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CASES AND TRANSACTIONS

- Hydra and Olympia: transfer of nonperforming loan ("NPL") portfolios
- La Solanilla: financing a solar power plant
- Advent Group: high-yield issue
- Mayakoba: hotel refinancing in Mexico
- Elecnor: novation of the group's syndicate financing

LEGISLATION

- Adapting the Securities Market Act to market abuse regulation
- Taxpayers of stamp duty in mortgage loans
- Regional legislation on protecting the right to housing

CASE LAW

- Third-party preference claim right and credit rights pledges
- Non-rescission of payment of due and payable credit in the framework of a refinancing due to it being an ordinary payment
- How a syndicate financing structure works in insolvency proceedings

ADMINISTRATIVE DOCTRINE

- Effects of mortgage enforcement procedures on leases and the awarding to the creditor after an auction that elicits no bids
- Charges arising after the mortgage are not canceled when the loan is settled through dation in payment
- Taxable base for stamp duty when assigning portfolios of mortgage loans and credits

OTHER DEVELOPMENTS

- Agreement on the directive on preventive restructuring
- Special division of General Codification Commission on pre-insolvency measures
- Authorization to approve consolidated text of Insolvency Act
- Regulation of credit agreements relating to immovable property
- Reform process of benchmark interest rates in the Eurozone

OUR ARTICLES

- Banking Regulation 2019. Spain

CASES AND TRANSACTIONS

Hydra and Olympia: transfer of nonperforming loan ("NPL") portfolios

Cuatrecasas advised CaixaBank, S.A. on the Hydra and Olympia transactions for transferring NPL portfolios to foreign investors.

The portfolio in the Hydra transaction was made up of unsecured NPLs owned by companies and individuals, while the Olympia portfolio was made up of bilateral and syndicate NPLs with and without securities in rem, granted to small and medium sized enterprises.

In the framework of the Hydra and Olympia transactions, an in-depth analysis was carried out of the effects of personal data protection regulations on these kinds of transactions, coinciding with the introduction on May 25 of the Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 and of the adaptation of Spanish law to this regulation through the Act on Data Protection and Guarantee of Digital Rights of December 5, 2018.

Also, the new developments of the ever-changing court doctrine and state and regional legislation regarding credit assignment and consumer protection were incorporated.

These transactions are another example of the effort by Spanish banks to clean up their balance sheets in line with EU directives and the uninterrupted appetite of international investors for Spanish assets.

La Solanilla: financing a solar power plant

Cuatrecasas advised Fotowatia Renewable Ventures on the approximately €28 million financing Banco Sabadell granted to build, commission and operate the *La Solanilla* solar power plant (50 MW) in Trujillo, Cáceres.
Cobra Instalaciones y Servicios will build the new solar plant that will generate 103 GWh of clean energy a year, which is enough to supply about 25,000 Spanish homes and avoid emissions of 1 Kg of CO2 per hour.

This transaction, along with other more recent ones on which Cuatrecasas advised, is proof of how the renewable energies market is again turning to greenfield projects.

Advent Group: high-yield issue

Cuatrecasas advised the Advent Group on the issue of a high-yield bond for $650 million that was placed on the international markets.

The issue was carried out through the Spanish company Al Candelaria (Spain), S.L. and structured in a single tranche with a fixed interest rate and maturity date of December 2028.

The funds from the issue were partially used to cancel the group's existing financing in Colombia's largest crude oil pipeline, currently operated by the Colombian company Oleoducto Central, S.A.

The issue, subject to New York law, also includes securities in rem under Colombian and New York law, meaning that comprehensive multijurisdictional legal advice was required.

Citigroup Global Markets Inc. and Credit Suisse Securities (US) LLC were the issue's placement entities and Wilmington Trust, National Association was the paying agent.

Mayakoba: hotel refinancing in Mexico

Cuatrecasas advised financial institutions BBVA Bancomer, Banco Bilbao Vizcaya Argentaria, Banco Sabadell, SabCapital SOFOMER and CaixaBank on refinancing the debt of the Banyan Tree, Fairmont and Rosewood luxury hotels and villas of the Mayakoba tourist resort at Playa del Carmen (Riviera Maya, Mexico).

