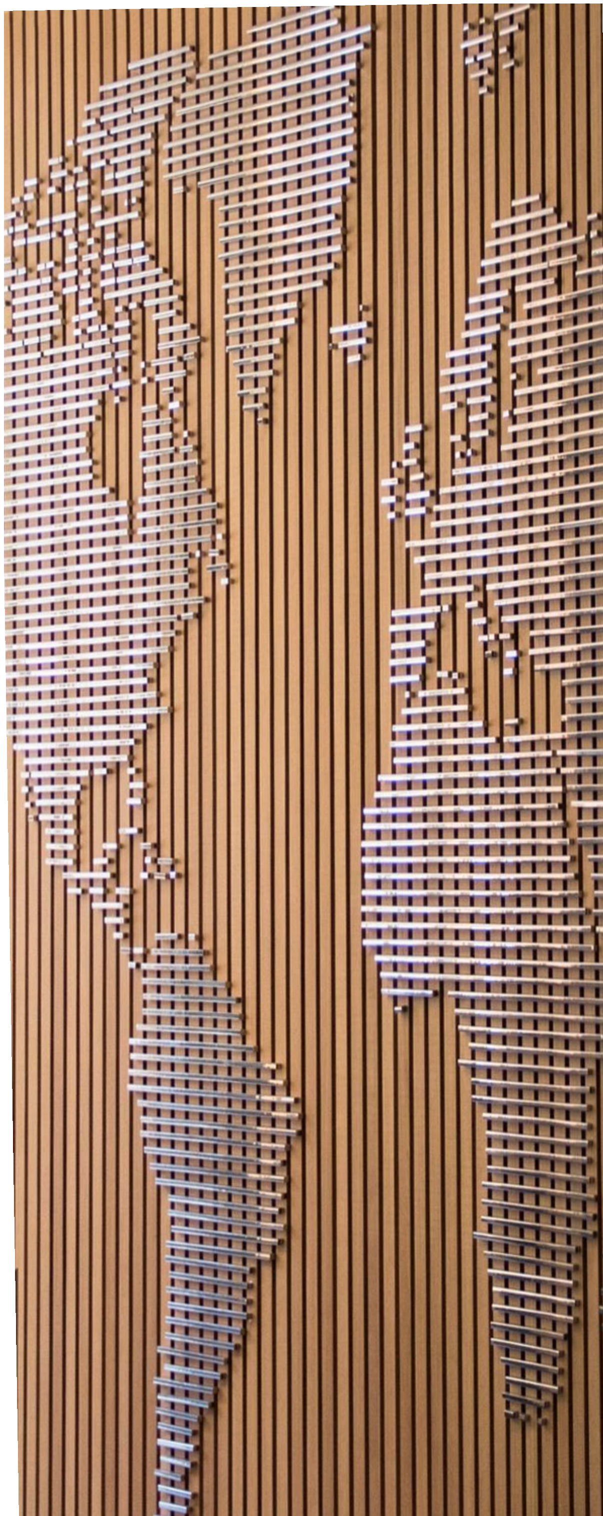
CUATRECASAS

Finance and restructuring

hird quarter 2021

)ctober 2021



ASES AND TRANSACTIONS

- COMSA: Bank debt refinancing
- NEXUS ENERGÍA: Asset-backed securities fund on the MARF
- CAIXABANK: Asset-backed securities fund and issuance of bonds on the MARF
- ELECNOR: Commitment to sustainability by restructuring sources of financing
- AnaCap: Acquisition of performing loan portfolios
- COEMAC: Sale of production unit

LEGISLATION

- Draft Bill amending the consolidated text of the Spanish Insolvency Act (TRLC)

CASE LAW

- Law 511 of the Navarra Regional Civil Code: the Constitutional Court dismisses the appeal on the grounds of unconstitutionality
- Inapplicability of composition agreements to third-party collateral
- Voting rights subject to conditions and subordination

ADMINISTRATIVE DOCTRINE

- Stamp duty on deeds novating mortgage loans to extend the term

OTHER NEWS

- Luxembourg Rail Protocol

CASES AND TRANSACTIONS

COMSA: Bank debt refinancing

Cuatrecasas advised the Catalan construction company Comsa Corporación on closing the refinancing of its bank debt for a global amount of €487 million.

This enables Comsa to restructure its long-term debt to adjust it to the forecasts under its 2021-2026 strategic plan. It also secured its long-term revolving credit lines, incorporating the CESCE guarantee for most of them.

After restructuring its financial debt, Comsa's banking pool is now reduced to four banks: Santander, CaixaBank, Sabadell and BBVA.

Cuatrecasas assisted Comsa Corporación with its two previous financing rounds in 2013 and 2016.

