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# Finance and restructuring

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# CASES AND TRANSACTIONS

## Greenalia – green commercial paper program with MARF

Cuatrecasas has advised Greenalia, S.A. on registering a green commercial paper program with the Spanish Alternative Fixed-Income Market (MARF), with a maximum outstanding balance of €100 million. The commercial papers issued in this program will be considered green under the Green Bond Principles (GBP) and Green Loan Principles (GLP).

This issue will enable the company to strengthen its position as a green finance pioneer. The completion of the transaction marks its first commercial paper program with the MARF. Banco Santander acted as lead arranger and Banca March as collaborating entity.

## Europastry – sustainable financing agreement

Cuatrecasas has advised BBVA, ING and other financial institutions on closing a syndicated financing agreement with Europastry, the Catalan frozen bakery dough company, for €800 million. The transaction incorporates sustainability criteria linked to targets for reducing $CO_2$ emissions and saving water consumption.

The loan breaks down into a €525 million refinancing of the current liability with credit institutions and €275 million to fund growth plans, with a four-year term to maturity at the end of 2025. In addition to BBVA and ING, the transaction involved CaixaBank, Sabadell, Santander, Bankinter and Banca March, as well as Dutch entities ING and Rabobank.

## Cementos Molins – novation and extension of sustainable syndicated financing

Cuatrecasas has advised Cementos Molins on the novation and extension of its sustainable syndicated financing for the group and its affiliates in Spain, which was formalized in 2019. This novation, which continues to be classified as a sustainability-linked loan, extends the maturity by two years, until December 2026, and now has a limit up to €300 million, divided between a term loan of €75 million and a credit facility of €225 million. The rest of the terms and conditions remain unchanged.

The financing, which was the first sustainable syndicated financing of a cement company in Spain, continues to be linked to sustainability targets, more specifically to the reduction of $CO_2$ emissions, one of the drivers of the company's sustainability roadmap.

The novation, signed by all the financing entities of the original loan, involves CaixaBank, acting as agent bank and finance and sustainability coordinator, Banco Sabadell, BBVA, Banco Santander, HSBC and Banca Intesa Sanpaolo.

# LEGISLATION

## COVID 19 – Extension of exceptional financial and corporate measures

Since March 2020, we have been reporting on the main legal developments affecting companies regarding the measures approved as a result of COVID-19. For an executive summary of the main measures, see our legal flash:

COVID-19: Key aspects for companies, financial institutions and funds

Exceptional measures have continued to be adopted in recent months, among which we highlight those adopted under Royal Decree-law 27/2021.

Following the European Commission's extension of the State aid Temporary Framework, the Spanish government has adopted Royal Decree-law 27/2021, under which it extends several measures due to expire at the end of the year to support the recovery of businesses.

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- It extends until June 30, 2022, the guarantee facilities managed by ICO (the Spanish State Finance Agency) and the company recapitalization funds managed by SEPI (the State-Owned Industrial Holding Company) and COFIDES (the Spanish Development Finance Institution).
- It postpones for another year (until the end of 2022) the application of grounds for dissolution due to qualifying losses.
- It postpones until June 30, 2022, the insolvent debtor's obligation to file for insolvency.
- It extends until December 31, 2022, the obligation to seek prior authorization of certain foreign direct investments made by non-EU/non-EFTA residents.

For more details, see our legal flash: Spain | Extension of exceptional financial and corporate measures

## Approval of the Insolvency Act Amendment Bill

On January 14, 2022, the Insolvency Act Amendment Bill for the transposition of Directive (EU) 2019/1023, of 20 June 2019, on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt was published in the Official Gazette of the Congress of the Deputies. This bill will be processed under the urgent procedure over the coming months.

Several measures of this bill entail major changes in debt restructuring. Among others, the bill regulates so-called restructuring plans—i.e., pre-insolvency instruments that are more agile, flexible and with a broader scope than that of refinancing agreements, including the possibility of cramming down not only all types of creditors, (financial and commercial), but also debtors. Also, the bill provides greater legal certainty as to the extension and effects of the purchase and sale of production units.