The refinancing for $185 million was carried out through three transactions (i) canceling lines of

financing and existing guarantee packages; and (ii) creating and implementing new financing and guarantee structures for each asset, including the creation under Mexican law of irrevocable trust agreements concerning management, guarantee and source of payment to manage and control the flows arising from operation of the hotels, as well as mortgages and other securities in rem.

Thanks to this transaction, the financing for these assets was structured in line with the operative reality of the hotel complexes, and it is now properly secured without altering the day-to-day business.

The process began with the original owners, Obrascon Huarte Lain, and was finalized by the current owners, RLH Properties, a hotel asset management company and owner of Madrid's Villa Magna hotel and Mexico City's Four Seasons hotel, on whose latest refinancing Cuatrecasas also advised the financial institutions.

Elecnor: novation of syndicate financing

Cuatrecasas advised the bank syndicate led by Banco Santander on the novation of the financing agreement granted to the Elecnor Group in 2014.

Among other aspects, the novation includes a two-year extension of the maturity until July 2024.

In the framework of this transaction, Elecnor made a voluntary early payment of €100 million of the part of the loan under syndicated financing, in line with its progressive financial deleveraging strategy; this was possible thanks to meeting its objective of generating cash. This repayment will help reduce financial costs, allowing for sufficiently generous financing limits.

The syndicated financing now has a limit of €400 million, divided into a loan tranche of €200 million and a credit tranche of €200 million.

The novation, underwritten by the 14 institutions participating in the syndicated financing, required coordinated legal advising in multiple jurisdictions, including Brazil, Chile, the US and Australia.

LEGISLATION

RDL 19/2018: adaptation of Securities Market Act to market abuse regulation

The ninth final provision of Royal Decree-Law 19/2018, of November 23, on payment services and other urgent measures on finance matters, amends the consolidated text of the Securities Market Act to complete the adaptation of its content to the EU reform of market abuse regulations.

Royal Decree-Law 17/2018: taxpayers and stamp duty in mortgage loans

Under Royal Decree-Law 17/2018, of November 8, amending the consolidated text of the Transfer Tax and Stamp Duty Act, approved by Royal Legislative Decree 1/1993, of September 24, the government raises to act status the recent case law by the Plenary Session of the Supreme Court Judicial Review Chamber distributed in three judgments dated November 27, 2018 (cassation appeals 5911/2017, 1049/2017 and 1653/2017). In those judgments, the Supreme Court rectified three previous judgments by the second section of the same Chamber in which article 68.2 of the Transfer Tax and Stamp Duty Act had been canceled, and the lender had been considered responsible for paying the stamp duty and notary tax in transactions to establish a mortgage loan.

The three judgments, re-assuming the court's traditional rulings and interpreting article 29 of the consolidated text of the mentioned tax act established the case law under which the taxpayer in transactions to establish a mortgage loan is the borrower.

Based on this, the mentioned royal decree-law, which came into force on November 10, 2018, introduced two new developments into the

consolidated text of the Transfer Tax and Stamp Duty Act.

- It includes a second paragraph in article 29, establishing that the taxpayer responsible for stamp duty in mortgage loan deeds is the lender.

- It includes section 25 under part B) of article 45.I, establishing a new exemption in mortgage loan deeds in which the borrower is one of the persons or entities included in part A) of article 45.I (including the state, public authorities, and nonprofit entities that meet the requirements of the Patronage Act). It is, therefore, a new case of exemption for mortgage loan transactions in which the borrower is an entity that previously benefited from a subjective exemption in mortgage loan transactions due to its borrower status. This new exemption prevents the reform from involving a greater cost in the form of stamp duty charged by the lender entities.

Therefore, with effect for the tax periods starting on January 1, 2018, Royal Decree-Law 17/2018 amends the Corporate Tax Act to establish that the stamp duty paid in mortgage loan deeds will be considered a non-deductible expense.

Regional legislation on the protection of the right to housing

Below we highlight regional legislation—namely in Catalonia, Extremadura, Murcia and Navarra—on the protection of the right to housing, an area undergoing many new developments currently and with a great impact on assignments of mortgage loan portfolios, securitization and real estate sales.

Catalonia

In its communication of November 2, 2018, the Council of Ministers authorized the Spanish prime minister to withdraw the appeals the former government had filed with the Constitutional Court against the Catalan regional regulations on the protection of the right to housing.

