Mapping Preventive Restructuring Frameworks and the EU Directive for the JCOERE Project

Country Report

Spain

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The Spanish Perspective on Restructuring

As described below the policy reasons behind the Spanish approach to restructuring have been articulated as being two-fold, namely allowing for the restructuring of debts and the preservation of economic activity and employment. The original legislation which seems to have originated in 2003 has been reformed in 2013, 2014 and 2015. The regulation on out-of-court payment compositions and the regulation on the refinancing and restructuring of corporate debts are included in Annex A to the EIR Recast. Legal frameworks in Spain therefore provide a range of options to entities in financial difficulty. These provisions include the stay and the possibility of including dissenting creditors where a majority approves the compromise in a particular class. However, at present Spain has no procedure that includes a cross-class cram-down as such but it seems that the introduction of a procedure that includes a cross-class cram-down may be contemplated.[2]

PART 1: The General Context of Preventive Restructuring

Function and Aims of Insolvency and Rescue

The purpose of preventive restructuring in Spain is twofold. First, restructuring aims to reach an agreement between the debtor and its creditors (for their benefit) that will allow for the restructuring of the debts owed to the them. Secondly, restructuring aims to save the company, thereby continuing its economic activity, and preserving jobs.

Existing Legislative Frameworks

There are two preventive restructuring procedures in the Spanish framework that try to achieve these aims.[3] First, Spain provides for refinancing agreements that may be proposed to financial creditors before the commencement of insolvency proceedings, which may be approved by a judge and kept

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[2] See Ignacio Tirado, 'Scheming against the Schemes: A New Framework to Deal with Business Financial Distress in Spain' (2018) 3 ECFR 516, 530 where the lack of a cross-class cram-down is discussed as a shortcoming with references to several academic and institutional sources, including the IMF.
[3] Contained in the Ley 22/2003, de 9 de julio, Concursal, "BOE" núm 164, de 10/07/2003 ("Ley 22/2003").

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confidential if the agreement meets certain requirements.[4] Spain also provides for out-of-court payment compositions, which may also be offered to creditors of both legal and natural persons prior to the initiation of insolvency proceedings.[5] Both of these procedures are the result of more recent reforms in 2013 introducing a legal framework for out-of-court payment compositions;[6] in 2014 on the refinancing and restructuring of corporate debts;[7] and in 2015 on urgent measures in insolvency proceedings.[8]

PART II: Specific Substantive Aspects of Preventive Restructuring in Domestic Processes and in the Directive

The Stay of Individual Enforcement Actions

Spain provides for an automatic stay covering negotiations during both refinancing agreements and out-of-court payment agreements.[9] According to article 5(5) *bis* of the Spanish Insolvency Act, the debtor has three months to reach an agreement with his creditors. If no agreement is reached after three months, during the fourth month the debtor must file for bankruptcy if it meets the threshold for insolvency. During this three-month period, legal actions are also stayed.[10] While the stay can be lifted if the relevant assets are no longer needed to continue business activities of the debtor,[11] Spain may need to consider whether some minor modification is necessary in order for its provisions to fully comply with article 6(9) of the PRD during the implementation stage so that a judge can in all cases lift a stay if necessary.

The Adoption of Restructuring Plans

Strictly speaking, in both refinancing agreement and out-of-court payment composition frameworks, creditors do not formally vote in classes. However, majorities for secured claims are calculated taking into account the total value of secured liabilities.

Refinancing Agreements

Refinancing agreements generally only apply to finance creditors. Spain defines financial creditors as any creditors that are not public creditors, workers or commercial creditors. Banks and credit institutions are an example of financial creditors; however, shareholders having lent money to the company will also be considered financial creditors.

Strictly speaking, in Spanish refinancing agreements creditors have no voting rights, just the choice whether to subscribe the agreement or not.[12] Since refinancing agreements only affect financial claims, non-financial creditors (workers, commercial and public creditors) do not take part in the adoption of these agreements. Claims of related persons within the meaning of article 93(2) of the Spanish Insolvency Act (shareholders of the debtor, other companies of the group, etc.) are not taken into consideration for the formation of majorities either, although these creditors will likely be affected by the agreement. Nevertheless, workers and commercial creditors can voluntarily adopt the agreements, but their claims will not be taken into consideration for the formation of the majorities.[13] The effects can be extended to dissenting or non-voting creditors with the requisite majorities.

