INSOL Europe/LexisNexis coronavirus (COVID-19) Tracker of Insolvency Reforms—Spain update

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Restructuring & Insolvency analysis: The Spanish Government has enacted a series of measures to temporarily relieve directors of the strict obligation to file for insolvency within two months of insolvency in Royal Decree-Laws 8/2020 (RDL 8/2020), 16/2020 (RDL 16/2020) and other pieces of law like Royal Decree 463/2020, in response to coronavirus, COVID-19. What do these measures imply in the context of insolvencies and restructurings? Written by Jose Christian Bertram, JosÈ Antonio RodrÌguez and Jorge V·zquez of Ashurst LLP.

Can directors still file for insolvency of a company?

Yes, they can, but it is worth noting that the obligation for them to file within two months is disapplied for so long as the state of alarm that was declared on 14 March 2020 (the State of Alarm) is in place and up to 31 December 2020.

What if the directors decide not to file within such two-month period but a third party does?

The risk of a third party filing for the insolvency of a company is a risk that borrowers are always aware of and that might make directors more prone to file. The way RDL 8/2020 and RDL 16/2020 deal with this is ensuring that, even if a third party files, such third party filing will not be processed until 31 December 2020—and if the borrower had also filed at any time on or before such date, the debtor's filing will be treated as having filed first.

How does this affect an Article 5bis filing?

In respect of any filing under Article 5bis that had been made prior to 14 March 2020 (the start of the State of Alarm) but which filing period expires during such State of Alarm or prior to 31 December 2020, the relevant borrower will not be required to file for insolvency until 31 December 2020 even if the Article 5bis deadline had elapsed—and again any debtor filing made prior to 31 December 2020 will be treated with preference over any creditor filings. Where a 5bis filing is made prior to 30 September 2020, the debtor will still not be required to file until 31 December 2020 (irrespective of when the 5bis filing expired), but otherwise the general rules will apply.

Could I use the enhanced time frame now to pursue restructuring negotiations?

Yes. The additional timing made available in the case of an Article 5bis filing or for the purposes of filing for insolvency may facilitate the negotiation of a restructuring between the borrower and its financial lenders. The fact that the more general obligation to file for insolvency within a two-month period is put on hold is also giving borrowers and lenders some leeway to negotiate the terms of a restructuring.

How does the stay in any procedural timings affect a homologation or Spanish scheme?

Parties to a restructuring are entitled to freely negotiate the terms thereof: no change there. In the event that such parties need a homologation court ruling to cram down dissenting lenders, they can still file the writ with the competent court, but note that it will not be resolved until the stay in procedural timings has been lifted (see Practice Note: Spain—restructuring and insolvency guide). This can in turn have an impact on how a restructuring is designed:

- the effects of the restructuring on dissenting creditors will not be in force until the homologation court ruling has been issued, and hence there might be an interim period during which the contractual relationship with the dissenting lenders is still subject to the pre-restructuring terms of the relevant agreement
- in the event that the restructuring documentation foresees that it shall only become effective upon the homologation court ruling having been issued, the current situation might give rise to delays that may stress the company's cash situation—companies should therefore avoid any suggestion of restructuring documentation being subject to homologation

Are there any other specific rules worth noting?

Under RDL 16/2020 new rules have been implemented that will apply temporarily after the State of Alarm is lifted. Among others:

- During one year since the State of Alarm started:
  - borrowers who had previously reached a refinancing agreement may launch a new refinancing process (even if one year has not yet elapsed - unlike the general rule in Spain)
  - borrowers with a company voluntary arrangement (CVA) reached within an insolvency may renegotiate the CVA (again, unlike the general rules in Spain)
  - upon the borrower becoming aware of a breach to an existing CVA, it will not be required to file for liquidation within the insolvency, provided that it submits a CVA amendment proposal, and
  - in any insolvencies declared within this period, any auction of assets (aside from the process in the liquidation plan if any) must be made out of court

- in any insolvencies declared within two years after the State of Alarm started, any funding provided by specially connected persons to the borrower (or resulting from payments made by those specially connected persons to third parties on behalf of the borrower) from the date that the State of Alarm started, will not be subordinated but rather treated as an ordinary claim

Enforcement of security

The measures around coronavirus include a general stay on the time frames of court proceedings, including in this case insolvency proceedings. As the market is aware, the Spanish Insolvency Act contains a provision that provides for a stay on enforcement of security interests over assets necessary for the borrower's business until a creditors' voluntary arrangement (not affecting the claim secured by such security) has been reached, or a year has elapsed without liquidation having been opened. Typically secured creditors build in the time frame of a year in their expectations, and practice has shown that borrowers tend to (if no CVA is reached) file for liquidation immediately upon the one-year period expiring in order to avoid enforcement of security—once liquidation has been declared by the court, the ability to start enforcement on security is taken from the secured creditor's hands, who will have to abide by the procedures for sale set out in the liquidation plan that will be drawn up. However, the general stay in court processes may provide a window of opportunity now for creditors to bring enforcement claims.

In addition, 5bis filings are still available and they can obviously still provide protection for borrowers against certain enforcement actions.

Challenges of liquidation plans

There are several cases in Spain of liquidation plans that have been challenged in court in the relevant proceedings, and where the lack of speed of the court system has led to the hearing at the relevant court of appeal being delayed for over a year. This can now be impacted by the general stay in court proceedings, as some hearings were due to take place in March/April this year and there is currently a proposal for the state of alarm to be extended until 11 April 2020, for now.

Note that, under RDL 16/2020, new rules have been implemented around: (1) the duty to file for liquidation, as explained above, and (2) approval of liquidations plans which had been tabled for fifteen days once the State of Alarm is lifted.

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We look at various countries worldwide which are expediting reforms to their restructuring and insolvency laws, temporarily suspending onerous insolvency law provisions, increasing limits for statutory demands, suspending enforcement powers and introducing other measures to deal with the coronavirus crisis. As the situation is rapidly evolving with more countries adding new measures daily, you should contact local lawyers in the relevant jurisdiction to check the current measures in force.