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# Restructuring and Insolvency

Key aspects of 2022 in Spain





## **Key aspects of restructuring and insolvency proceedings in 2022 in Spain**

The approval of the draft bill amending the Insolvency Act will bring about a significant change to restructuring transactions and will facilitate the sale of business units.

With the reform of the law, creditors will be able to agree and impose a restructuring plan on other creditors and the debtor's shareholders. In addition, new money, including interim financing, is also protected and business units can be transferred as part of a restructuring plan.



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## Before and after the reform of the law

In 2022, there will be two distinct stages in the restructuring market: before and after the approval of the draft bill amending the Insolvency Act to incorporate the Directive on preventive restructuring.

### FIRST SEMESTER

During **the first half of 2022**, restructuring proceedings will be conducted mainly at the initiative of debtors, as the option for creditors to file for insolvency and the insolvent debtor's obligation to file for insolvency has been postponed until June 30, 2022.

During this semester, we will see restructuring transactions subject to current pre-insolvency legislation, with possible access to company recapitalization funds managed by the State-Owned Industrial Holding Company (*Sociedad Estatal de Participaciones Industriales, SEPI*) and the Spanish Development Finance Institution (*Compañía Española de Financiación del Desarrollo, COFIDES*).

During this stage, we will also see the first renegotiations of the financing guaranteed by the state through guarantee facilities managed by the Spanish State Finance Agency (*Instituto de Crédito Oficial, ICO*).

### SECOND SEMESTER

The end of the insolvency moratorium is expected to coincide with the approval of the draft bill transposing the Directive on preventive restructuring. From its entry into force (expected in the **second half of 2022**), new opportunities will arise for debt restructuring providing a more central role to creditors, who will be able to benefit from more agile and flexible pre-insolvency instruments with a broader scope, including the possibility of cramming down not only all types of creditors (financial, commercial and even holders of public law credits, subject to certain requirements) but also debtors.

In addition, the aim is to promote the purchase of business units by providing greater legal certainty with regard to its scope and effects.



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## New restructuring plans

Corporate restructuring under the new Insolvency Act will be characterized by the following features:

**Restructuring plans.** Restructuring plans will replace the current refinancing agreements and out-of-court agreements for payment, aimed at promoting restructuring at an earlier stage of the potential insolvency situation, when the likelihood of insolvency becomes apparent. Restructuring plans will also be available in cases of imminent and current insolvency. The scope of restructuring plans has been broadened, and may now include the debtor's assets and liabilities, including the transfer of business units and even the whole company. Restructuring plans will not require the express consent of the debtor that is a legal entity (with the exception of SMEs).

**Ability to cramdown.** There is a much greater possibility of cramming down holdouts within the same class. The restructuring plan also allows cramdown effects over whole classes of creditors, even those in higher ranks, and to shareholders as long as the absolute priority rule (revisable *ex post*) is preserved. Cramdown effects can only be sought if the plan is court-sanctioned.

### **Definition and classification of creditors.**

The scope of creditors that may be affected by the restructuring is broadened. Any credit that might be subject to amendments could be affected by the plan, with few exceptions. The plan requires the affected claims to be separated into different classes for voting purposes. Class formation must be based on the existence of a class joint interest determined on an objective basis. The reform remains silent on contractual subordination, enabling the relevant internal voting mechanics to apply and be externalized. The debtor or a majority of creditors or potentially affected interested parties may request previous confirmation from the sanctioning court on the adequacy of class formation, thus exhausting the possibility of bringing a challenge on these grounds at a later stage. In the case of SMEs, only debtors can seek this prior confirmation.

**Executory agreements.** The plan can terminate or amend executory agreements in force (as well as senior management contracts) when that amendment or termination is in the interest of the restructuring.



**Interim financing and new money.** The draft bill addresses the temporary financing granted during the negotiation of the restructuring plan (interim financing), as well as the new money necessary to fulfill the plan and protect it in the event of a subsequent insolvency declaration of the debtor. Hence, as long as the plan has been court-sanctioned, interim financing and new money are (i) protected from potential clawback actions, and (ii) deemed an administrative expense that is paid on a cash flow basis (50%) and ranks senior over unsecured creditors (50%).

**Best interest and absolute priority rule.**

As to the court sanction of the restructuring plan, the following rules have been envisaged: the best interest test, which must be observed in any event; and the absolute priority rule (relative priority in the case of SMEs), which can be excluded so long as it is critical for the debtor's viability and damage to the affected credits is not unjustified. In any case, neither rule can be reviewed *ex ante* when the restructuring plan is approved by the sanctioning court, but *ex post* if there is opposition or challenge by any affected party.

**Court sanction (*homologación*).** Court approval of the restructuring plan will be necessary when the following effects are sought: (i) cramdown effects on creditors, creditor classes or shareholders; (ii) termination of agreements in the interest of the restructuring; and (iii) protection from potential clawback actions to interim financing and the new money envisaged in the plan, as well as other acts or agreements linked to the plan. For the restructuring plan to be court-sanctioned, it must offer a reasonable prospect of avoiding insolvency, ensure the debtor's viability in the short and mid term, and impose a proportionate sacrifice on creditors to fulfill these aims. There will also be the obligation to fulfill the requirements of content, form and approval, and equal treatment among creditors of the same class.

**Challenge of the restructuring plan.** The party seeking the court sanction will be able to decide whether to allow holdouts to potentially challenge the restructuring plan: (i) before the court sanction (*ex ante* control), in which case the insolvency court ruling will be binding and final; or (ii) after the court sanction (*ex post* control), in which case the insolvency court ruling will be binding but not final (subject to appeal before higher courts).

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## New acquisitions of business units

With regard to the acquisition of business units, under the new Insolvency Act, it is possible to transfer a company or its business units at three stages during the insolvency proceedings: (i) by submitting the request for opening special liquidation proceedings; (ii) during the liquidation stage, by including the acquisition in the liquidation plan; or (iii) as a supervening offer not included in the liquidation plan so it does not condition the opening of the liquidation phase. Even before filing a request for insolvency proceedings, debtors whose circumstances indicate a likelihood of insolvency or who are in a situation of imminent insolvency or current insolvency may request the court to appoint an independent expert responsible for collecting offers for the purchase of business units (pre-pack).



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"Pragmatic and constructive in negotiations." Chambers, 2021

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"Understanding of the intricacies of the transaction, and more importantly, of the client's needs." Chambers, 2020

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Chambers  
AND PARTNERS



Law firm of the year in  
Restructuring and  
Insolvency in Spain.



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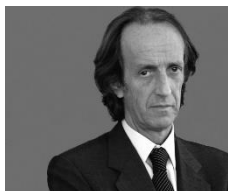
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IS 713573