

Acquisition of production units in Spain

Julio Menchaca Vite presents an analysis of the acquisition of production units at each stage of the insolvency proceedings



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The acquisition of production units (PU), defined by article 149.4 of the Insolvency Act 22/2003 (IA) as “a set of means organised for the purpose of carrying out an essential or ancillary economic activity”¹, can be structured in each of the phases of the Spanish insolvency procedure, i.e.:

- (i) common phase,
- (ii) composition phase,
- (iii) liquidation phase, and
- (iv) pre-pack process; each of them with the specificities analyzed below:

Acquisition of PU in the common phase

The common phase begins with the declaration of insolvency and finishes with the opening of the composition phase or the opening of the liquidation phase (article 21.2 IA), and does not have as its main objective the sale of assets or the PU of the debtor. However, the IA allows acts of disposal to be carried out at this stage if they are performed for the benefit of the insolvency proceedings and are duly justified.

As a general rule, the disposal must be authorised by the Judge (article 43.2 IA), although there are exceptions where it can be executed directly by the insolvency administrator (article 43.3 IA). In the case of the sale of the PU, the aim is mainly to ensure the viability of the company, which usually takes place when delaying the insolvency proceedings may lead to the loss of the main customers and suppliers’ agreements, the departure of key workers, or the

obsolescence of machinery or technology.

Given that the sale of the PU at this stage is an exceptional case, the room for manoeuvre is wide for the Judge or the insolvency administrator, allowing them broad flexibility to decide on the form and terms of the sale, on the possibility of having or not having publicity, or on the method of assessing the bids.

However, the discretionary powers for the sale at this stage are not absolute, since in any case the sale rules in articles 146 bis and 149 IA, which refer to the specialties in the transfers of PU and on the legal rules of liquidation, respectively, must be complied.

Acquisition of PU in the composition phase

We can distinguish two different phases of composition, (i) the early proposal of composition, and (ii) the “regular” phase of composition.

In accordance with article 104 IA, the early proposal of composition may be filed if the opening of the liquidation has not been requested, from the opening of the insolvency proceedings until the period for notification of the credits by the creditors has passed, that is, one month after the publication of the declaration of the insolvency proceedings in the Official State Gazette (article 21.1.5^o IA).

On the other hand, the composition phase that we have called “regular”, to differentiate it from the anticipated proposal, takes place after the common phase (article 111.1 IA).

In both scenarios it is possible

to include the sale of PU within the composition (article 100.2 IA), where the purchaser may or may not assume the debts towards the creditors. If they do not assume them, the transfer of the PU will take place outside the composition. On the contrary, if the debts are expressly assumed by the purchaser (article 146 bis.4 IA), he must sign the composition and proceed to the payment of the debts in the terms set in it, as a condition for the transfer of the PU.

This is usually the option to be executed when the buyer wishes to maintain the relations



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with the creditors, or when they have guarantees on assets which are vital for the development of the activity.

Acquisition of PU in the liquidation phase

The liquidation phase, which is the other alternative of ending the common phase together with the composition phase, requires that the insolvency administrator files a plan of liquidation (PL), in which, if possible, the sale of the PU will be contemplated (article 148 IA), as the legislator prefers the sale as a whole over the fragmented sale of the assets.

The PL will be filed before the Judge, who, before approving it will put it to the consideration of creditors, workers and the same debtor for a period of 15 days, so that they can express their observations or proposals for modification and, in the case of workers, may issue a report through their representatives.

Once this period has elapsed, the Judge will proceed to approve

the PL and, if appropriate, may modify it in the aspects that he deems appropriate. He may also agree to the liquidation in accordance with the legal rules of article 149 IA.

In this sense, it is possible to observe the convergence of the many interests that influence the PL and that the possible buyer must take into account when presenting his offer. This is without prejudice to the possibility that the same bidders may make observations or proposals for modification to the PL, since some authors argue that said bidders are entitled to do it because of their legitimate interest in the proceeding, by virtue of article 184.4 IA.

Acquisition of PU through a pre-pack process

A mechanism increasingly used for the acquisition of PU is by means of the so-called pre-pack process, consisting of the presentations of the insolvency proceedings application together

with a binding purchase offer, being applicable to the abbreviated procedure (art. 190.3 IA), in order to proceed to the sale as promptly as possible.

This option is based on section IV of the Statement of Reasons of the IA, which states that *“The law seeks, secondly, that the solution of insolvency should not be delayed in time, something that only harms the insolvent party and its creditors by reducing the value of their assets on whose disposal their collection depends, eliminating possibilities of guaranteeing their viability and increasing costs. To this end, the insolvency proceedings are simplified and streamlined, favouring the anticipation of liquidation, promoting and regulating a true abbreviated procedure.”*

The recent experiences we have had executing this formula have confirmed its effectiveness, achieving transmissions in record time and with results that clearly benefit the insolvency proceedings in terms of continuity of activity and preservation of jobs.

Conclusions

The Spanish legislation, in its aim to encourage the sale of the PU as a whole, to meet the objectives of maximising the value of the assets, maintaining the activity and preserving jobs, permits the disposal of the PU in each and every one of the phases of the insolvency proceedings, finding different formulas that can be more or less attractive to each concerned party. According to our experience, such sales are effective, increasing the number of PU that are successfully transmitted and opening a wide range of possibilities for investors. ■

Footnotes:

1 Concept that is consistent with Article 1.1.b of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, which defines the PU as *“an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.”*

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