Refinancing agreements are confirmed (homologated) by the court.[14] Once confirmed by the judge, dissenting creditors may challenge an agreement on the basis of "disproportionate sacrifice" (see infra).[15]

[4] Ley 22/2003, arts 5 bis, 71 bis, and additional provision 4.
[5] Ley 22/2003, arts 231-242 bis.
[6] Ley 14/2013 de 27 de septiembre que introdujo la regulación del acuerdo extrajudicial de pagos.
[7] Ley 17/2014 de 30 de septiembre de refinanciación y reestructuración de deudas empresariales.
[8] Ley 9/2015 de 25 de mayo de medidas urgentes en material concursal.
[9] Law 22/2003, arts 5a and 235.
[10] Law 22/2003, art 5(4)(e).
[11] Law 22/2003, art 5(4) *bis*.
[12] Ley 22/2003, additional provision 4(1).
[13] Ley 22/2003, additional provision 4(1).
[14] *ibid*.
[15] Ley 22/2003, additional provision 4(6).

Out-of-Court Payment Compositions

In out-of-court payment compositions, Spanish law recognises unsecured and secured creditor classes, although, in principle, secured claims are not affected by out-of-court payment compositions. Thus, in principle, only unsecured creditors have voting rights, since only they are affected by the compositions. Secured claims will only be affected by the plan when they choose to participate in it,[16] otherwise their rights remain segregated in connection with the security that they possess over the debtor company's assets. The effects will be extended to other secured creditors when the requisite majorities of creditors vote in favour.

Company out-of-court payment compositions in Spain are verified by a mediator. These professionals are responsible for verifying the fairness of the procedure and that the requisite majorities have been met in order to confirm a composition.[17]

Intra-Class Cram-Down in Spanish Restructuring Frameworks

An intra-class cram-down is available in Spain if certain majorities are met. These majorities range from 60% to 80% depending on the restructuring procedure in question. If the requisite majority is met for a category of claims, then dissenting creditors within that category will be bound to the plan. In the case of refinancing agreements, the effects can be extended to dissenting and non-voting creditors when certain legal requirements are fulfilled and the agreement is approved or confirmed by the Court ("*homologación*").[18] Among the legal requirements, the agreement has to be subscribed to by a certain majority of financial claims. This majority depends on the content of the agreement and the type of claims affected by it (unsecured/secured claims).

In the case of *unsecured claims* affected by refinancing agreements, the agreement must be subscribed to by at least 60 % of the financial claims if certain circumstances are present: when it imposes on these claims either (1) a debt repayment postponement of less than five years, or (2) its conversion on participating loans for the same period of time.[19] There is a 75% voting threshold for adoption of the plan if the agreement imposes (1) a postponement of five years or more, but never beyond ten years; (2) a write-off or release; (3) a debt-equity swap; (4) the conversion on participating loans for five years or more, but never beyond ten years, or (5) a payment by transfer of assets.[20]

In order to extend the effects of the agreement to the dissenting and non-voting creditors who are *secured*, there are similar criteria that indicate which threshold is needed as in relation to unsecured claims set out in the previous paragraph, though the thresholds are higher. In the first set of circumstances listed in the previous paragraph, the agreement must be subscribed by at least 65% of the financial secured claims, whereas in the second set of circumstances, the threshold rises to 80%.

Similar rules are applicable in the case of out-of-court payment compositions.[21] However, no confirmation ("*homologación*") is required to extend the effects. The adoption of the agreement with the abovementioned majorities is sufficient to make it binding upon the dissenting or non-voting creditors within individual classes.[22]

As Spanish law already provides for the classification of creditors into different categories, changes may not be needed to comply with article 9(2-3). However, it could be beneficial to have additional and more clearly established classes of creditors. As Spain allows for confirmation majorities above 75% in some circumstances it may need to consider amendments in line with the maximum majority of 75% set out in the PRD.