In particular, the agreement refers to (i) Act 24/2015, on urgent measures for handling the urgent housing and energy poverty situation; and (ii) Act 4/2016, on urgent measures to protect the right to housing of individuals at risk of housing exclusion.

With the withdrawal of these appeals, and in line with the Constitutional Court's doctrine, the following essential protection measures included in the two regional acts will once again be valid:

- The possibility for banks to propose social rent to individuals that will be evicted from their homes and that meet certain requirements.

- The expropriation for the temporary use of unoccupied housing owned by banks and large companies and the mandatory assignment of the use of that housing.

- The obligation in certain cases to rehouse individuals or family units at risk of housing exclusion.

However, the Council of Minister's communication does not specify which provisions will be affected by the withdrawal of the appeals of unconstitutionality or which will remain pending resolution by the Constitutional Court instead.

Of general interest is the Sole Additional Provision of Act 24/2015 on the right to buy back loans secured against housing that if it were to become valid again, would lead to a new legal circumstance of loan buyback in Catalonia, in addition to the right to buy back disputed debts under the Spanish Civil Code.

Extremadura

Through its judgment of October 4, 2018, 106/2018 (ECLI:ES:TC:2018:106), the Constitutional Court cancels—as it has done so in the case of other similar regional regulations—the seizing of the temporary usufruct of housing to cover the housing needs of individuals in special social emergency situations established in Act 2/2017, of February 17,

on emergency social housing situation in Extremadura.

Murcia

Through its judgment of October 4, 2018, 102/2018 (ECLI:ES:TC:2018:102), the Constitutional Court confirms that the out-of-court mediation proceedings in situations of over-indebtedness established in Act 10/2016, of June 7, reforming Act 6/2015, of March 24, on housing in Murcia and Act 4/1996, of June 14, on the Statute for Consumers and Users in the Region of Murcia are in line with the Spanish Constitution because, among other reasons, these proceedings are established as voluntary proceedings.

Navarra

On January 1, 2019, Regional Act 28/2018 of December 26, on the subjective right to housing in Navarra came into force. This act amends several housing protection regulations in Navarra, including Regional Act 10/2010, of May 10, on the right to housing in Navarra. We highlight the following aspects of that act that are amended:

- It reduces the maximum prices of transfers resulting from mortgage enforcement proceedings concerning protected housing.
- It forces financial institutions and their real estate subsidiaries; asset management institutions, including those arising from bank restructuring; and real estate entities, whatever their registered office, to supply the corresponding authority with certain information about any unoccupied housing they own on December 31 each year and within a 30-day deadline. Before this amendment, it was only necessary to supply this information at the authority's request. The concept of unoccupied housing has also been amended.

We highlight that the mentioned Regional Act 10/2010, of May 10, on the right to housing in Navarra establishes the seizure of housing from legal entities that do not make use of housing they own for two years and after having been required to do so. In its judgment 16/2018 of February 22, 2018 (ECLI: ES:TC:2018:16), the Constitutional Court rejected the appeal filed against that provision, as we reported in our Financing and Restructuring Newsletter-May 2018.

CASE LAW

Third-party preference claim and credit rights pledge

In judgment 701/2018 of Thursday, December 13, 2018 (ECLI: ES:TS:2018:4160), the Supreme Court rules on a third-party preference claim filed by a bank against the Spanish tax authorities, requesting acknowledgment of its preference in relation to the payment of two monetary deposits that had been pledged in its favor and later seized by the tax authorities in debt collection proceedings relating to the owner's tax debts.

The first instance court judgment upheld the bank's claim even when the credit was not due or payable, because it considered that it had acquired rights based on an obligation reinforced with the establishing of a guarantee that must be respected by any third party. The provincial court of appeals upheld the tax authorities' appeal and confirmed that the financial institution did have a possible right although not specified or certain and that accepting the third-party claim would mean having the deposits pledged indefinitely.

