The transposition of Directive (EU) 2019/1023 into Spanish law: the main lines of reform of Spanish pre-insolvency law

Lourdes V. Melero Bosch*

ZVglRWiss 121 (2022) 353–362

The transposition of the Directive on restructuring and insolvency into Spanish law will take place in the course of the reform of the Spanish Insolvency Act. The reform bill currently undergoing parliamentary procedure aims to amend pre-insolvency instruments, insolvency procedure and the discharge of debt system. This paper will focus, however, on the planned reform of Spanish pre-insolvency law, the aim of which is to align with the Directive in saving viable companies and preventing or overcoming insolvency.

Die Umsetzung der Richtlinie über Restrukturierung und Insolvenz in spanisches Recht wird im Zuge der Reform des spanischen Insolvenzgesetzes erfolgen. Ziel des Entwurfs, der sich derzeit im parlamentarischen Verfahren befindet, ist es, die vorinsolvenzlichen (präventiven) Instrumente, das Insolvenzverfahren und das System des Schulderlasses zu ändern. Der vorliegende Beitrag konzentriert sich jedoch auf die geplante Reform des spanischen Vorinsolvenzrechts, dessen Ziel in Angleichung an die Richtlinie die Rettung lebensfähiger Unternehmen und die Vermeidung oder Überwindung der Insolvenz ist.

Content

I. Introduction 354
II. Restructuring plans: early rescue of companies to avoid liquidation 355
1. The *probability of insolvency* as a prerequisite for initiating a restructuring plan 356
2. The inclusion of dissenting creditors into the restructuring plan 357
3. Position of shareholders in the restructuring 359
III. Duties and liability of directors in situations of probable insolvency 360

---

* Dr. *Lourdes V. Melero Bosch*, Associate Professor at the University of La Laguna (Spain). – This work is carried out in the framework of the Research Project PID 2019-107487GB-100 on "Corporate governance in the proximity of insolvency", funded by the Ministry of Science and Innovation and whose principal investigator is Dr. *Juana Pulgar Ezquerra*.

I. Introduction

Directive (EU) 2019/1023 of the European Parliament and Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) was due to be transposed into national law by 17 July 2021. Spain, like many other Member States, has requested an extension, which expires on 17 July 2022.

The regulation intended to implement this transposition (hereinafter, the Draft) is currently undergoing the parliamentary process. It is limited, almost exclusively, to a modification of Spanish insolvency and pre-insolvency law.[1] In effect, the transposition of the Directive on restructuring and insolvency will be carried out through a reform of the Spanish Insolvency Act, aiming at a "far-reaching structural reform of the insolvency system", as stated in the Explanatory Memorandum of the Bill.

It is within Spain's Insolvency Law that the Spanish legal system deals with insolvency matters, both in terms of providing pre-insolvency instruments and regulating insolvency proceedings. The aim of the reform is therefore to modify both scenarios. On the one hand, the reform aims to facilitate the restructuring of viable companies through so-called "restructuring plans" and, on the other hand, to achieve a rapid and orderly liquidation of those that are not viable, through significant modifications to insolvency procedure. The reform also aims, in line with the objectives of the Directive, to configure a more efficient second-chance procedure, extending the list of debts that can be discharged and introducing the possibility of exoneration without prior liquidation of the debtor's assets and with a payment plan, thus allowing the debtor to keep his or her habitual residence and business assets.

This paper will focus, however, on the amendments that are intended to be incorporated into Spanish pre-insolvency law by transposing the Directive and not by the proposed amendments to the insolvency procedure itself or to the mechanism for debt discharge.

In this sense, the general aim of the reform is to establish the necessary legal bases to facilitate the restructuring of viable companies, thus avoiding insolvency proceedings. This objective is served by the introduction of so-called restructuring plans, which entail the abolition of the current pre-insolvency instruments and their unification into a single instrument. It is intended to incorporate a general procedure, with some special features for SMEs that are not considered to be micro-enterprises. Moreover, recognizing

1 This is Bill no. 121/000084, reforming the revised text of the Insolvency Act, approved by Royal Legislative Decree 1/2020, of 5 May, for the transposition of Directive (EU) 2019/1023. The full text of the Bill is published in the Official Gazette of the Spanish Parliament, available at https://www.congreso.es/public_oficiales/L14/CONG/BOCG/A/BOCG-14-A-84-1.PDF#page=1.

the singularities of micro-enterprises means that a single insolvency procedure will be introduced, specially adapted to the needs of these entities[2] and characterised by maximum procedural simplification.