<u>The Confirmation of Restructuring Plans</u>

In Spain, whether there are conditions for approval by administrative or judicial authorities depends on the type of plan or procedure in question. Refinancing agreements must be approved by a court;

[16] Ley 22/2003, arts 238 and 238 *bis*.
[17] Ley 22/2003, art 238.
[18] Ley 22/2003, additional provision 4(1).
[19] Ley 22/2003, additional provision 4(3)(a).
[20] Ley 22/2003, additional provision 4(3)(b).
[21] Ley 22/2003 arts 238 and 238 *bis*.
[22] Ley 22/2003 arts 238(1) *bis* and 240.

however, the out-of-court payment composition is initiated by the debtor with a request to a registrar (*Registro Mercantil*) or an official list of mediators to appoint an insolvency mediator.[23]

Non-voting and dissenting creditors can contest the refinancing plan before the judge by claiming that the plan imposes upon them a "disproportionate sacrifice". In the case of out-of-court payment compositions, non-voting and dissenting creditors can invoke before the judge the disproportionate nature of the measure. While Spanish law allows for non-voting and dissenting creditors to contest the plan, there does not appear to be a specific 'best-interest-of-creditors' test, however it is usually applied by the courts. Spain may wish to include this test expressly in the law to align with the PRD.

Cross-Class Cram-Down

Spain does not currently provide for a cross-class cram-down in either its refinancing agreements or its out-of-court payment compositions. These procedures allow simply for a majority rule based on a range of circumstances that affect the percentages of majority by value applied along with judicial or administrative approval. These can bind dissenting creditors within a class, including secured creditors. Thus, the fairness of impairing the rights of dissenting creditors is not considered, although the current majority rule provisions do allow the court to consider whether a plan imposes a disproportionate sacrifice to dissenting or non-voting creditors. It is not yet clear what test the Spanish legislator will adopt when it comes to implement the PRD.

Protection of New and Interim Financing

In Spain, refinancing agreements that include the extension of available credit or the amendment or extinction of credit obligations, cannot be revoked as long as the terms of the agreement respond to a feasibility plan that permits the continuity of employment or of the business in the short or the medium term, thus protecting additional financing under such plans.[24] In addition, in those refinancing agreements in which it is foreseeable that access would be needed to the resources generated by the total or partial continuation of the business, the proposal shall also be accompanied by a feasibility plan that specifies what those necessary resources are, the means and conditions of obtaining them, and any commitments to the provision of these resources by third parties. The claims granted to the insolvent debtor to finance the feasibility plan shall be settled under the terms established by the agreement.[25] Thus, the provision of additional finance is at least protected from being challenged in the event that it is included in a restructuring plan. The Spanish system therefore provides certainty for lenders who may choose to lend under a restructuring plan and as the super priority aspect of article 17(4) is optional, this appears to satisfy the provision of adequate protection under the PRD.

PART III: Specific Procedural Aspects of Preventive Restructuring in Domestic Processes and in the Directive

The Threshold of Insolvency

Insolvency may be final or imminent. Spain deems a company insolvent if the debtor cannot meet debts due, whether or not the inability to pay is only on a temporary basis. Impending insolvency is when a debtor has not yet stopped paying, but it is foreseeable that it will eventually be unable to do so.[26]

Debtor in Possession

In both of the restructuring frameworks discussed in this report, the debtor is not divested of his control over the business or its assets, though the involvement of practitioners and other professionals are stipulated in both types of procedures. The out-of-court payment composition in Spain requires the appointment of an independent insolvency mediator, a professional who must meet certain requirements and who receives remuneration that is governed by express rules.[27] Refinancing agreements do not require independent professional expert. In view of article 5 of the PRD, the Spanish legislator may

[23] Allen and Overy, 'Restructuring Across Borders – Spain: Corporate Restructuring and Insolvency Procedures' (2018) 5-9 < http://www.allenovery.com/expertise/practices/restructuring/Pages/Spain-corporate-restructuring.aspx> accessed 26th October 2019.
[24] Ley 22/2003, art 71 bis.
[25] Ley 22/2003, art 100(5).
[26] Ley 22/2003, art 2.
[27] Ley 22/2003, arts 232 *et seq.*

need to introduce procedures that allow for limited professional involvement or supervision in an advisory capacity of insolvency practitioners, but it appears that both restructuring frameworks extant in the Spanish system are conceptually debtor in possession as the debtor generally remains in control of the decision-making of the company while those procedures are ongoing.

Rights *in Rem* under the EIR Recast and the PRD

In so far as the encumbered asset is located outside of Spain, the Spanish position in relation to the interaction of rights *in rem* with preventive restructuring is that rights *in rem* (specifically the rights of secured creditors) cannot be infringed in an insolvency or a restructuring, without express and unanimous consent by the secured creditors.