## Covered bonds - Transposition into Spanish law of the EU Directive

Royal Decree-law 24/2021, of November 2, has transposed into Spanish law several EU directives, including Directive (EU) 2019/2162 of the European Parliament and of the Council of 27 November 2019 on the issue of covered bonds and covered bond public supervision and amending Directives 2009/65/EC and 2014/59/EU.

These are the key aspects of the Royal Decree-law:

- It groups together in a single legal instrument the previously dispersed regime for covered bonds.
- It specifies which entities can issue covered bonds (credit institutions) and provides a single definition of "covered bonds."
- It harmonizes the criteria and sets the conditions for issuing bonds, and it determines the cover pool serving as collateral, the rules applicable in the event of insolvency and liquidation of the issuer, the cover pool monitor and the requirement to have a liquidity buffer.
- It provides for intragroup pooled covered bond structures, the use of joint funding and extendable maturity structures.
- It implements new rules on mortgage notes and mortgage transfer certificates.

For more details, see our legal flash: Spain | Covered bonds. Transposition of Directive 2019/2162

The Spanish Parliament validated RDL 24/2021 last December, and it is currently being processed as a bill.

## Developments in EU law affecting non-performing loan ("NPL") assignments

In the area of NPL assignments, we highlight the adoption of Directive 2021/2167 of the European

Parliament and of the Council of 24 November 2021 on credit servicers and credit purchasers and amending Directives 2008/48 and 2014/17 (the "**NPL Directive**")

The NPL Directive lays down a common framework and requirements for credit servicers and credit purchasers. The primary aim is to reduce the current stocks of NPLs and to prevent excessive build-up in bank portfolios in the future.

- The NPL Directive imposes authorization and registration requirements on **credit servicers**.

  The authorization requirements represent a significant change compared to the absence of restrictions on debt management activities under Spanish law.

  Furthermore, credit servicers authorized in a Member State will be entitled to carry out their activities in other Member States under their home regulatory framework without the need to request authorization in each Member State of destination.

  The NPL Directive provides for the establishment of a national register of all credit servicers authorized to provide services in each Member State, including credit servicers operating in other Member States that benefit from the freedom to perform credit servicing activities in other jurisdictions.

- As regards **credit purchasers**, the NPL Directive establishes operating rules aimed at protecting the debtor's contractual position

The NPL Directive also requires that borrowers must be informed of any credit assignment before first debt collection is claimed and whenever requested by borrowers.

The NPL Directive entered into force on December 28, 2021, and Member States must transpose it into national law by December 29, 2023. However, existing credit servicers may continue to carry out their activities for a period of six months after the transposition deadline before being subject to authorization.

Secondly, work is progressing on the proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims. According to the draft proposal, the objective is "*to help increase crossborder transactions in claims by providing legal certainty through the adoption of uniform conflict-of-laws rules at EU level, thus eliminating legal risks and potential systemic consequences and enabling crossborder investment, access to cheaper credit and market integration*."

This technically rather complex proposal is still under discussion and at the interinstitutional negotiation stage between the EU Parliament and the Council.

On the other hand, the European Commission presented last June a proposal for a Directive on consumer credits that will repeal and replace Directive 2008/48/EC. Within the framework of this Directive and consumer protection in general, the European Commission has also adopted a proposal to review Directive 2014/17/EU of 4 February on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (the Mortgage Credit Directive or MCD), for which it requested EBA's technical advice on December 20, 2021.

# CASE LAW

## Culpable insolvency due to faulty accounting of financial assistance credit

A company provided financial assistance for the acquisition of its shares by the parent company in 2001. The receivable against this company was recognized in the accounts for years although it was not possible to collect it. On opening insolvency proceedings, the administrator was sentenced to partial payment of the insolvency deficit, because the financial assistance aggravated the insolvency

and because of material accounting irregularities. Also, the company failed to file the annual accounts from a certain year.