The effectiveness of corporate restructuring depends, to a large extent, on the early detection of a situation of corporate crisis. Therefore, it is particularly important to provide for early warning mechanisms that allow a responsible debtor to identify the need for action to avoid or manage insolvency. In this respect, however, Spanish legislators have decided not to incorporate early warning systems in the Insolvency Act, but have merely introduced an authorisation for the relevant ministries to regulate by ministerial order a warning system which allows impending insolvency to be detected, in accordance with certain indicators.[3]

As mentioned above, we will now turn our attention to the most important aspects of the reform of Spanish pre-insolvency law,[4] bearing in mind the statements contained in the Explanatory Memorandum of the Draft Bill, which justify the proposals presented.

II. Restructuring plans: early rescue of companies to avoid liquidation

The use of pre-insolvency instruments in Spain has increased slowly, though their use is still relatively limited. The transposition of the Directive seeks to boost their use in the belief that they are the best option for saving viable companies. Thus, the so-called "restructuring plans" are introduced, eliminating the current pre-insolvency instruments (*refinancing agreements* and *out-of-court payment agreements*) and combining them into a single mechanism, but with some adaptations for debtors with few assets, a low turnover or a small number of employees.

The stated objective is to encourage earlier restructuring and, therefore, have a greater likelihood of success. This will contribute to ease the burden on

---

2 Micro-enterprises (or micro-SMEs) are defined as companies with fewer than ten employees and annual revenues of less than two million euros. The procedure would guide situations of current or imminent insolvency, as well as situations of probable insolvency, and would therefore allow to benefit both insolvent debtors whose liquidation is obligatory and situations where business viability is concerned. The proposal, however, has been criticised by some doctrinal sectors for the predominant role given to the debtor in this procedure. Among others, *Prendes Carril*, Comentario al Proyecto de Ley de Reforma del Texto Refundido de la Ley Concursal, 3 Revista Aranzadi Doctrinal, 1, 3 (2022).

3 At present, the Ministry of Industry, Trade and Tourism: "Self-diagnosis of business health" (website in force, with free and open access: https://saludempresarial.ipyme.org/Home).

4 In Spanish doctrine there is already talk of a "Restructuring Law". See *Quijano González*, Reestructuraciones, derecho de sociedades y derecho concursal, 5 Revista General de Insolvencia & Reestructuraciones, 15 (2022).

the courts and to a greater efficiency in insolvency proceedings. The proposed regulation, however, has been described by some authors as excessively complex for a largely extrajudicial procedure.[5]

Notwithstanding this, it can be noted that the Spanish option is based on the principle of minimal and *a posteriori* judicial intervention: the negotiation and voting of the plan is informal and outside of any regulated procedure or intervention by the judicial authority, though without prejudice to the possible appointment of an expert in restructuring if necessary or if requested by the parties. In general, the judge only intervenes at the end of the process, to approve the plan agreed by the classes and the majority of creditors required by law.

Moreover, the draft opts for a very broad definition of the concept of "restructuring plans", including restructuring measures affecting both liability and assets. In addition, the Directive allows approving a restructuring plan that provides for the sale of parts or even the whole of the company, so-called "liquidation plans", which may be an attractive option, especially for small and medium-sized enterprises. A novelty in the Spanish legal system is also the possibility to terminate contracts due to restructuring.

The plan is also explicitly protected against insolvency rescission actions, mainly involving interim financing or new financing. However, legal protection is conditional on the plan having been approved, and that it includes a certain proportion of affected credits in relation to total liabilities.

The restructuring plan requires the approval of the creditors and, if necessary, subsequent judicial approval, if the extension of its effects to dissenting creditors or even against the debtor is sought. It is therefore of particular interest to refer to cases in which dissenting creditors are included into the restructuring plan or in which restructuring is imposed against the will of the debtor's shareholders. First, however, we refer to the assumption on which this new pre-insolvency instrument is based.

1. *The likelihood of insolvency as a prerequisite for initiating a restructuring plan*

Eligibility for a restructuring plan is linked to the existence of a situation of probable insolvency.[6] A new concept is thus incorporated into our insolvency law that requires a delimitation between this situation and that of current and

5 *Prendes Carril*, 3 Revista Aranzadi Doctrinal, 1, 3 (2022).