NEXUS ENERGÍA: Asset-backed securities fund on the MARF

Cuatrecasas advised Nexus Energía, S.A. on launching the asset-backed securities fund HT NEXUS, FT to obtain financing from the credit rights arising from its energy marketing activity.

The fund will be able to make issues for up to a maximum of €50 million, carried out through a commercial paper program listed on the Spanish Alternative Fixed-Income Market ("MARF"). Axesor rated the program 'A- (sf).'

The incorporation of HT Nexus FT and the program's register on MARF will enable Nexus to obtain regular financing at competitive interest rates for the purchase of energy using the resources obtained from interested investors who will acquire promissory notes backed against their Coface-insured invoices pending collection.

The Swiss bank Mirabaud acted as the transaction's structurer and global coordinator, and the fund will be managed by Haya Titulización, S.G.F.T., S.A., which will also act as a registered advisor once the program is registered on the MARF.

CAIXABANK: Asset-backed securities fund and issuance of bonds on the MARF

Cuatrecasas advised CaixaBank on setting up the securitization fund CAIXABANK CORPORATES 1, F.T., which has issued bonds totaling €2,301,500,000, distributed into two series, yielding a fixed income of 0.20% and 0.30%. They were admitted to trading on the MARF. CaixaBank, S.A. has assigned to the fund its credit rights arising from certain loans granted to large companies (both bilateral and syndicated loans).

This transaction qualifies as "securitization" under article 2 of Regulation (EU) 2017/2402, of December 12, 2017, laying down a general framework for securitization and creating a specific framework for simple, transparent and standardized securitization.

CaixaBank, S.A. has acted both as the assignor of credit rights and the underwriter of all bonds. CaixaBank Titulización, S.G.F.T., S.A. is the entity managing the fund, also acting as a MARF registered advisor.

ELECNOR: Commitment to sustainability by restructuring sources of financing

The Elecnor Group has restructured its long-term sources of financing, making them green through its direct commitment to achieving objectives linked to the Sustainable Development Agenda.

Elecnor S.A. has refinanced the syndicated loan agreement that it entered into in 2014 and which had already been novated annually from 2015 to 2019. With this last novation, Elecnor has managed to extend the due date by a little over two years. The Elecnor Group has also made a voluntary early repayment of €150 million of the loan tranche and has increased the credit tranche by €100 million. This has brought the syndicated financing limit to €350 million, divided between a loan tranche of €50 million and a credit tranche of €300 million.

CUATRECASAS

In addition, Elecnor has signed three long-term private placements totaling €100 million:

- €50 million over a 10-year period, in sustainable loan format, coordinated by Banca March.
- €20 million over a 10-year period, in sustainable loan format, which additionally complies with the Green Loan Principles by assigning funds to projects classified as green, signed by the Spanish State Finance Agency (ICO) and coordinated by Banco Sabadell.
- €30 million over a 14-year period, in the form of sustainable bonds issued on the MARF—with a BBB- investment grade rating by Axesor for the Elecnor Group—and structured and placed by Banco Sabadell.

These formats of financing comply with the requirements established in the Sustainability Linked Loan Principles and the Sustainability Linked Bond Principles, leading them to be rated as sustainable.

The new credit lines will contribute toward Sustainable Development Goal 13 of the UN Global Compact on “Climate action,” promoting the development of projects that are sustainable and environmentally friendly. The Group's activities are strongly focused on actively promoting environmental protection through renewable energies and the reduction of its carbon footprint.

AnaCap: Acquisition of performing loan portfolios

Cuatrecasas advised the fund AnaCap Financial Partners (“AnaCap”) on two consecutive portfolio acquisitions. The portfolios were comprised of performing consumer loans and unsecured consumer loans in Spain.

In the first transaction, the portfolio was purchased from a Spanish bank, and it is comprised of auto and consumer loans. The second investment involves a portfolio made up of point-of-sale-originated consumer loans, mostly from the health and dental sector.

The loans in both portfolios represent approximately €200 million face value.

Cuatrecasas also advised on AnaCap’s financing for the portfolio acquisitions, which was structured through securitization.

COEMAC: Sale of production unit

Cuatrecasas advised Grupo COEMAC, formerly URALITA, on selling its last operating business, namely the piping production unit, present in over 40 countries, which was developed by its subsidiary, Iberian market leader ADEQUA WS, S.L.U.

A share deal was impossible due to the contingencies affecting the company that owned the business, so Cuatrecasas designed the transaction’s strategy and structure, promoting an asset deal within the ongoing insolvency proceedings.

