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# EXTRAORDINARY MEASURES IN INSOLVENCY MATTERS DURING THE HEALTH CRISIS

The containment measures adopted in Spain to deal with the health crisis caused by COVID-19 have led to huge losses and liquidity difficulties for most companies. The Government, by means of Royal Decree-Law 16/2020 of 28 April, has adopted a package of measures with a threefold objective: firstly, to allow companies to gain time to recover their financial situation without falling into insolvency proceedings, by providing incentives for refinancing; secondly, to facilitate the continuity of companies that are in compliance with an insolvency agreement or a refinancing arrangement; and thirdly, to speed up the insolvency proceedings in view of the expected avalanche of applications for declaration of insolvency proceedings.

**1. Suspension of the duty to apply for insolvency**

The first of the objectives of the package of measures is materialised by suspending this duty during the year 2020:

- Until 31 December 2020, the debtor who is in a state of insolvency will not be obliged to apply for insolvency. This avoids that the failure to comply with the 2-month deadline for filing such an application results in the classification of the insolvency proceedings as culpable and in the responsibility of the administrative body, and at the same time provides the company with a period in which to restructure its debt, recover its liquidity situation and compensate losses.

- This suspension is not dependent on the fact that the insolvency has occurred as a result of the COVID-19 crisis; however, if on 14 March 2020 (the start of the state of emergency), the general period of 2 months available to the debtor to apply for insolvency has already expired, the new measure does not restart that period.

- Nor is the debtor required to notify the court of the commencement of negotiations with his creditors ("pre-insolvency"), but if he does so before 30 September 2020, the general rules apply, i.e. he has three months to negotiate and is required to apply for insolvency during the following month.

- Until 31 December 2020, applications for insolvency made by third parties (generally by the creditors) will not be accepted for processing, and if the application for insolvency made by the debtor has been submitted before that date, it will be accepted in preference, even if it is later than the application made by a third party. Thus, the insolvency proceedings will be declared voluntary.

In addition, the Royal Decree Law 16/2020 seeks to encourage the **recapitalization of companies in difficulty** prior to their insolvency, in two ways:

- Claims arising from loans or equivalent, involving cash receipts, made from 14 March 2020 by persons especially related to the debtor (e.g. shareholders, directors and companies in the same group) will be classified as ordinary claims (and not as subordinate claims) if the debtor is declared bankrupt up to 14 March 2022.

- If a person especially related to the debtor pays a debt of the debtor as of 14 March 2020, and consequently subrogates himself in the position of a creditor, the claim he acquires as a result of subrogation will also qualify as an ordinary (and not a subordinate) claim if the debtor is declared bankrupt up to 14 March 2022. The original claim is required to be either ordinary or privileged (thus excluding subordinated claims).

**2. Measures regarding the refinancing of companies**

These measures are aimed at facilitating the modification of existing insolvency agreements, out-of-court payment agreements or standard refinancing agreements, when the economic crisis produced by the COVID-19 has made them impossible to comply with:

- The so-called **re-agreement** is introduced: a debtor who is in compliance with an insolvency agreement may submit a **proposal for modification** before the insolvency judge until 14 March 2021, accompanied by a viability plan and a new payment plan. In general, the debtor will propose longer deferrals and/or acquittals of greater amounts than those initially approved. This measure represents an extraordinary relief for the bankrupt, since the general regulations do not allow the

modification of an already approved agreement, so that the only solution in case of default is the opening of the bankruptcy liquidation.

The re-agreement proposal is processed in writing, and the majorities required for its approval are the same as those required for the agreement to be modified, regardless of the content of the re-agreement. Thus, acquittals of more than 50% and/or deferrals of more than 5 years could be approved by a vote of 50% of the ordinary claims.

The re-agreement does not affect claims accrued during the period of compliance with the original agreement, nor does it affect privileged claims, unless they vote in favour of or expressly adhere to the proposed amendment.