6 The probability of insolvency has been defined as "the grey area between solvency and the clearest insolvency. This is a stage in which the company is not insolvent, or even imminently insolvent, but begins to have financial difficulties to meet future payments". In this sense, *Martínez Muñoz*, La responsabilidad de los administradores societarios en el período de crisis empresarial. Reflexiones a propósito de la Directiva 2019/1023 sobre marcos de reestructuración preventiva, 162 Revista de Derecho Bancario y Bursátil, 1 (2021).

imminent insolvency. As stated in the Explanatory Memorandum of the Draft, "probability of insolvency, imminent insolvency and current insolvency are three sequentially ordered states: the probability of insolvency is a state prior to imminent insolvency and the latter a state prior to current insolvency".

With the introduction of this concept, a debtor who is in a situation of probable insolvency cannot be declared insolvent but can make use of the mechanisms that constitute pre-insolvency law. The temporal delimitation of these three successive moments thus becomes a relevant issue due to the alternatives offered to the debtor. Thus, according to the proposed text, the *probability of insolvency* is considered to exist when it is objectively foreseeable that, if a restructuring plan is not achieved, the debtor will not be able to regularly meet its obligations due within the next two years. On the other hand, a debtor is in a state of *imminent insolvency* if it is foreseeable that he/she will not be able to meet the due obligations regularly and on time within the next three months. In the latter case, the debtor may file for insolvency proceedings or start negotiations to reach an agreement with creditors within the framework of a restructuring plan.

On the other hand, if the debtor is in a situation of *current insolvency*, i.e. when he/she can no longer regularly meet his/her obligations, he/she may also make use of a restructuring plan, but he/she must notify the judge in charge of the insolvency proceedings for the purposes of suspending the duty to apply for a declaration of insolvency. In order to make the system as flexible as possible, the Draft does not exclude recourse to pre-insolvency proceedings if the debtor is in a state of imminent or even current insolvency. However, the difference in treatment between these scenarios is justified by the fact that, in the Spanish legal system, the debtor who is in a situation of current insolvency is legally obliged to apply for a declaration of insolvency. Failure to comply with this duty can have important consequences in a subsequent insolvency proceeding, such as the presumption of guilt in the insolvency proceeding. Moreover, if the debtor, being in a situation of current insolvency, does not notify the initiation of negotiations to reach a restructuring plan, any creditor may request a declaration of the debtor's insolvency. The communication of negotiations will also mean that the individual executions on the debtor's assets that are necessary to continue with the business activity will be paralysed, except in the case of a public enforcing creditor.

2. *The inclusion of dissenting creditors into the restructuring plan*

The Draft adopts the principle of universality of liabilities that may be affected, except for public claims in certain circumstances, labour claims, maintenance claims and non-contractual claims. However, when the effects of the plan are to be extended to dissenting creditors, it is necessary to implement the specific procedure requiring judicial approval. Therefore, the formation of

the classes of creditors is a particularly important issue, since for the approval of the restructuring plan, the affected claims must be voted by the creditor class according to their nature.

In this context, several criteria are provided for to determine how these classes should be formed. Following the general clause, taken from the Directive, which refers to the existence of a common interest of the creditors in each class determined in accordance with objective criteria, it is stated that the main parameter applied for forming the classes should be the insolvency credit rankings. In addition, it is allowed that claims of the same rank are divided into classes considering data, such as their financial or non-financial nature or the asset on which their collateral is based in the case of secured claims, among other criteria. Although the formation of the classes will normally be controlled *ex post*, at the homologation stage, as a novelty, the interested parties are granted the option of requesting prior judicial confirmation before the competent judicial authority.

Relying on the majority decision of the parties concerned makes it possible to reduce judicial intervention in accordance with the criteria of necessity and proportionality. As in the law to be repealed, the intervention of a judicial authority is reduced to two distinct and independent moments: the communication on the opening of negotiations with creditors (referred to above) and the confirmation of the restructuring plan reached. In this respect, the major innovation, which results from the Directive, is the possibility to approve a restructuring plan that has not been approved by all classes of creditors, including the natural-person debtor or the legal-person debtor if the rights of the members are affected. Under certain conditions, the plan is allowed not only to include dissenting creditors within an adhering or favourable class, but even to include whole classes of dissenting creditors or even the shareholders themselves if the meeting has voted against the plan.

