CECA MAGÁN
ABOGADOS

# ACTUALIDAD – Nota Técnica

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## RECOGNITION OF THE CREDITS ARISING FROM AN ICO-COVID GUARANTEE IN THE EVENT OF BANKRUTCY OF THE DEBTOR

One of the measures adopted by the Spanish Government to relieve the economic effects caused by the pandemic consisted of the concession of a line of State guarantees with the purpose of providing companies and self-employed persons with financing.

The afore-mentioned guarantees are the ones for the financing granted mainly by credit institutions to companies and self-employed persons in order to meet needs arising, among others, from **the management of invoices, payment of salaries and suppliers, working capital requirements, maturities of financial or tax obligations or other liquidity needs** (Royal Decree-Law 8/2020, of March 17), as well as guarantees for the financing granted by supervised financial institutions to companies and self-employed persons to meet, mainly, their financial needs arising from **new investments** (Royal Decree-Law 25/2020, of July 3).

By means of Royal Decree-Law 27/2021, of November 23, the maximum date for granting these guarantees was extended until June 30, 2022 (i.e., the same date of the so-called "bankruptcy moratorium" date).

The line of the guarantees is not exactly small, if we consider that the Royal Decree-Law 8/2020, of March 17 established the guarantees maximally amount to 100,000 million euros and Royal Decree-Law 25/2020 established the maximum amount of 40,000 million euros. According to sources from the Ministry of Economic Affairs and Digital Transformation, on the date of January 12, 2021, self-employed persons and companies received in 2020 more than **114,000 million euros** of financing through the ICO's Line of Guarantees.

## BANKRUPTCY DECLARATION OF THE DEBTOR AND RECOGNITION OF THE AMOUNT OF THE GUARANTEED CREDIT

In case of the bankruptcy declaration of the debtor (the borrower), there are the doubts regarding the treatment to be given to this type of guarantees.

According to the Resolution of May 12, 2021, of the Secretary of State for Economy and Business Support (which publishes the Agreement of the Council of Ministers of May 11, 2021, and develops the regime for the collection of executed guarantees, established in Article 16 of Royal Decree-Law 5/2021, of March 12), the bankruptcy declaration of the debtor produces, in relation to the COVID-guarantees, among others, the following effects:

- Regardless of whether the execution of the guarantee has been initiated, the order of bankruptcy declaration will produce the subrogation of the Ministry of Economic Affairs and Digital Transformation in the financing operations of the guarantees issued by ICO, regarding the part of the main guaranteed amount, without prejudice to the maintenance of all the obligations that correspond to the financial institutions.

- The subrogation will not imply any obligation of ICO with the debtor, so that the financial entities will continue to manage the whole financial transaction, including the main guaranteed amount subrogated.

- In the event of the bankruptcy of the guaranteed debtor, the communication of the credit to the Bankruptcy Administration will be carried out by the financial institutions within the term established by the bankruptcy regulations and must include a description of the entire transaction.

## DOES IT MEAN THAT THE STATE WILL BE CONSIDERED AS CREDITOR UNDER THE BANKRUPTCY PROCEDURES? FOR WHAT AMOUNT? AND WHAT TYPE OF CLASSIFICATION WILL THE CREDIT DERIVED FROM THE GUARANTEE, WHICH HAS NOT BEEN EXECUTED, HAVE?

### Jurisprudential treatment of the matter

Despite the apparent clarity of the regulation, the answers of the Commercial Courts have not been homogeneous, and currently there are contradictory pronouncements. Due to the novelty of the matter, for the time being there is no defined line of jurisprudence on this matter. At the same time, the high number of bankruptcy procedures expected after the end of the "bankruptcy moratorium" will undoubtedly lead to this matter being analyzed by an increasing number of commercial courts.

On the one hand, the **Judgment of the Mercantile Court 11 of Barcelona, dated March 4, 2022,** established that the credit to be recognized by the Ministry, derived from the guarantee, must have the same rank and qualification as the credit held by the credit institution (in the analyzed case, ordinary). The afore-mentioned Judgement also established the necessary coordination between the Ministry and the credit institution referred in the Resolution of May 12, 2021, above-mentioned. The same qualification of the credit results from what is established in the Resolution of May 12, 2021, which establishes that the credit guaranteed by the Ministry will have at least the same rank in order of priority as the rights corresponding to the part of the main amount not guaranteed.

Regarding the **amount of the credit, the Ministry will be recognized as creditor for the uncollected guaranteed amount and the credit institution for the remaining uncollected amount.**

The Commercial Court No. 11 of Barcelona expressly excluded that the credit corresponding to the amount of the guarantee be considered as contingent, based on Royal Decree 5/2021 and the Resolution dated May 12, 2021, mentioned above, which in this case operate as a special law.

On the contrary, the **Judgment of the Commercial Court no. 2 of La Coruña dated March 7, 2022, and the Judgment of the Commercial Court no. 9 of Barcelona, dated January 14, 2022**, pronounced in terms opposite to what was established by the Commercial Court no. 11 of Barcelona, establishing that an ICO-COVID credit should have a double treatment: on the one hand, **as credit (ordinary in that case)** in favor of the credit institution for the outstanding amount of the credit (in that case, an

ordinary credit in favor of the credit institution for the outstanding amount of the credit) including in this qualification the amount guaranteed by the State, and as **contingent credit without amount** corresponding to the amount guaranteed by the State.

In contrast to what was established by Commercial Court No. 11 of Barcelona in its judgement dated March 4, 2022, Commercial Court No. 2 of La Coruña and Commercial Court No. 9 of Barcelona understand that there is a conflict about the regulations between the Royal Decrees published because of the state of health alarm and the Consolidated Text of the Bankruptcy Law (TRLC), giving the preference to the Bankruptcy Law as it is a regulation with a higher rank than the royal decree which regulates the regime of collection of the guarantees, being applicable both Article 263 TRLC and the regulations of the Civil Code in relation to the guarantee.

## CONCLUSIONS

It must be considered that from the point of view of the debtor, in the bankruptcy procedures, the debt shall be fully recognized, either to the credit institution or to the State, with the particularity of that in both cases there will be a credit recognized for the total amount of the credit.

The discussion can be important for the credit institutions, which can see how the credit is recognized in full, with the State holding a contingent credit (position, for example, of the Judgment of Commercial Court No. 2 of La Coruña), or only in that part of the credit not guaranteed, with the State holding an ordinary credit for the amount guaranteed as a consequence of the direct subrogation (position of the Judgment of Commercial Court No. 11 of Barcelona).

Obviously, a different matter is the payment of the credit, but with no less importance. Following the position kept by the Commercial Court No. 11 of Barcelona (in line with the automatic subrogation of the State), we understand that the collection of the credit should be made by its holder (the State), who should automatically pay it to the financial institution, although the Resolution of May 12, 2021, establishes that the credit institutions will continue to manage the credit.

In this regard, it should be noted that the Resolution of May 12, 2021, establishes the coordination mechanisms between the ICO and the credit institutions, and refers to the framework agreements between the ICO and said institutions in relation to the recoveries in the event of execution of the guarantees.

Finally, it should be considered that the Resolution of May 12, 2021, establishes that even if the subrogation takes place, the financial entities will be responsible for the analysis of the agreement proposals made within the insolvency proceedings, acting in coordination with the State Attorney's Office and, with unity of criteria in the decision-making process in the insolvency proceedings, on the basis of the *pari passu* clause.

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