of grouping to benefit from the funds.

Following the traditional regime of the LGS, the rule establishes that all members will have the status of beneficiaries and will therefore be jointly and severally liable for all subsidised activities (a mention that could be interpreted as a tightening of the regime of joint and several liability of the beneficiaries provided for in the LGS - certainly joint and several, but with quantitative limits). Such liability, moreover, includes the obligation not only to execute but also to justify and, in the worst case, to reimburse or repay the amounts received, and to be liable for any administrative infringements.

In any case, its members must sign an agreement defining the basic aspects of its operation and the rules which will govern between them, both internally and with regard to the public body managing the funds, in all matters relating to the implementation of the project which is the object of European funding (among other aspects, the commitments made by each of the members, their representative, the internal organisation of the grouping or the system of ownership of all the results of the project must be defined). The relevance of this agreement is obviously extreme and requires special care in its drafting.

Finally, it is important to note that the new Royal Decree-Law recognises the admissibility of subjective changes in the Groups (so that their members change, new entities enter, or the representative is changed), which will be possible provided that the change complies with the Regulatory Bases, does not harm the implementation of the project or violate the principle of equal treatment.

This is a provision which ultimately recognises that such subjective changes may be necessary for the proper implementation of the projects supported and may help to resolve the many disputes which arise in this respect in many grants, especially in complex and long-term projects.



- The Consortiums for the implementation of the Recovery, Transformation and Resilience Plan

The new Royal Decree-Law encourages their creation - accepting that they can assume a transcendental role in the management of funds and/or the execution of projects - and, to this end, establishes a special regime, providing that their creation does not require the legal authorisation provided for in Article 123.2 a) of the LRJSP but may be agreed by the Recovery, Transformation and Resilience Plan Commission, following a favourable report from the Technical Committee.

- Mixed-economy companies

Finally, the Royal Decree-Law adapts the regulation of LCSP mixed economy companies to public-private partnerships (public works concessions and service concessions) established for the execution of projects financed by the Recovery, Transformation and Resilience Plan, although the procedure for selecting the private partner of the future mixed economy company is made more flexible.

In addition, the possibility is envisaged for mixed economy companies to use means of financing such as capital increases (provided that the new capital structure does not change the essential conditions of the award, unless this was provided for in the contract) or the securitisation of the rights to payment held by the company against the contracting authority for the contract awarded to it, subject to the authorisation of the contracting authority and in accordance with stock market regulations.

You can consult Royal Decree-Law 36/2020, of 30th December, which approves urgent measures for the modernisation of public administration and for the implementation of the Recovery, Transformation and Resilience Plan [here](#).

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