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Credit & Restructuring Considerations

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How do the proposed amendments to the Spanish Insolvency Act affect pre-insolvency restructurings?

Main issues to consider

The Spanish Insolvency Act Amendment Bill (the “Amendment Bill”) is now with the lower House of the Spanish Parliament (“*Congreso de los Diputados*”) as the first step in its passage into law. This Amendment Bill primarily seeks to transpose Directive (EU) 2019/1023 on preventive restructuring frameworks. Such a significant amendment is expected to be approved at some point during the first half of 2022.

Although the Amendment Bill is still a work in progress and is subject to changes that may be proposed during its passage through Parliament, it does allow us to have a preliminary idea of the impact it may have on pre-insolvency restructuring and of some of the new features that such amendments intend to incorporate in the pre-insolvency regime.

The mere existence of an Amendment Bill could also have an effect on restructurings currently being negotiated or in the pipeline, given that the nature of some of the amendments described above could impact the dynamics among the different stakeholders and the timing of the process.

Below follow some of the main changes proposed in the Amendment Bill:

1 NEW PRE-INSOLVENCY FILING

The so called “5bis” regime (currently regulated in Article 583 of the Spanish Insolvency Act), which grants a debtor an automatic standstill during a period of three (3) months to negotiate with its creditors, will:

1. Require a higher degree of information to be provided to the judge (description of probability of insolvency, list of creditors with whom negotiations will take or are taking place, description of the company and its assets, description of intra-group guarantees, etc.) and
2. be extendable for an additional period of three (3) months if, among other things, such extension is approved by 50% of the creditors holding non-subordinated debt that may be subject to the restructuring plan.

2 CLAWBACK PERIOD

The proposed clawback period is as follows:

1. Two (2) years prior to the insolvency filing (as well as the period between such date and the opening of insolvency proceedings), and

2. two (2) years prior to the pre-insolvency filing (the above-mentioned “5bis”), as well as the period between the date of such filing and the opening of insolvency proceedings), if a restructuring plan has not been agreed or, if agreed, has not been sanctioned by a court of law (‘homologated’) and insolvency proceedings are opened within the year after the pre-insolvency negotiation period (either the 3 initial months or the extension thereof) has expired.

3 CREDITOR CLASSES

Approval of a restructuring plan will require voting by classes of creditors, which will be formed by the common interest of creditors taking into account issues such as the insolvency ranking, type of claim, conflicts of interest, etc. Secured creditors will constitute a class on their own unless the security is so heterogeneous that it may justify a different class treatment.

4 MAJORITIES

A Restructuring Plan shall be approved by a 2/3 majority (for unsecured creditors) and a 3/4 majority (for secured creditors) of each class (as applicable). The syndicate drag provision to cram-down members within a syndicate will apply those same majorities, which means that the required drag majority remains unchanged for secured creditors

(3/4) but is lowered for unsecured creditors (from 3/4 to 2/3).

As an exception to the above, the Amendment Bill includes the possibility of a lower majority threshold (and even cross-class cramdown) in the following cases: a) when a simple majority of each class is obtained if one of them is a secured (or generally privileged) creditor class, or b) when the Restructuring Plan is at least approved by one class that should reasonably receive a payment based on a valuation of the business as a going concern (based on a valuation report issued by the restructuring expert).

In order to avoid ex post discussions and challenges, the Amendment Bill introduces a process to have the classes judicially confirmed ahead of the filing for court homologation.

The arguments to challenge the homologation will be more detailed and will vary depending on the levels of approval by creditors and shareholders. A new feature in the Amendment Bill is that in the case of secondary purchases of claims below par the purchaser will not be able to argue that the applied haircut in the Restructuring Plan is higher than needed if its lower than the purchase discount.

5 SHAREHOLDERS

The Amendment Bill treats the shareholders fundamentally as a class for procedural purposes, although with a number of particularities.

This is a significant step away from prior pre-insolvency regimes and would allow a Restructuring Plan to cram down equity holders in a number of scenarios, mainly when their claims are out of the money and the company is in current or imminent state of insolvency. The Amendment Bill also includes a provision whereby, when a plan includes measures that require shareholder consent or approval (such as capital increases or amendments of the articles of association / by-laws) and the shareholders refuse to grant it, then the company directors (or even a third party appointed by the judge) will have the capacity to deliver such consents or approvals.

6 SALE OF THE PRODUCTIVE UNIT

The Amendment Bill provides that a Restructuring Plan may include the sale of all or part of the business if this solution provides creditors with a higher return than in a liquidation.

7 PROTECTION FOR NEW MONEY

The Amendment Bill provides for special claw-back protection for new money in interim or bridge financing provided during the restructuring process and until the homologation procedure is concluded.

8 LIFTING OF INSOLVENCY FILINGS

Any insolvency proceedings petitioned by a debtor can be stayed by the judge if requested by creditors holding more than 50% of the debt that may be affected by the restructuring plan and so long as the judge can be convinced that such a plan has probabilities of being approved.

9 GROUP RESTRUCTURING

The Amendment Bill includes a number of provisions dealing with the restructuring of group companies, one of the main ones relating to the capacity to extend a restructuring plan to guarantees granted by group companies which are not part of such plan.

The Amendment Bill is a work in progress and not definitive. The above list only intends to highlight some of the main issues and does not intend to be comprehensive nor complete. Legal advice should be sought before taking any action.

Restructuring Team