



Country Reports

In this section of *eurofenix* we bring you short updates from our members including insolvency measures in response to the COVID-19 crisis in their jurisdictions. To contribute to a future edition, please contact: paulnewson@insol-europe.org

Spain: New Restructuring Plans under the Transposition of the EU Directive



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Spain published the transposition of the Directive on Preventive Restructuring and Insolvency in its Official Gazette on 6 September 2022.¹ The reform came into force on 26 September.

Among many amendments, Spanish law now defines one only pre-insolvency tool: “*planes de reestructuración*” or restructuring plans. This tool is substituted for the two pre-insolvency tools available in Spain until now: (i) out-of-court payment arrangements (with almost no practical use) and (ii) refinancing agreements (with limited effects, as they only allow for modification of the conditions of financial claims).

What are the main characteristics of Restructuring Plans?

- They can also be proposed by creditors.
- The debtor remains in possession during the process.
- Following the EU Directive, Spanish restructuring plans can be used even in the likelihood of insolvency (2 years before the moment companies will become insolvent).
- There is a choice about which creditors are affected by the plan and which can remain unaffected. The general rule is that any creditor or claim can be affected by a restructuring

plan. However, there are some exceptions for claims that cannot be affected, such as those that derive from torts, and there are many limitations regarding **public claims** (for example, they can only be affected by a relatively short stay; not any other content).

- The content of restructuring plans is very wide and allows for a lot of flexibility:
 - o The plan can modify the assets (and even foresee the sale of productive units or the whole business as a going concern), the conditions and structure of the liabilities (and even modify the debtor) and shareholder capital.
 - o Contracts may be terminated in the interest of the restructuring. The applicable law in contracts can also be modified under the plan.
 - o The plan can terminate senior management contracts.
 - o Any operational measures needed can also be part of the plan.
 - o Under certain circumstances, the effects of the plan may be extended to third party guarantees granted by group companies.
 - o Debtor-in-possession financing: interim and new financing with protection of the financing provider (even if it is an especially related

party to the debtor, if certain requirements are met).

How do negotiations for a Restructuring Plan work?

Spanish companies can either:

- (i) negotiate out of Court and file directly for the sanctioning of the restructuring plan (“*homologación*”) or
- (ii) file a communication with the Court informing it of the opening of negotiations with creditors (with not much involvement by the Court).

In practice, we foresee that the communication will be filed in most cases because it allows for certain additional measures or relief. For example, a stay on enforcement proceedings against assets that are necessary for the restructuring or the appointment of a restructuring expert.²

How does Class Composition work?

Spain has introduced class composition with this reform. The general rule for class composition is that there is a common interest of the creditors included under the same class. This is implied by the payment rank included under the Spanish Insolvency Law:

- (i) privileged claims (both secured and with general privilege, such as 50% of public claims),

- (ii) ordinary claims and
- (iii) subordinated claims.

Some classes need to be created compulsorily. Specifically:

- (i) secured claims (one or several classes of secured claims depending on the underlying security interests),
- (ii) public claims and
- (iii) claims of SMEs if the plan foresees more than 51% of reduction for their claims.

Furthermore, some rules need to be followed:

- Equitable treatment within each class.
- The sacrifice needs to be proportional.
- The best interest of creditors test: the creditor cannot obtain more in a liquidation scenario than in the restructuring scenario.
- Spain follows the absolute priority rule: classes of a higher rank need to be paid in full before making any payment to lower rank classes. Logically, classes cannot receive more than the value of their claims.
- Classes that do not vote in favour cannot obtain less favourable treatment than other classes of the same rank that vote in favour.

We have, so far, the example of iron and steel company Celsa, in which the plan intends to affect three classes, all of them composed of financial claims. The class composition was made on the grounds of the financial instruments from which each of the claims derived and it has been recently approved by the Court.³

How does voting and approval of the Plan work?

Voting takes place in classes. If more than 2/3 (in value) of the creditors of a class of unsecured creditors vote in favour, it is considered that the whole class approves. In the case of secured creditors, 3/4 is needed. The approval of the plans and reasons to challenge an approved plan will depend on whether the plan is consensual (all the classes approved the plan) or non-consensual (not all

the classes approve it).

- If all the classes vote in favour, the plan is **consensual** and can therefore be sanctioned by the Court. There might be impairment within each class (for those creditors that did not vote in favour) but there is no cross-class cramdown.
- If not all the classes vote in favour, the plan is **non-consensual**. There is impairment within each class and there is cross-class cramdown (or cram-up). For the plan to be sanctioned:
 - o We need a simple majority of the classes voting in favour plus at least one of those that vote in favour has to be secured or have a general privilege (basically, the Public Authorities); or
 - o At least one class that is in the money according to the restructuring expert's valuation votes in favour.

Therefore, cram-down (or cram up) is possible in Spain and secured creditors can be affected provided that the plan complies with the absolute priority rule.

On the other hand, the plan can be sanctioned even without the consent of the shareholders if the company is facing actual or imminent insolvency. This is clearly a way to incentivize shareholders to restructure their companies facing the likelihood of insolvency and, in time, to put an end to the stigma still associated with insolvency in Spain.

What happens if a dissenting creditor challenges the Plan?

A dissenting creditor can challenge a sanctioned plan. There are different rules for consensual plans and non-consensual plans and also special rules where the plan has not been accepted by the shareholders. Counterparties to contracts that have been terminated in the interest of the restructuring can also challenge the plan.

Regarding the main effects of a challenge to the plan, our system provides for the legal certainty needed for restructuring plans to become successful in the future:

- If the Court rules favourably on the challenge, the plan will have no effects on the challenging party. If the effects cannot be reversed, the dissenting party has a right to be compensated.
- The effects of the plan against any other party are generally maintained. The plan will be left with no effect against any third party only if the grounds for the challenge were
 - (i) an incorrect class composition or
 - (ii) that the needed majorities were not obtained.

The first example: In Re Xeldist Congelados, S.L.U.

A Galician Court has recently sanctioned the first restructuring plan in *In Re Xeldist Congelados, S.L.U.*⁴ Regarding the affected classes under this plan, it included:

- (i) vendors,
- (ii) vendors providing new financing (in either cash or goods),
- (iii) some classes composed by one single or several secured creditors,
- (iv) some classes composed by one single unsecured creditors,
- (v) a secured class composed of leasing companies,
- (vi) tenants and
- (vii) financial creditors.

As not all classes voted in favour, the plan was non-consensual. It was sanctioned as it counted with the simple majority of the classes voting in favour (from which at least two were secured). The plan included interim and new financing which obtained protection from claw back actions through the Court's sanction. ■

Footnotes:

¹ Ley 16/2022, de 5 de septiembre, de reforma del texto refundido de la Ley Concursal, aprobado por el Real Decreto Legislativo 1/2020, de 5 de mayo, available in Spanish at: <https://www.boe.es/buscar/act.php?id=BOE-A-2022-14580>.

² The restructuring expert is necessary if the company tries to impose a cramdown via an in the money class. Indeed, the valuation made by the restructuring expert will allow us to know which classes are in the money and which ones are not.

³ Requesting the approval of the class composition eliminates incorrect class composition from the grounds to challenge the plan if it is finally sanctioned, adding further certainty to the process.

⁴ Comunicación previa y homologación judicial 491/2022, followed by Commercial Court nr. 3 of Pontevedra (Ruling of 2 December 2022).



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