Informative Note

Bankruptcy measures approved by 28th April Royal Decree-Law 16/2020

29th April 2020

Regarding 28th April Royal Decree-Law 16/2020, on procedural and organisational measures to deal with Covid-19 in the area of the Administration of Justice, which provides for important insolvency measures such as the postponement of the duty to request the opening of the liquidation phase or to file an application for insolvency proceedings, modification of the creditors' agreement or incentives for the financing of companies, among others

On 28 April, the Council of Ministers approved Royal Decree-Law 16/2020, on procedural and organisational measures to deal with COVID-19 in the area of the Administration of Justice (hereinafter, "**RD-L 16/2020**"), with the aim of providing an agile solution to the accumulation of procedures suspended due to the declaration of the state of alarm when said procedures are reactivated, as well as preventing the increase in litigation that will occur as a result of the extraordinary measures adopted and the economic situation itself derived from the health crisis. In this context, various measures of a procedural, bankruptcy, corporate, organisational or technological nature are approved and, likewise, certain adjustments are made to various legal texts previously approved during the state of alert.

This new Royal Decree-Law repeals Article 43 of Royal Decree-Law 8/2020, of 17 March, which established the suspension of the duty to apply for bankruptcy during the state of alert and provided that judges would not admit applications for the necessary bankruptcy until two months after the end of the state of alarm.

Among the measures adopted, Chapter II, and from the bankruptcy point of view, the Royal Decree-Law, establishes a series of measures aimed at preventing the scenario after the COVID-19 crisis has been overcome from leading to declarations of bankruptcy or the opening of the liquidation phase for companies that could be viable under general market conditions.

The measures are of various kinds and cover both substantive and procedural aspects. The measures are essentially the following:

1. Modification of the arrangement with creditors and temporary non-admission of applications by creditors for breach

Royal Decree Law 16/2020 provides for the possibility of the bankrupt party submitting a proposal to modify the agreement that is pending compliance, during the year following the declaration of the state of alert.

This proposal for modification of the bankrupt party will be processed in accordance with the same rules established for the approval of the original agreement, with the only exception that the processing will always be in writing -regardless of the number of creditors-, and under the same majority regime

established for the acceptance of the original agreement, regardless of the content of the modification; the modification will not affect the credits accrued or contracted during the period of compliance with the original agreement or the privileged creditors to whom the effectiveness of the agreement has been extended or who have adhered to it once it has been approved.

Applications for a declaration of default submitted by creditors within six months of the declaration of the state of alert will not be admitted for processing until three months have elapsed since the end of the previous six-month period. During those three months the bankrupt party may submit a proposal to modify the agreement.

In this way, the duty to request the opening of the liquidation phase is postponed when, during the validity of the agreement, the debtor becomes aware of the impossibility of complying with the committed payments and the obligations contracted after its approval; likewise, the modification of the agreement is facilitated.

2. Deferral of the duty to apply for the beginning of the liquidation phase

During a one year period from the declaration of the state of alert, the debtor will not have the duty to request the liquidation of assets when it is aware of the impossibility of complying with the committed payments or the obligations contracted after the approval of the insolvency agreement, provided that the debtor presents a proposal for the modification of the agreement and this is admitted for processing within this period.

During this one-year period, the judge will not issue an order opening the liquidation phase requested by the creditor.

3. Refinancing arrangements and temporary non-admission of claims by creditors

During the period of one year from the declaration of the state of alert, the debtor who has approved a refinancing agreement may inform the court competent for the declaration of insolvency that he has initiated or intends to initiate negotiations with creditors to modify the agreement in force or to reach a new one, even if one year has not passed since the previous application for approval.

The rules laid down for the amendment of the agreement in paragraph (i) shall apply.

On the other hand, Royal Decree Law 16/2020 establishes a temporary non-admission rule of all those requests for declaration of noncompliance with the refinancing agreement that are presented by the creditors within six months from the declaration of the state of alarm, until one month has passed from the end of said six-month period.

During that month, the debtor may inform the court of the commencement of negotiations with creditors to amend the existing agreement or, where appropriate, to reach a new agreement without the need for a year to elapse from the submission of the previous notice. The debtor shall have a period of three months to reach such an agreement and to submit it to the court.

4. Deferral of the duty to submit the application for competition and limitations on the applications for competition required

Article 11 contains one of the most relevant measures in bankruptcy matters as it eliminates, in general, the duty to request the declaration of bankruptcy contained in Article 5.1 of the Bankruptcy Law until 31st December 2020.

This temporary waiver of the obligation to apply for a declaration of bankruptcy will also benefit those debtors who have already notified the competent court of *(i)* the opening of negotiations with creditors provided for in Article 5 bis of the Bankruptcy Law, *(ii)* an out-of-court settlement agreement or (iii) adhesion to an early proposal for a settlement.

