

Jordi Gras Sagrera

## The end of the insolvency moratorium with insolvency reform imminent

### 1. End of the insolvency moratorium

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The so-called insolvency moratorium was one of the measures that, as in other European countries, the Spanish legislature approved to deal with the economic consequences of the pandemic. The purpose of this was to avoid the insolvency of companies that could be viable under normal market conditions. The obligation to file for insolvency was suspended and debtors were protected against possible applications for insolvency proceedings by creditors.

The Spanish insolvency moratorium, originally linked to the state of emergency, has been extended several times, and finally came to an end on 30 June.

On the other hand, in the midst of the pandemic, on 1 September 2020, the Consolidated Text of the Insolvency Law came into force, with the aim of organising and clarifying the insolvency legislation of 2003, which had been subject to successive and partial legislative reforms.

### 2. Insolvency reform

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Coinciding with the end of the insolvency moratorium, the Consolidated Text is undergoing a major reform that is expected to be approved this July and will come into force in September 2022. The reform, which is obligatory for the Spanish legislature in order to transpose the European Restructuring and Insolvency Directive into Spanish law, will entail a paradigm shift in the insolvency management model that will affect debtors, creditors and potential investors. The deadline for transposition of the directive expires on 17 July 2022, following the expiry of the twelve-month extension granted by the European Commission.

### 3. Consequences of the end of the moratorium

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The end of the insolvency moratorium has, among others, the following consequences:

#### A. An obligation to file for insolvency proceedings for debtors who are currently insolvent or who were insolvent before 30 June 2022.

As of 1 July 2022, debtors currently in insolvency (i.e. those who are not able to pay their debts regularly on their respective due dates) are again obliged to file for insolvency proceedings within two months of the insolvency occurring. This period to comply with the obligation to apply for voluntary insolvency proceedings may be extended to a maximum of four months if the debtor applies for pre-insolvency proceedings before the relevant commercial court. After this period has elapsed, the debtor who is still in a situation of current insolvency must file for insolvency proceedings.

Failure or delay in the obligation to file for insolvency proceedings may have significant consequences, as the insolvency may be classified as culpable and, eventually, may give rise to liabilities for the persons affected by the declaration of culpability.

Similarly, debtors who were in a situation of current insolvency before 30 June 2022 will also have two months to file for insolvency proceedings from 30 June 2022 (i.e. until 1 September 2022), unless they file a pre-insolvency notice and thus obtain the above-mentioned period of up to 4 more months from the pre-insolvency filing.

#### **B. The option for creditors to apply for their debtor's insolvency proceedings and the processing of insolvency proceedings applied for during the moratorium period.**

From 1 July, the Commercial Courts will once again admit applications for insolvency proceedings (those requested by creditors). Also from 1 July 2022, the Commercial Courts will continue to process applications for insolvency proceedings filed by creditors whose application had been suspended as a result of the moratorium, unless:

- (i) Prior to the insolvency proceedings, the debtor has filed for pre-insolvency proceedings. In this case, the application for insolvency proceedings will be suspended and will only be processed if the debtor does not file for voluntary insolvency proceedings 3 months after the pre-insolvency application, or;
- (ii) The debtor has requested voluntary insolvency proceedings before the end of the insolvency moratorium, in which case the voluntary insolvency proceedings requested by the debtor will be processed as a priority.

#### **4. Conclusion: decisions after the end of the moratorium and before the entry into force of the insolvency reform**

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Subject to what the legislature may finally provide in transitional provisions, everything seems to indicate that pre-insolvency notifications and applications for insolvency proceedings filed after the insolvency moratorium and prior to the entry into force of the insolvency reform will basically be regulated by the Consolidated Text currently in force.

Given the above scenario (and without overlooking the special obligations essentially incumbent on company directors), a range of possibilities opens up that must be carefully studied and implemented by debtors, creditors and potential investors. Among others, we can list the following: (i) should one file for pre-insolvency proceedings under the current regime or wait until a restructuring plan is prepared in accordance with the reform?; (ii) should one file for insolvency proceedings now or wait until the new regime comes into force?; (iii) should one, and at what point in time, propose the sale of a production unit and subsequent insolvency proceedings (pre-pack insolvency)?; (iii) what precautions should one take to acquire certain assets of a company in difficulties?; (iv) how should one protect their credit from potentially insolvent companies?; etc.

Expert advice will be necessary for appropriate, rapid and efficient decision-making.

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