Supreme Court judgment 726/2021, of October 26, 2021 (ECLI:ES:TS:2021:3874), confirmed the sentence although no challenge was presented against the financial assistance at the time and the liability action against the administrator was time-barred. In this respect, it must be considered whether the conduct was likely to aggravate the insolvency (which is all the more improbable the longer the time elapsed) and whether the administrator operated as such during the two years before the insolvency declaration. In this case, the undue recognition of a significant receivable in the company's accounts (compromising the true and fair view of the assets) by the administrator—who remained in that position—did aggravate the insolvency.

The Supreme Court recalls that the accomplice (in this case, the parent company) cannot be sentenced for insolvency liability.

## Termination of lease agreements for use other than housing in foreclosure cases

Supreme Court judgment 783/2021 of November 15 (ECLI:ES:TS:2021:4141) considers that the successful bidder of a property leased under a lease agreement for use other than housing and not registered in the Land Registry before the mortgage foreclosure can terminate the lease. The judgment argues that, unlike agreed transfers, mortgage foreclosures are not subject to article 29 of the Urban Leases Act ("LAU"), which provides that the acquirer of the leased property will assume the rights and obligations of the lessor unless the requirements of article 34 of the Mortgage Act are met. Instead, article 1571 of the Spanish Civil Code applies, under which the purchaser of a leased property may terminate the lease in force on executing the sale, except as provided in the Mortgage Act, with the lessee being entitled to compensation for damages.

The Resolution of the General Directorate of Legal Certainty and Public Registration dated November 3, 2021 (Official Gazette of the Spanish State of November 26, 2021), also establishes that unless these leases have been registered in the Land Registry before the mortgage or the seizure entry, the mortgage foreclosure will entail termination of the lease agreement and associated rights (e.g., the lessee's first refusal and pre-emptive rights in the event of sale under article 25 of the LAU, applicable to judicial transfers of property).

## Assignor's legal standing in mortgage securitizations

We highlight Supreme Court judgment (Civil Chamber) 3767/2021 of October 20, 2021 (ECLI:ES:TS:2021:3767), confirming that the entity that securitizes mortgage loans and credits has, together with the bond holder, legal standing against the debtors.

The Supreme Court considers that the legal structure underlying mortgage securitization has the following characteristics:

- The issuance of mortgage bonds does not alter the link between the entity and the debtor, since the entity remains the holder of the loan.
- Following the assignment, the entity is in charge of loan custody and administration.
- The entity is considered a "mortgage creditor" by virtue of article 15 of Act 2/1981 (also provided for in additional provision 1 of Royal Decree-law 24/2021).
- Upon the assignment, the entity continues to appear as the registered holder of the loan in the corresponding land registry.

Moreover, standing is not limited to the foreclosure proceedings, but also extends to the declaratory process.

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# ADMINISTRATIVE DOCTRINE

## Novation of mortgage loans and ranking

The Resolutions of the General Directorate of Legal Certainty and Public Registration dated September 8 and December 21, 2021, assess the different situations that may arise with respect to the ranking of a mortgage loan subject to a modifying novation.

The General Directorate applies the criterion of Act 2/1994, of March 30, on the subrogation and modification of mortgage loans that provides for the possibility of mortgage recharge while maintaining the ranking: the capital increase will not imply an alteration or loss of the registered mortgage ranking, except when it entails an increase in mortgage liability or there is an extension of the term due to this increase. Otherwise, the excess will be treated as a second mortgage.

In the absence of intermediate charges or title, the parties may agree to maintain a single mortgage to guarantee the new obligation, in which case the accessory concepts guaranteed (interest and costs) must be the same, and the corresponding mortgage liability must be calculated consistently. If the configuration is not uniform, it will be considered that the parties have opted for the establishment of two mortgages with their respective mortgage liabilities for the different items.

For additional information, please contact Cuatrecasas.

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