The Supreme Court, repeating the arguments of its judgment of October 7, 609/2016 (ECLI: ES:TS:2016:4415), confirmed the first instance court's judgment and declared the preference of the credit guaranteed with the pledge over the tax authorities' seizure, even when the guaranteed credit was not yet certain, liquid, due and payable. It highlighted that the requirement for the third party's credit to meet these criteria made sense when there were privileged credits without a security in rem but not when there is a credit with a

pledge. The Supreme Court explained that realizing the assets or rights previously pledged must respect the security in rem so that when it is executed, the acquiring party does so with the pledge, and the security owner maintains the security intact. It acknowledged that, in cases in which the security in rem is registered, it is easy to meet this premise, but in other cases in which it is not, as in the case of ordinary pledges of credit rights, realizing the seized rights can eliminate the security. Therefore, guaranteed creditors are allowed to assert their preference for payment through third-party preference claim, a preference that would be determined based on the date the pledge was established and not on the date on which the guaranteed credit becomes due and payable.

Non-rescission of payment of due and payable credit in the framework of a refinancing due to it being an ordinary payment

In judgment 681/2018 of October 24, 2018 (ECLI: ES:APB:2018:10349), the Provincial Court of Barcelona (Section 15) analyzes whether the payment made by the insolvent party to a nonfinancial creditor using funds obtained from a refinancing agreement entered into with the financial creditors can be considered an ordinary act in the company's business activity.

For the court, the insolvent party overcame the insolvency with the granting of the refinancing agreement, which was when the party made the payment to the nonfinancial creditor. Under the agreement, it was possible to postpone the due credits with the financial creditors, and it meant the entry of new money into the company, which was used to pay nonfinancial creditors. Five months later, the company informed the court of the negotiation with the creditors in line with article 5 bis of the Insolvency Act and, just short of one year from the date of the payment whose rescission was being debated, the company filed for voluntary insolvency proceedings.

The provincial court turned to Supreme Court case law on the consideration of the debtor's ordinary acts as nonrescissory (article 71.5.1 of the Insolvency Act): these acts cannot be extravagant acts or business transactions; they must have the standard characteristics of their classification; they must occur in the debtor's usual course of business; and cannot be of an exceptional nature. This exception aims to protect anyone entering into business with the debtor declared insolvent and that trusted in the efficiency of those business activities in that they were carried out as part of the debtor's usual course of business and under standard market conditions. In this case, the payment to the nonfinancial creditor is an ordinary act, given that it is payment of a liquid, due and payable credit, carried out when the company had overcome the insolvency through the refinancing and with equal treatment of the company's remaining nonfinancial creditors.

How a syndicate financing structure works in insolvency proceedings

In relation to Reyal Urbis insolvency, two court decisions were issued establishing the functioning of a syndicate financing structure in insolvency proceedings:

- Order of November 13, 2018, by Commercial Court No.6 of Madrid: the insolvency administration had requested cessation of the effects of the payment commitment to the agent that was signed before the insolvency proceedings started. Based on that request, the court confirmed that these matters relating to the agent bank must be resolved in relation to the insolvency proceedings because they are the only insolvency proceedings in which both sides are heard with full guarantee of claims, evidence and defense.

- Order of November 13, 2018, by Commercial Court No. 6 of Madrid: Based on section 6, article 197 of the Insolvency Act, two creditors of the syndicated financing granted to the insolvent party that had appealed the order approving the liquidation plan requested suspension of all liquidation transactions until there was judgment on those appeals. The

court rejected the suspension request, considering that continuing with the liquidation agreed under the approved plan was important for the insolvency proceedings. It also considered that the request for suspension was general and disproportionate because it aimed to stop all liquidation transactions indiscriminately and, therefore, did not aim to stop only those that directly, specifically and personally affected the appellants. It also referred to that fact that the creditors requesting suspension did not offer any security that could guarantee the negative effects of a possible suspension, which could be substantial given the large number of properties making up the insolvent party's assets.

We highlight that the court, in relation to the same insolvency proceedings, issued an order on March 6, 2018, approving the liquidation plan submitted by the insolvency board. The plan established a system for realizing different assets depending on the mortgage charges on them, i.e., assets free of charges, assets with bilateral charges or with syndicated charges.

Two of the main developments introduced by the order approving the plan are based on the consideration of the syndicated financing agreement as an agreement in force (even if expired and not performed). Based on that, it was concluded that one of the institutions in the syndicate alone could not be considered "executing party" (and therefore could not bid individually for the assets) as, under the syndicate agreement, the institutions had to act based on unanimity, and the total assets over which there were mortgage charges covered the entire syndicated debt. It was also resolved that the syndicate agent would distribute the price received from realizing the assets with syndicated charges as established in the agreement.