- The debtor's duty to apply for **commencement of the liquidation phase on the grounds that it is impossible to comply with the insolvency agreement** or the obligations assumed after its approval is suspended until 14 March 2021, provided that the debtor presents a proposition for a re-agreement and said re-agreement is admitted for processing within that period. During this period, the judge will not open the liquidation phase even if a creditor requests it, accrediting the debtor's insolvency.

- If any creditor requests the **declaration of default of an insolvency agreement** up to 14 September 2020, the judge will not admit it for processing if, up to 14 December 2020, the debtor submits a proposition of a re-agreement, which will be processed in preference to the request for a declaration of default.

- The above measures also apply to **out-of-court settlements** (although these are extremely rare).

- To encourage the granting of **fresh money**, it is clarified that claims arising from cash receipts in the form of loans or equivalent or guarantees, even those whose creditor is a person with a special relationship to the debtor, will be classified as claims against the estate if the agreement or re-agreement is not honoured (and therefore the liquidation phase is opened) until 14 March 2022. The agreement or re-agreement must state the identity of the creditor and the maximum amount of the financing or guarantee.

- The **modification of approved refinancing agreements** (which avoid the declaration of insolvency) is facilitated in a similar way to the insolvency agreement: until 14 March 2021, the debtor can inform the court that he has initiated or intends to initiate negotiations with his creditors to modify the existing agreement or to reach a new one, even if a year has not passed since the previous application for approval. This communication is equivalent to that of Article 5 bis of the Insolvency Law ("pre-insolvency"), which avoids the necessary declaration of insolvency and suspends certain executions for a period of 3 months.

- If any creditor requests a **declaration of default on an approved refinancing agreement** up to 14 September 2020, the judge will not admit it for processing if, up to 14 October 2020, the debtor communicates that he has initiated or intends to initiate negotiations with his creditors for its modification or to reach a new one, even if a year has not passed since the previous request for approval. If within 3 months from this communication, no agreement has been reached, the judge will admit the application for a declaration of default.

**3. Measures to speed up and simplify insolvency procedures**

Royal Decree Law 16/2020 introduces the following measures in order to mitigate the foreseeable increase in the workload of the commercial courts:

- In the insolvency proceedings already opened, and in those declared up to 14 March 2021, the **auction** of assets and rights of the estate will necessarily be extrajudicial (i.e. notarial), regardless of what the liquidation plan provides for. An exception is made for the sale of productive units, which may be carried out by judicial or extrajudicial auction, or by direct sale, in accordance with the general rules.

- Until 14 March 2021, certain types of actions will be dealt with as matter of **urgency** (i.e. preferential): ancillary proceedings under insolvency law in labour law matters, the sale of productive units or several assets, proposals for agreements or re-agreements (and the objection to their approval), ancillary proceedings under insolvency law to reintegrate the active mass, approval of refinancing agreements or their modification, precautionary measures, and any others agreed by the insolvency judge for the maintenance and conversation of the estate.

- The insolvency ancillary proceedings in order to **object the inventory and the list of creditors in insolvency proceedings** declared up to 14 March 2022 and in those already opened when the provisional texts have not yet been submitted is simplified: only documentary and expert evidence will be admitted, which must be attached to the application and the reply, no hearing will be held unless agreed by the judge, and failure to reply to the application will be considered as abandonment, except for public creditors.

- The procedure for approving the **liquidation plan**, which usually takes several months, is simplified: when 15 days after the end of the state of emergency it has been reported to the judicial office, the judge will approve it, amend it or agree to the liquidation in accordance with the supplementary rules. In other words, the procedure of the insolvency administration is abolished.

- The processing of **out-of-court settlements** is simplified: until 14 March 2021, it is considered to have been attempted unsuccessfully if at least two appointed insolvency mediators have refused to accept the position. In practice, the attempt to reach an out-of-court settlement is merely a formality to access the benefit of residual debt discharge (so-called second chance for a natural person), which used to be prolonged in time due to the refusal of most of the appointed insolvency mediators to accept the position.

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If you have any questions, please contact us:

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