# Recent key developments in the area of Spanish financial regulation

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## Law 16/2022 reforming the Insolvency Act and transposing the Directive on restructuring and insolvency into Spanish law (published in the *Official State Journal* on September 6th, 2022)

The purpose of Law 16/2022, which took effect 20 days after its publication, is to introduce into Spanish legislation a preventive restructuring procedure designed to ensure the continuity of viable companies and businesses that are facing financial difficulties that could threaten their solvency and lead them into bankruptcy. To that end, the new legislation amends Spain's Insolvency Act in order to introduce the following aspects:

Modification of the pre-insolvency legal regime, specifically:

- The scope of application (*i.e.,* parties to pre-insolvency proceedings) and objective applicability criteria (in the event of probable, imminent or current debtor insolvency).
- Notification of the start of negotiations with creditors with a view to reaching a restructuring agreement.
- Restructuring plans, which include the restructuring measures affecting both liabilities and assets. The possibility of selling part or even all of a company under liquidation plans.
- The rules regarding the expert in charge of the restructuring, a new role whose appointment is contemplated by the Directive in certain instances.
- Special considerations for debtors that do not meet certain thresholds but do not qualify as micro enterprises.

The new legislation also sets up a "second-chance" procedure by extending the list of forgivable debts and introducing the possibility of debt forgiveness without first liquidating the debtor's net assets subject to a payment plan, permitting the debtor to keep his or her regular abode and business assets.

It also regulates the special procedure for micro enterprises which combines certain aspects of both insolvency proceeding and restructuring plans. That procedure will apply to micro enterprises that are at the stage of pre-insolvency (probability of insolvency), imminent insolvency (when it is foreseeable that the enterprise will not be able to uphold its obligations within the legally prescribed deadlines) or are actually insolvent (when they cannot uphold their enforceable obligations in the legally prescribed manner).

The private international legal regime is likewise adapted for Regulation (EU) 2015/848, of the European Parliament and of the Council, of May 20th, 2015, on insolvency proceedings, and the special pre-insolvency proceedings are introduced into the general regimes under private international law.

Lastly, it is worth highlighting the provisions related with the collection regime applicable to the guarantees extended under Royal Decree-laws 8/2020, 25/2020 and 6/2022 and the amendment of the Corporate Enterprises Act in respect of the joint and several liability of directors for company debts.

## Law 18/2022 on the creation and growth of companies (published in the *Official State Journal* on September 29th, 2022)

Law 18/2022 aims to: (i) make it easier to start up a company; (ii) improve access to finance and its regulation; (iii) eliminate obstacles

to the performance of economic activities; and (iv) reduce trade debt non-performance. The new law took effect 20 days after its publication, with the exception of the chapter devoted to crowdfunding, which will take effect from November 10th, 2022, and the article addressing e-billing between business owners and professionals, which will take effect later.

In broad terms, the following measures stand out:

1. Measures related with collective investment via modification of Law 35/2003 (of November 4th, 2003) on collective investment undertakings.
    - Express acknowledgement of the European Long-Term Investment Fund (ELTIF).
    - Elimination of the quarterly reporting requirement.
    - Introduction of by-default electronic communication with investors and shareholders.
    - Permission for collective investment undertaking management companies to set up as limited-liability companies.
2. Measures related with private equity via modification of Law 22/2014 (of November 12th, 2014) on private equity firms, other closed-end collective investment undertakings and the companies that manage closed-end collective investment undertakings.
    - Acknowledgement of closed-end collective investment undertakings that invest in loans and those whose main goal is to invest in the invoices, loans, credit and trade bills used in the ordinary course of business operations.
    - The new legislation expands the definition of the core business of a private equity firm to include investment in financial institutions whose business is underpinned primarily by the application of technology to new business models, applications, processes or products.
    - Changes to private equity firms' mandatory investment coefficient.
    - The limits on investments are focused on investable assets, which are defined as committed capital plus any borrowings received less the maximum amount of fees, charges and expenses indicated in the corresponding prospectus. Committed capital is that corresponding to the date of the investment.
    - Increased headcount requirement for SME-focused private equity fund investees, from 250 to 499.
    - Reduced initial capital injection requirement for private equity firms from 50% of subscribed share capital to 25%.
    - Express acknowledgement of the ELTIF.
    - Permission for closed-end collective investment undertaking management companies to set up as limited-liability companies.
    - Inclusion of discretionary management of investment portfolios owned by occupational pension funds as an ancillary service that can be provided by closed-end collective investment undertaking management companies.
    - Permission for the shares of Spanish private equity funds to be traded with other investors when the latter invest on the basis of a personalised recommendation by an intermediary that provides them with advisory services so long as, in the event their financial net worth is less than 500,000 euros, that investment is at least 10,000 euros and is held and does not represent more than 10% of that net worth.
3. Matters related with AML/CFT via modification of Law 10/2010 (of April 28th, 2010) on the prevention of money laundering and terrorist financing.

- Puts the personal data protection requirements on a par with the GDPR.

- Regulates the exchange of information among bound parties.

4. Measures related with supervision and solvency via modification of Law 10/2014 (of June 26th, 2014) on the organisation, supervision and capital adequacy of credit institutions.

   - Additional protection for the customers of credit institutions. The latter are required to act honestly, impartially, transparently and professionally, upholding their customers' rights and interests. Any information addressed to their customers, including advertising messages, must be clear, sufficient, objective and not misleading. Moreover, credit institutions are required to keep their customers duly informed at all times.