This is a highly innovative deal in Spain due to many technical aspects. First, the production unit was transferred at an early stage of the insolvency proceedings (right after filing for bankruptcy), which (i) streamlines the process, in contrast with transfers made during the liquidation stage of the proceedings; and (ii) increases legal certainty, given the applicable legal remedies. The structure of the transferred production unit was also innovative, since it comprised not only ADEQUA assets, but also its parent company’s assets. This required extending the scope of the concept “production unit” while promoting a joint and coordinated administration of the insolvency proceedings. Finally, we draw attention to the quick progress of the insolvency proceedings, since the sale was finalized in less than six months.

Several economic aspects are particularly noteworthy. The acquiring company paid a price five times higher than the offers submitted before the insolvency proceedings, and also took on the financial, commercial, payroll, tax and social security debt attached to the production unit. Also,

an additional compensation scheme has been designed in case the acquiring company wishes to divest quickly. All of this has maximized the purchase price and credit recovery for creditors. Regarding employment, the designed sale includes several guarantees to maintain all jobs, approximately 300 employees that were transferred along with the production unit. This received the support of the employees' representatives and made it possible to justify the request for an asset deal.

LEGISLATION

Draft Bill amending the consolidated text of the Spanish Insolvency Act (TRLC)

August 25 was the end date of the public consultation for the Draft Bill amending the consolidated text of the Insolvency Act ("TRLC"), amending the recently enacted TRLC to implement Directive (EU) 2019/1023, of June 20, 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. See below the most notable developments of the draft bill:

- **Restructuring plans**. Restructuring plans are established to replace refinancing agreements and out-of-court agreements for payment, aimed at promoting restructuring when there is likelihood of insolvency (i.e., impending solvency is no longer required).

  Restructuring plans must be approved by each class of creditors with the favorable votes of two-thirds of the affected creditors (three-fourths in the case of creditors secured with collateral). The debtor and creditors representing more than 50% of the affected liabilities may request judicial confirmation that the affected parties have been grouped into classes correctly before court validation.

  Plans must be validated by a judicial authority so that the interim financing, the new financing and the acts implementing the plan can (i) be exempt from avoidance actions in the subsequent insolvency proceedings, and (ii) extend its effects to dissenting creditors, which may include shareholders and the company under insolvency proceedings. The requirements and majority rules for validation will change depending on whether the plan has been approved by all classes of creditors.

  The court order validating the plan may be challenged before the provincial court of appeal. After court validation, the parties may not seek to set aside the plan on grounds of a breach.

- **Other pre-insolvency measures**. The stay of executions and the suspension of the request for voluntary insolvency proceedings and of the cause for dissolution due to losses are maintained for the purpose of the debtor notifying the court with jurisdiction over insolvency proceedings of the existence of negotiations with its creditors, or of the intention to initiate them immediately to reach a restructuring plan. These measures will remain in place for a three-month period extendable to twelve months under certain conditions.

- **Discharge of outstanding debt**. The draft bill provides two ways for discharging debt to allow for a "second chance": liquidating assets or through a repayment plan.

- **Sale of production units**. Debtors whose circumstances indicate likelihood of insolvency or who are in a situation of impending insolvency or current insolvency may request the court to appoint an independent expert responsible for collecting offers for the purchase of production units. These offers must involve payment in cash and the commitment to continue the activity for three years. Production units on sale will be posted on the electronic platform for asset liquidation.

- **Micro-enterprises**. The draft bill creates a special procedure for micro-enterprises (those with fewer than 10 employees and an annual turnover or annual balance sheet not exceeding €2 million), which works mostly online with little court oversight. There will be a free and publicly accessible liquidation platform to check the assets of liquidating micro-enterprises under special procedures.

- **Public claims**. Public claims continue to be privileged within and outside insolvency proceedings and reinforce their protection.

CASE LAW

Law 511 of the Navarra Regional Civil Code: the Constitutional Court dismisses the appeal on the grounds of unconstitutionality

Regional Act 21/2019, of April 4, amending and updating the Navarra Regional Civil Code modified Law 511 of this Regional Civil Code, which regulates a pre-emptive right for debtors in credit assignments. This modification was challenged through unconstitutionality appeal 315/2020.

In its judgment of September 16, 2021, the Constitutional Court dismissed the appeal regarding Law 511, arguing that it would not be contrary to the bases of contractual obligations, which must be set out by national legislation.

The Constitutional Court also concluded that Law 511 does not apply to matters subject to commercial law, which is an exclusive competence of national authorities.

Inapplicability of composition agreements to third-party collateral

In judgments 549/2021, of July 20, 2021 (ECLI:ES:TS:2021:3038), and 586/2021, of July 27, 2021 (ECLI:ES:TS:2021:3233), the Supreme Court interprets article 135 of the Insolvency Act (currently article 399 of the TRLC), concluding that any measures adopted in composition agreements (e.g., acquittals, moratoria) do not apply to collateral provided by non-debtor third parties if the creditor has voted against the agreement. Therefore, this creditor's rights against third parties would not be affected, whether they are joint obligors or have provided personal guarantees or collateral (e.g., mortgages or pledges granted by a third party).

