The implementation in Spain of pre-packaged insolvencies: an approach to their content

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This paper provides an introduction to a new instrument that seeks to strengthen and speed up the procedures that facilitate the disposal of production units and company assets at a pre-insolvency stage.

On 20 January last, the Barcelona Companies Court judges, known for their practical and innovative philosophy, approved a series of guidelines for the implementation and processing of what has come to be known as pre-packaged ("pre-pack") insolvency, a mechanism focused on the management, at an early stage prior to the opening of insolvency proceedings, of a procedure for the realisation of the company's assets (whether of the company as a whole, of the production or business unit or units, or as a sale of all assets).

The main feature of this mechanism is that it will be carried out under the supervision of an independent expert in restructuring matters or administrator, who will be appointed by the Court and who will subsequently acquire the status of Insolvency Practitioner.

The aim of this mechanism is to encourage and speed up a process of disposing productive assets which, on many occasions, given the idiosyncrasy, structure and timing of the insolvency proceedings, is weighed down and far removed from the necessary practical spirit, which can end up involving an impairment in the value of the company and/or its assets, as well as - in many cases - in the company's chances of being rescued as a going concern.

The introduction in Spain of this mechanism (already present in other legal systems) is in line with the spirit and purpose of Directive 2010/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, the transposition of which should take place, with the exception of some of its provisions, by 17 July 2021 at the latest - although the Directive itself provides for the possibility of requesting an extension of one year for its application, a circumstance that should not be ruled out given our country's track record in terms of transposition of the legislation passed down to us by Europe.

In any case, in view of the aforementioned (current) lack of transposition of the Directive and of an express legal regulation (apart from the content of Book Two of the recently published Recast Version of the Insolvency Act - TRLC -) the Barcelona Companies Court Judges, once again demonstrating their desire to provide our insolvency system with agile and avant-garde solutions, have established a series of guidelines for the implementation and development of this mechanism, which we summarise below according to the three phases into which the procedure is divided:

1. A first phase, the application

— Together with the procedure provided in Art. 583 TRLC (commonly known as pre-insolvency procedure), the debtor may report on the preparation of transactions for the realisation of the company's assets, specifically detailing the same.

— It may also request at that time, or in writing thereafter, the appointment of an independent or restructuring expert.

— The application must be accompanied by proof of completion of a web form with information on the production units or assets affected by the situation, as well as a list of companies or investors contacted, or in the process of being contacted, in order to ascertain the degree of interest that the sale being prepared or planned may arouse, informing interested parties of the existence of a register where they can be entered on.

2. A second phase, the preliminary development of the content of the transactions

— This phase may have the sensitive nature referred to in the communication of negotiations in Art. 582 TRLC.

— The independent expert appointed in this phase will acquire the status of insolvency practitioner once the insolvency proceedings have been opened, and the rules on appointment and liability laid down for insolvency administrators will apply to him/her.

— The independent expert must respect the debtor's powers of administration and alienation, without interfering, but may record in writing any reservations or objections to their exercise that he/she deems appropriate.

— In the performance of his/her duties, he/she must assist and supervise the debtor in the preparation of the transactions, familiarise himself/herself with the debtor's business, inform creditors of the procedure (especially secured and public administration creditors, as well as employee representatives), verify and supervise public disclosure and transparency in the preparation of sales transactions and issue a final report on his/her management, including details of the asset sales prepared.

— This report shall contain an impartial and independent assessment of the public disclosure of the procedure, the degree of free competition attained, the price, guarantees and conditions of payment, the value of the assets, a prediction of progress once the insolvency proceedings are opened, and lastly proposing the implementation of the purchase offers.

— The remuneration of the independent expert shall be in accordance with the rules on the schedule of insolvency practitioner fees and with the provisions set out therein for the liquidation stage.

3. A third phase, the implementation

— The petition for the opening of insolvency proceedings shall be accompanied by the final management report of the independent expert and the proposals for the implementation of the binding purchase offers.

— The judicial authorisations to carry out the transactions will be processed in accordance with Art. 530 TRLC (petition for insolvency proceedings with presentation of a liquidation plan), with the proposals being served in the same Order that opens the insolvency proceedings so that creditors or any interested party can make representations within a period of ten days.

— Once this period has elapsed, the already appointed insolvency practitioner will proceed to issue the report provided for in Art. 530(2) TRLC, and it will be up to the insolvency judge to issue, the following day, the authorisation authorising or refusing the completion of the realisation transactions. This decision can only be appealed against by means of an appeal for reconsideration.

In view of the current situation, with the end of the insolvency moratorium determined by Act 3/2020 of 18 September now approaching, and with the uncertainties that loom over the viability of many of our companies if they do not obtain resources to alleviate their financial distress, there is no doubt that the establishment of these guidelines directly addresses the European recommendations regarding the need to establish protocols that allow viable companies - or those productive units that are viable - to maintain their business activity.

All of this, of course, without ignoring the need to respect in any case the current insolvency legislation in relation to the specificities of the disposition of assets and production units in the context of insolvency proceedings, and the surrounding practical reality, especially in relation to the transfer of undertakings and the, often mandatory, placing of the purchaser, by way of subrogation, in contracts, salary and social security claims or security given over assets that are disposed of with the subsistence of the lien; all of this in order to harmonise the procedure and provide the mechanism with proper functioning and effectiveness, thereby laying the foundations for a necessary, and hopefully brief, legislative implementation. In the absence of this implementation, obstinately undertaking asset disposals contrary to the rules and principles governing our current insolvency legislation will only entail the risk of voidness of the transactions carried out and headaches for all parties.

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