   - Permission for credit institutions headquartered in a country that is not an EU Member State and without a branch in Spain to provide services in Spain, subject to prior authorisation from the Bank of Spain.

   - Obligation for credit institutions to formulate policies and procedures, including adequate internal control mechanisms, in the areas of:

     - Product governance and oversight, with a view to ensuring that bank products and services are designed in due consideration of the needs, characteristics and objectives of the target market to which they are addressed and are marketed through appropriate channels.

     - Remuneration of the persons involved in the sale and marketing of banking products and services. An entity's remuneration policies must, moreover, be designed to induce responsible conduct and fair treatment of customers and to prevent conflicts of interest.

     - Packaged or bundled sales practices in retail banking.

5. Measures related with crowdfunding via modification of Law 5/2015 (of November 27th, 2015) on the stimulation of corporate financing.

   - Implementation of the EU-harmonised legal regime governing crowdfunding platforms. Among other matters, the new law regulates the authorisation of these platforms, their registration with the CNMV, the requirement to draw up a key investment information document (KIID), a key platform information document and the platforms' penalty regime.

   - It also implements the legal regime governing non-harmonised crowdfunding platforms, *i.e.,* those not subject to Regulation (EU) 2020/1503 of the European Parliament and of the Council of October 7th, 2020, on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937.

   - Permission for investors to group together.

6. Measures related with the start-up of businesses:

   - Amendment of the Corporate Enterprises Act (Legislative Royal Decree 1/2010):

     - Modification of the share capital requirement for incorporation of a limited-liability company from 3,000 euros to at least 1 euro. Establishment of a specific transitory regime for creditors until share capital reaches 3,000 euros.

     - Elimination of "sequential formation companies" (article 4 bis).

- With respect to the average supplier payment term calculation, the changes stipulate that the date of receipt of an invoice can only be considered the start of the payment period in specific circumstances.

- Repeal of Title XII addressing "new business limited companies".

- Amendment of Law 14/2013 (of September 27th, 2013) on support for entrepreneurs and their international expansion, in relation to their limited liability and the steps needed to incorporate a limited liability company.

7. Measures for tackling trade debt non-performance.

   - Creation of a State Observatory for Private Non-Performance.

   - Amendment of Law 56/2007 (of December 28th, 2007) on measures for advancing the information society, with respect to the widespread adoption of e-billing, by extending the requirement to issue and send e-bills to all business owners and professionals in the course of business dealings.

8. Measures for eliminating obstacles to the performance of business activities.

   - Amendment of Law 20/2013 (of December 9th, 2013), on guaranteeing market unity, in relation to the economic agent protection and intergovernmental cooperation measures.

   - Amendment of Law 12/2012 (of December 26th, 2012), on urgent measures for the deregulation of trade and certain services, in order to expand the catalogue of permit-exempt activities.

## Royal Decree 885/2022 fostering occupational pension schemes (published in the *Official State Journal* on October 19th, 2022)

The goal of this Royal Decree is to implement Law 12/2022, of June 30th, 2022, regulating occupational pension schemes. It took effect the day after its publication.

It regulates the following matters, among others:

- The organisation and operation of the Sponsorship and Oversight Committee by way of interministerial collegial body. That committee will act as the public sponsoring entity and take the form of a collegial body under the Ministry of Inclusion, Social Security and Migration, specifically made up of nine members from the General State Administration. It will be vested with the key duties regarding publicly sponsored occupational pension funds (the Funds or FPEPP in Spanish), including the incorporation, dissolution, selection of management companies and custodians, formulation and approval of investments strategies and ongoing oversight of performance.

- The initial incorporation of the Special Control Committee and the procedure for any subsequent incorporations and renewals. That committee will be made up of 13 people, appointed by the Sponsorship and Oversight Committee, with proven experience, knowledge and supervisory and managerial capabilities. The basic rules governing how it functions will be established in an internal code.

- The procedure for overseeing the correct functioning and governance of the Funds. Fund management companies, depositary entities and external auditors must send the Special Control Committee and the Sponsorship and Oversight Committee an annual report on any incidents detected, along with proposals for improving how the Funds operate, most particularly with respect to their governance.

- The annual fees accrued by the Funds' management companies, including their fixed remuneration, any performance-driven remuneration and any remuneration corresponding to entities in which they have delegated specific tasks must be less

than 0.30% of the value of the capital accounts to which they are to be charged.

- That limit will apply on a combined basis to cumulative fees to be received by multiple management companies when the Fund or other occupational pension plan owns shares in other pension funds or invests in collective investment undertakings or private equity firms managed by entities that belong to the same group as the management company.

- Management companies may pass on any fees derived from investments in other open pension funds, collective investment undertakings or private equity firms that do not belong to their same group up to a maximum limit, in addition to the limit above, of 0.55% of the value of the capital accounts to which they are to be charged.

- The annual fees accrued by the depositary entities selected by the Funds must be less than 0.10% of the value of the capital accounts to which they are to be charged. Irrespective of those fees, depositary entities are entitled to receive fees for the settlement of investment transactions, subject to compliance with the general rules regulating the corresponding rates.

- Fund management companies and depositary entities may exceptionally pass on upfront implementation costs incurred to connect up to the common digital platform needed to set the Funds up within no more than five years of their selection as management company or depositary entity, along with other expenses contemplated in the administrative specifications.

- Twice-yearly, the management company and the depositary entity must inform the Special Control Committee of all the expenses passed along as implementation costs, broken down by item and expressed in percentage terms.