In its second judgment, the Supreme Court notes that the right to choose between the different options offered under an approved composition agreement should not be mistaken with voting rights or the right to adhere to composition agreements. The right to choose refers to an already approved composition agreement that is binding on creditors, who are only offered alternative options regarding forms of repayment—regardless of whether they voted for or against the agreement. The repayment obligation will thus be considered fulfilled on the performance of one of the options.

Voting rights subject to conditions and subordination

In its judgment 238/2021, of June 11, 2021 (ECLI:ES: APM:2021:5109), the Madrid Court of Appeals ("MCA") ruled on the appeal filed by a credit institution (the "appellant") in the insolvency proceedings of one of the companies that had been incorporated to purchase a real estate project through a sale and lease back deal. The appellant was the agent bank for the syndicated financing, and its claims were classified as subordinated based on two arguments:

- The appellant bank held a pledge on the shares of the holding company of the group created to purchase the project and was entitled to exercise the voting rights of the company's shareholders under certain circumstances. Based on this actual or potential control over the group, the bank's claim was subordinated under article 93.2.3 of the Insolvency Act.

- Although the agent bank assigned its claim, it retained its pledge, there being no evidence that it exercised the voting rights on behalf of the assignees.

The MCA considered that the appellant exercised the voting rights acting as a secured creditor (on January 6, 2011) after the acquisition of its claim against the company on September 14, 2008. Therefore, the MCA reversed the classification of the appellant's claims as subordinated.

Thus, the potential ability of secured creditors to exercise voting rights is irrelevant as to the subordination of claims if the conditions to exercise those voting rights (beyond the secured creditor's control) are not fulfilled when the claim arises. In that case, the control would not be potential but hypothetical under article 1114 of the Spanish Civil Code.

ADMINISTRATIVE DOCTRINE

Stamp duty on deeds novating mortgage loans to extend the term

The Spanish Directorate-General for Taxation ("DGT") issued its binding response to the tax consultation of August 16, 2021 (V2305-21), setting out the criterion regarding the taxable base of the stamp duty ("AJD") in notary deeds for mortgage loan term extensions.

The DGT examined a mortgage loan term extension with the specificity that the deed is not subject to the AJD exemption under Act 2/1994, of March 30, on the subrogation and modification of mortgage loans because the lender is not a credit institution.

The DGT's current criterion is that "*the taxable base must be calculated considering the substance of the taxable event. Regarding simple mortgage novations executed in a public deed, the basis for the calculation is the economic content of the quantifiable financial clauses defining the economic capacity of taxpayers ultimately subject to taxation*" (Supreme Court judgment 338/2019, of March 13, 2019 (Third Chamber) ECLI:ES:TS:2019:748).

Although the DGT has been following the Supreme Court's criterion (e.g., in response V3216-20), neither the Supreme Court nor the DGT had specified how to calculate the economic content of the novated financial clause. This new response is relevant because the DGT states that the taxable base in notary deeds for mortgage loan term extensions that are not exempt from AJD will be based on "*the economic content of the quantifiable financial clauses defining the economic capacity of taxpayers ultimately subject to taxation.*" In the case at hand, the taxable base would include any additional interest and expenses arising from the term extension.

OTHER NEWS

Luxembourg Rail Protocol

On July 27, 2021, the Spanish Council of Ministers authorized the signing of the Luxembourg Protocol to the convention on international interests in mobile equipment on matters specific to railway rolling stock ("LP"), adopted in 2007.

The LP provides an international legal framework for acknowledging and regulating the guarantees on railway rolling stock in favor of lenders, lessors and sellers. It also provides an international registry for these guarantees and a common mechanism for the recovery of assets in case of debtors' insolvency or non-compliance.

The LP is part of the Cape Town Convention on international interests in mobile equipment, adopted in 2001 and promoted by UNIDROIT.

Spain is a party to the Cape Town Convention, but it has only adhered to one of its four protocols, i.e., the Protocol on Matters Specific to Aircraft Equipment.

CUATRECASAS

For additional information, please contact Cuatrecasas.

©2021 CUATRECASAS

All rights reserved.

This document is a compilation of legal information prepared by Cuatrecasas. The information and comments in it do not constitute legal advice.

Cuatrecasas owns the intellectual property rights over this document. Any reproduction, distribution, assignment, or any other full or partial use of this document is prohibited, unless with the consent of Cuatrecasas.

IS 713573