

PRE-PACK SALES IN SPAIN. A BRIEF ANALYSIS OF THE GUIDELINES ISSUED BY THE COMMERCIAL COURTS OF BARCELONA

As opposed to other European jurisdictions or the US, Spanish law does not contemplate the so-called pre-pack sale. This is a tool enabling the negotiation of a sale of all or part of a company's business or assets with a purchaser prior to the declaration of insolvency of the company, and the insolvency administrator effecting the sale immediately on, or shortly after, the declaration of insolvency of the company (a "pre-pack").

Consequently, the sale of business units or assets in the context of insolvency proceedings in Spain runs the risk of becoming a long and burdensome process which typically results in a loss of value of the relevant business and/or loss of jobs.

It is expected that a pre-pack tool will be formally adopted by the Spanish insolvency regime through the implementation of Directive (EU) 2019/1023 on preventive restructuring frameworks (the majority of which has to be implemented by Member States by 17 July 2022).

In the context of the above and absent legal recognition of a pre-pack, the commercial courts of Barcelona have issued a set of guidelines on how a pre-pack should work (the "Guidelines"). It is not surprising that the courts of Barcelona are behind this initiative, as they have always distinguished themselves by being some of the most forward-thinking courts in Spain (let's not forget that these same courts were the first to allow -under certain circumstances- the cram down of secured creditors outside formal insolvency proceedings at a time when there appeared to be no legal provision contemplating this).

The Guidelines allow debtors who have filed for pre-insolvency proceedings (formerly known as "5-bis") to notify the competent commercial court (i.e. the court where its centre of main interests is located) in that same filing or at any time during the following three months that it is commencing to prepare transactions for the sale of the company's assets (whether this is the sale of the whole business, of certain business units or a global sale of assets), specifically listing and identifying them. The debtor may also request the appointment of an independent expert or "restructuring receiver" to assist in those sale transactions, something which is not currently contemplated in the context of pre-insolvency proceedings. Such restructuring receiver will subsequently be appointed as an insolvency receiver once formal insolvency proceedings are opened.

The notification must attach certain documentation, including confirmation that the government of Catalonia has been notified of the affected assets, and a list of entities, competitors, industrial and financing funds and/or investors with whom the debtor has already been in contact or

commits to contact in the process of searching for potential bidders for the envisaged sale. The debtor must also commit to informing such potential bidders of the existence of a “register of interested parties”.

The debtor may request that the notification of the commencement of a pre-pack sale be kept confidential, in the same way as the filing of pre-insolvency proceedings. Practice shows that the confidentiality of this filing is often crucial to the success of the intended sale.

While the restructuring receiver will have no powers relating to the management and disposal of the debtor’s assets, its main duties will consist of assisting the debtor in the preparation of the pre-pack sale, getting acquainted with the company’s business, informing creditors of the process, being involved in negotiations with secured creditors, public creditors and workers’ representatives, and supervising the process with a view to ensuring that it complies with the legal requirements of publicity, transparency and fair competition, and that all potential bidders are granted equal access to the same information and opportunities.

This preliminary phase will end with the issuance of a final report by the restructuring receiver, which shall be made available to the debtor, the competent court, the workers’ representatives and the most relevant creditors of the company (in particular, secured and public creditors). It is unclear what should be understood by “most relevant creditors of the company” and whether all creditors who request it will have access to the report.

The report must contain an independent and non-biased assessment of the publicity, dissemination of information and fair competition of the process, whether the final price offered is reasonable, whether any bidders have advanced the funds necessary for the maintenance of the company’s business activity during the process, a forecast of the evolution of the value of the assets if the company files for insolvency and the pre-pack sale is not immediately implemented, and a proposal for the implementation of one or more binding purchase offers (or any alternative or complementary proposals).

Upon filing for insolvency, the company shall append the final report issued by the restructuring receiver and the final proposals for the implementation of a binding sale of the whole company, certain business units or assets. Once the competent court issues its ruling declaring the insolvency of the company, the creditors and any other interested parties will have ten days to make comments on the proposed sale, and the insolvency administrator will issue its mandatory report on the liquidation of the company, following which the judge will, within the following day, decide whether or not to authorise the intended sale.

Such decision may be challenged before the same judge. Although the Guidelines do not explain the grounds on which the challenge can be made, it is clear that it will be crucial that: (i) the principles of publicity, competition and equal treatment have been respected during the process, (ii) the price obtained is optimal, and (iii) that the privileges of secured creditors are respected.

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In conclusion, although the Guidelines raise certain issues and questions, this is an important and much-needed step towards the implementation of quick and value-preserving pre-pack sales in Spain. In fact, the commercial courts of Barcelona have been implementing pre-pack sales of business units since the end of July 2020, with the authorisation of the competent judge being obtained after the declaration of insolvency of the relevant companies in October 2020.

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The information contained in this Briefing is of a general nature and does not constitute legal advice. This Briefing was prepared on 29 January 2021 and Pérez-Llorca does not undertake any commitment whatsoever to update or review its content.

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