As for challenging the restructuring plan, the so-called "absolute priority rule" is chosen, which has a dual content, expressed in the principle that *no one can be paid more than he is owed, nor less than he deserves.* However, and because of the flexibility principle that guides the reform, the plan is allowed, in exceptional cases, to deviate from the absolute priority rule if this is manifestly necessary to ensure the viability of the company and does not unjustifiably prejudice the rights of the classes of creditors affected who have voted against the plan.[7] On the other hand, for the plan to be approved, it is necessary that it passes the creditors' best interest test. To verify that the requirements of this test are met, the value of what they receive under the restructuring plan

7 In the case of legal persons that are below certain thresholds and do not qualify as micro-enterprises, the possibility of imposing a restructuring plan without the debtor's approval is excluded and the absolute priority rule is ruled out, opting instead to allow the approval of plans that observe a relative priority.

will be compared to the value of what they could reasonably receive in the event of an insolvency liquidation.[8]

Another important novelty is introduced in relation to challenging restructuring plans: the interested parties are allowed to choose between unilateral or *ex parte* approval with a subsequent challenge before a higher court or to facilitate a contradictory procedure prior to approval. In the latter case, the court decision approving the plan is not subject to appeal.

3. *Position of shareholders in the restructuring*

As is well known, the Directive allows to impose the restructuring of the company's capital despite the refusal of shareholders. The aim is to prevent shareholders from preventing the adoption or implementation of a restructuring plan to restore the company's viability. In this respect, Article 12 of the Directive enshrines the principle that shareholders should not constitute an obstacle to the adoption of restructuring plans for viable companies, provided that their legitimate interests are protected. Spanish doctrine states that the position of shareholders is "weakened" to avoid blocking or impeding the restructuring plan.[9]

Restructuring measures may cover any change in the composition, terms or structure of the assets and liabilities or any other part of the debtor's capital structure, such as sales of assets or parts of the company as well as the sale of the company as a going concern, and any necessary operational changes or a combination of these elements (Art. 2. 1. 1.1 of the Directive). In this context, under current Spanish law, shareholders do not participate directly, with their vote, in the approval of the plan, unless the liability restructuring plan involves corporate restructuring (e.g. capital increase by offsetting claims). It is the creditors, grouped by class, who, with the majority of the liabilities, approve the restructuring plan.

However, the objective pursued by the Directive is to promote the economic survival of viable companies that are not subject to insolvency proceedings, and to this end it seems to sacrifice the shareholders' private interests in a situation of near insolvency in favour of the general corporate interest – if we identify this as the viability of the company – or even in the general interest of the creditors. To this end, it requires Member States to put in place measures to prevent private interests of shareholders from hindering the approval of a restructuring plan. However, it is left to national legislators how to ensure the viability of company restructuring and thus the viability of the company itself, despite shareholder opposition. This

8 For the test of the best interests of creditors, see *Pulgar Ezquerra*, Reestructuraciones preconcursales forzasas: el mejor interés de los acreedores, 323 Revista de Derecho Mercantil, 1 (2022).

9 *Quijano González*, 5 Revista General de Insolvencia & Reestructuraciones, 15, 25 (2022).

includes classifying shareholders as a new class of creditors or affected persons on whom restructuring can be imposed despite their refusal, under certain circumstances, or whose voting rights may be excluded to facilitate restructuring. Both options have been discarded for the time being. The draft reform of Spain's pre-insolvency law opts for a solution which departs from the Spanish law currently in force, and recognises shareholders' voting rights when the restructuring plan affects their rights, but allows that, in the event of current or imminent insolvency (not in situations of probable insolvency), the restructuring plan be approved against their will, thus avoiding certain abusive conduct which, in practice, leads to a redistribution of value to their benefit and to the detriment of creditors without any economic justification. For the purposes of expressing their consent, it is accepted that the company's will is expressed in accordance with the rules applicable to the corresponding type of company, therefore not subject to the procedural rules applicable to other creditors, but with certain special features to speed up the process and facilitate the achievement of an agreement favourable to the plan. The amendments are introduced, however, in the context of insolvency law, in the context of the reform of the Spanish Insolvency Act, but no amendments are introduced in the Companies' Capital Act.[10]

III. Duties and liability of directors in situations of probable insolvency

Finally, we refer to one of the questions that attracts most attention in Spanish doctrine, namely the question of the due conduct of company directors in situations close to insolvency. Article 19 of the Directive seems impose specific duties on directors to promote corporate viability and to avoid insolvency.

Most Spanish doctrines consider that the legal provisions contained in the Spanish legal system are sufficient and that no modification is necessary that provides specific conduct for company directors in the pre-insolvency phase.[11] However, in addition to the above, it is argued that the content of the fiduciary duties of diligence and loyalty must be adapted to this phase, and that the creditors' interests must be considered when directors take decisions.[12]

---

10 Royal Legislative Decree 1/2010, of 2 July, approving the revised text of the Companies' Capital Act.

11 Among others, *Gutiérrez Gilzanz*, La buena conducta de los administradores sociales en la preinsolvencia, 9973 Diario La Ley, 1, 4 (2021).