With regard to the applications for necessary insolvency proceedings, Article 11 itself, in conjunction with paragraph 1 of the second transitional provision, prevents the judges from admitting for processing, until 31st December 2020, those applications that have been submitted after the declaration of the state of alert and, likewise, gives priority over these to the admission for processing of applications for voluntary insolvency proceedings submitted by the debtor before 31st December 2020, even if this is later than the application for necessary insolvency proceedings submitted by a third party.

5. Measures to promote and encourage the financing of companies to meet their temporary liquidity needs. Rating of certain loans.

In the event of failure to comply with the approved or amended agreement within two years of the declaration of the state of alert, claims arising from *(i)* cash receipts from loans shall be considered as claims on the estate, credits or other businesses of a similar nature that may have been granted to the bankrupt party or *(ii)* those derived from personal or real guarantees constituted in favour of the bankrupt party by any person, including those who, according to the Law, have the status of persons especially related to him, provided that the agreement or the modification states the identity of the obligor and the maximum amount of the financing to be granted or the guarantee to be constituted.

In insolvency proceedings declared within two years of the declaration of the state of alert: *(i)* those deriving from cash income from loans, credits or other businesses of a similar nature which, since the declaration of the state of alert, have been granted to the debtor by those who have the status of persons especially related to him and *(ii)* those in which those who have the status of persons especially related to the debtor have been subrogated as a result of the payments of the ordinary or privileged credits made on behalf of the debtor, since the declaration of the state of alert will be considered claims against the estate.

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payments of the ordinary or privileged credits made on behalf of the debtor, since the declaration of the state of alert will be considered as ordinary claims.

6. Changes to the inventory challenge procedure and the list of creditors

To avoid the foreseeable increase in litigation in relation to the processing of bankruptcy proceedings in the courts, a series of rules have been established to speed up the bankruptcy process.
Thus, Royal Decree-Law 16/2020 simplifies the procedural regime relating to the challenge of the inventory of assets and rights and of the list of creditors of those bankruptcies that are declared within two years of the declaration of the state of alert, establishing the following procedural measures for this purpose:

- Cancellation of hearings, unless the bankruptcy judge decides otherwise in *(i)* incidents of disputed inventory and list of creditors, *(ii)* in bankruptcy proceedings where the bankruptcy administration has not yet submitted the provisional inventory and list of creditors, and *(iii)* in bankruptcy proceedings that are declared within two years of the declaration of the state of alert.

- Evidence: the only admissible evidence are document and expert evidence.

- Failure by any of the defendants to respond to the action shall be deemed to constitute an entry into the proceedings, except in the case of creditors under public law.

- The means of evidence that the parties intend to use must necessarily accompany the incidental claim for rebuttal and the replies thereto.

7. Preferential treatment

Royal Decree Law 16/2020 establishes the preferential processing of the following actions aimed at protecting workers' rights, maintaining the continuity of the company and preserving the value of goods and rights, until one year has passed since the declaration of the state of alert:

- Bankruptcy incidents in employment matters.
- Actions aimed at the disposal of production units or the sale of assets in bulk.
- Proposals for agreements or modifications of those that are in the period of compliance, as well as incidents of opposition to the judicial approval of the agreement.
- Bankruptcy proceedings relating to the reintegration of the workforce.
- The admission to process the application for approval of a refinancing agreement or the modification of the one in force.
- The adoption of precautionary measures and, in general, any other measures which, in the opinion of the bankruptcy judge, may contribute to the maintenance and conservation of the assets and rights.

Preference is also given to the processing of liquidation plans that were evident in the judicial office or that were submitted during the state of alert.

8. Auction and disposal of assets system

The Royal Decree-Law establishes that in those tenders that are declared within the year following the declaration of the state of alert and in those that are in process to date, the auction of assets and rights of the active mass must be extrajudicial, even if the liquidation plan establishes otherwise.

Excluded from the foregoing rule is the sale of the whole company or of one or more production units, which may be carried out either by auction - judicial or extra-judicial - or in any other manner authorised by the judge.

Likewise, the immediate undertaking of the goods and rights subject to special privilege or the giving in payment or for payment of said goods authorized by the judge is permitted, in any stage of the proceedings.

9. Suspension of the cause for dissolution due to losses under Article 363.1 e) of the Law on Corporations (LSC)

Losses for the year 2020 will not be taken into consideration for the sole purpose of determining the reason of the cause for dissolution provided for in article 363.1 e) of the revised text of the Law on Corporations, approved by Royal Legislative Decree 1/2010, of 2 July.

If the result for the 2021 financial year shows losses that reduce the net assets to less than half the share capital, the directors must call a meeting or any shareholder may request, within a period of two months from the end of the financial year in accordance with Article 365 of the aforementioned law, that a meeting be held to proceed with the dissolution of the company, unless the capital is increased or reduced to a sufficient extent.

We hope the information is useful and of your interest. At Andersen Tax & Legal we have created a multidisciplinary team to attend to all the questions that may arise on this aspect or in relation to the COVID-19.

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