

Composition of active mass: inventory of goods and rights

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Introduction

Article 192 of the Consolidated Text of the Bankruptcy Law (TRLC) introduces the concept of the 'active mass' of a bankruptcy, which constitutes all of the assets and rights integrated into the bankrupt's assets on the date of the declaration of bankruptcy, as well as those that are reintegrated to the bankrupt or acquired before the conclusion of the bankruptcy proceedings.

The active mass incorporates the principle of universality derived from Article 1.911 of the Civil Code (ie, the debtor is liable for all of its present and future assets).

This article examines the inventory of goods and rights included in the active mass, which must be prepared by the bankruptcy administration.⁽¹⁾

Composition of inventory

Under Article 198 *et seq* of the TRLC, the bankruptcy administration must prepare an inventory of the insolvent party's assets and rights, including their value, by the end of the day immediately preceding the day on which it presents its report.

If the insolvent party is a married person who is part of a community or joint property regime, the inventory will include their private assets and rights, as well as those of the community or joint property regime, when the latter is responsible for the insolvent party's obligations (which must be expressly indicated).

Property owned by others which is in the insolvent party's possession and over which the insolvent party has the right of use is excluded from the inventory. However, as an exception, the right to use an asset owned by others will be included in the inventory if the bankrupt is a financial lessee.

Function of inventory

According to the Supreme Court, the inventory's function is predominantly informative (STS 558/2018, 9 October 2018, Rec 2696/2015). The aim is to inform creditors of the insolvent party's assets and rights so that they can come to a proposed agreement or observe the foreseeable economic result of the liquidation of the insolvent party's assets. For this reason, Article 416.1 of the TRLC, which concerns the liquidation plan to be drawn up by the bankruptcy administration, indicates that the realisation of the assets and rights included in an insolvency estate is a broader concept than provided for elsewhere.

The inventory does not confer a title of ownership as it neither creates nor extinguishes rights. Thus, including an asset or a credit right in the inventory does not constitute a judicial declaration of ownership over such asset or right.

The inventory is not immovable, but rather is dynamic insofar as the insolvent party may dispose of assets and rights and acquire others during the insolvency proceedings or as a result of reinstatement actions.

Conversely, the inclusion of a claim in the list of the so-called 'passive mass' does have substantive legal consequences (STS 558/2018, 9 October 2018, Rec 2696/2015). Under Article 484.2 of the TRLC, the inclusion of a creditor's claim in the final list of creditors equates to a final judgment. This is not the case for credit rights in favour of an insolvent party against a third-party debtor which are included in the inventory of the active

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mass. The inclusion of such credit rights in the inventory does not in itself constitute a judicial title that legitimises a subsequent claim and, therefore, does not prevent a subsequent claim on the existence of a credit right not included in the inventory.

The inventory and the list of creditors have a different nature: while the list of creditors, with some exceptions, definitively determines the composition of the passive mass, which can no longer be contested, the inventory has an informative nature. Therefore, the inclusion of an asset or right in the inventory does not constitute a title of ownership different from those provided for in Article 609 of the Civil Code.

Hence, the inclusion of assets and rights in the inventory may be subject to litigation and determined in a declaratory judgment during the insolvency proceedings or even outside these proceedings, in accordance with the rules set out in Articles 119, 120, 136 and 137 of the TRLC (STS 558/2018, 9 October 2018, Rec 2696/2015).

Therefore, preclusion and, strictly speaking, *res judicata* will apply only if the same party is involved and such party challenged the inventory for the same reasons during through the bankruptcy proceedings.

Deficit

A deficit is considered to exist when the value of the assets and rights of the active mass, according to the inventory of the bankruptcy administration, is less than the sum of the amounts of the credits recognised in the list of creditors.

According to Article 456.2 of the TRLC, when the qualification section has been formed or reopened as a consequence of the opening of the liquidation phase, the judge may, in their qualification judgment, order all or some of the insolvent party's administrators, liquidators (*de jure* or *de facto*) or general managers that have been declared as persons affected by the qualification to cover, in whole or in part, any deficit, to the extent that the relevant conduct of these persons caused or aggravated the insolvency. The drafting of this article exceeds a mere recasting.

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Endnotes

(1) This article is part of a series on the active mass under the TRLC. For other articles in the series, please see:

- "[Composition of active mass under TRLC](#)"; and
- "[Composition of active mass under TRLC – case law](#)".

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