12 For *Quijano González*, 5 Revista General de Insolvencia & Reestructuraciones, 15, 24 (2022), there is "a commitment to modify the content and scope of duties, an effective mandate to alter the order of priorities in the adoption of prevention, recovery or reorientation measures, and a possible source of obligations and liability for non-compliance".

According to the preferable Spanish doctrine, the establishment of specific duties of directors in this period close to insolvency would require the following, in order to provide the system with legal certainty:[13] (i) to correctly delimit the period during which these duties are imposed; (ii) to establish a sort of roadmap or exemplify the rules of conduct to be carried out by the directors during this period, and (iii) to establish a specific liability regime. However, this was not the option chosen.

The Explanatory Memorandum of the Draft expressly states:

> "The provisions of Directive 2019/1023 regarding the duties of company directors are implicit in the current regulations, and therefore no new developments are introduced in the current system of corporate action or in the possible classification of the insolvency proceedings as being at fault".

The majority opinion in the Spanish doctrine is thus accepted: during this legislative period there will be no change in the legal regime of the directors' duties and liability, and it is therefore not necessary to make any changes in this respect either in Spain's company law or insolvency law.

In accordance with the above, the liability for the directors' actions in this period will be resolved by the means provided for in Spanish company and insolvency law. Basically, this means there is a liability for damages or, once insolvency proceedings have been declared, an order to cover the deficit. Of particular interest is the latter (insolvency liability), which is imposed if the company administrators behaved (by action or omission), in the two years prior to the declaration of insolvency, in a way that generated or aggravated the insolvency situation by fraud or gross negligence. Also relevant is the system of liability for debts that is activated against directors who have breached the duties inherent in the dissolution of the company due to qualified losses.[14] However, this should have less impact in this area if we consider that if losses are compounded by a situation of insolvency, the application for a declaration of insolvency becomes mandatory.

Finally, it is interesting to note that the Spanish translation of Article 19 of the Directive uses the term "imminent insolvency", the correct translation being "probability of insolvency". The delimitation of the term, to which we

---

13 *Pulgar Ezquerra*, Gobierno corporativo, sociedades cotizadas y proximidad de la insolvencia: Administradores, accionistas y acreedores, 30 Revista de Derecho Concursal y Paraconcursal, 1, 23 (2019).

14 *Pulgar Ezquerra*, 30 Revista de Derecho Concursal y Paraconcursal, 1, 23 (2019): "this is the area in which, in our opinion, creditors' protection against situations of economic difficulties of the company really lies, which in a very high percentage of cases begin with the aforementioned qualified corporate losses, because failure to comply with this duty to promote dissolution or insolvency in good time is punished with the liability for debts regulated in art. 367 LSC"; *Quijano González*, 5 Revista General de Insolvencia & Reestructuraciones, 15, 17 (2022), identifies here a "pre-insolvency function" of company law.

referred earlier, is important because it is a determining factor for considering creditors' interest in the conduct of the company directors.[15] For most of the Spanish doctrine, which is very critical of the Spanish translation of the Directive,[16] the duties imposed on company directors in Article 19 of the Directive refer to a situation of probable insolvency, not necessarily identified with imminent insolvency referred to in our Insolvency Act.[17] This is not a trivial issue since these terminological differences are important for the purposes of delimiting the time frame in which the adaptation of directors' conduct is justified,[18] especially with regard to the priority interest of the creditors during this period.[19]

15 *Gómez Asensio*, Los deberes de los administradores en situación de insolvencia inminente en la propuesta de directiva sobre marcos de reestructuración, 31 Revista de Derecho Concursal y Paraconcursal, 1, 5 (2019).

16 See *Gutiérrez Gilzanz*, 9973 Diario La Ley, 1, 3 (2021).

17 Among others, *Gutiérrez Gilzanz*, 9973 Diario La Ley, 1, 3 (2021).

18 *Quijano González*, 5 Revista General de Insolvencia & Reestructuraciones, 15, 23 (2022), draws attention to an appropriate temporal delimitation in relation to "pre-insolvency corporate governance".

19 On the priority interest of the creditors during likelihood of insolvency see *Recamán Graña*, La "business judgment rule" en la crisis. Una propuesta interpretativa, 54 Revista de Derecho de Sociedades, 1 (2018); *Gómez Asensio*, 31 Revista de Derecho Concursal y Paraconcursal, 1, 7 (2019).