However, to date, no assets with syndicated charges have been realized.

ADMINISTRATIVE DOCTRINE

Effects of mortgage enforcement procedures on leases and the awarding to the creditor after an auction that elicits no bids

In the framework of the registration in the property registry of a decree awarding the mortgage creditor in a direct enforcement procedure on mortgaged assets, the resolution by the Directorate General of Registries and Notarial Affairs ("DGRN") of October 11, 2018 (Official Gazette of the Spanish State 11. 5.2018) covers two interesting matters:

- Given the controversy over the need for a declaration from the awarding party on the absence of a lease on the property awarded (article 25 of Act 29/1994 of November 24, on Urban Leases), the DGRN indicates that enforcement is included in the wide concept of sale and purchase and, therefore, the right of first refusal is also recognized in the court sale of a property. It affirms that the lease on the property continues and, therefore, the lessee can exercise the right of first refusal if the lease agreement is registered in the property registry and has been registered before the mortgage is executed. If that is not the case, the mortgage enforcement would end the lease and the right to first refusal, and the declaration of the absence of a lease would not be necessary.

- Regarding the effects of awarding the property to the creditor on the debt and on third-party rights on the property, the DGRN explains that article 671.1 of the Code of Civil Procedure establishes two alternatives available to the mortgage creditor when awarding the property in the case of an auction that does not elicit bids, namely: (i) for a minimum percentage of the auction value (70% if it is the debtor's habitual residence and 50% in other cases) or (ii) "for the amount owed to it for all items," which is interpreted as the total amount owed to the creditor. Therefore, if the creditor opts

for this last alternative in the awarding process, the debtors' debt would be completely eliminated, and any amount exceeding the limit of the mortgage liability must be made available to third parties with rights registered or recorded after the mortgage.

Charges arising after the mortgage are not canceled when the loan is settled through dation in payment

In its resolution of September 21, 2018 (Official Gazette of the Spanish State), the DGRN considered whether it is appropriate to cancel charges arising after a mortgage that was foreclosed in a proceeding that concluded with an agreement between the foreclosing party and the foreclosed party approved in court before the auction took place, and without there being any mention to the cancellation in the agreement or in the approval order.

The resolution starts with a study of the concept of the court agreement and indicates that, although the agreement is approved by a court, it is contractual by nature; it is the parties, with their consent and by meeting the other legal requirements, who declare, constitute, modify and end a pre-existing legal relationship, making the process unnecessary as the relationship no longer has a purpose. Therefore, it is not a judgment and lacks the content and effects of a judgment.

Next, the DGRN discusses the absence of legal provisions guaranteeing the protection of third-party interests (e.g., in cases of mortgages guaranteeing third-party debt or given the presence of the owners of subsequent charges) when the payment of the mortgage debt is through dation. In court and out-of-court mortgage enforcement procedures, it must be proved that the affected parties (including the owners of previous rights and charges) have been notified of the procedure and that they have had the opportunity to participate in it or that, before the sale, they settled the amount of the credit, interest and expenses guaranteed by the mortgage. However, the legal system does not contain any provision for those cases in which the mortgage loan is settled through a dation in payment. Therefore, the attempted cancellation of the previous charges is not viable when the mortgage debt is paid through a dation in payment because the owners of those charges have not been able to exercise their rights.

Taxable base for stamp duty when assigning portfolios of mortgage loans and credits

In consultation V3109-18 of November 29, 2018, the Directorate General for Taxation ("DGT") repeats its criteria regarding the calculation of the taxable base for stamp duty when there is an assignment of a portfolio of mortgage loans and credits.

If an employer or professional transfers a mortgage loan portfolio, the transaction will be subject to VAT and, therefore, will not be considered a taxable asset transfer. However, the transaction will (i) be subject to transfer tax and stamp duty because it will be recorded in a notarial deed specifying a purpose, quantity or a valuable asset, and it can be registered in the property registry; and (ii) not be subject to the tax on taxable transfer assets or to inheritance and gift tax.

Regarding the taxable base for stamp duty, the DGT's criterion is that it would be made up of the amount of the loan pending payment on the transfer date and the corresponding interest, compensation, penalties for noncompliance and any other similar established concepts. This criterion is also confirmed in binding consultations, including V1262-15, V0966-15, V1079-15 and V2384-15.

However, binding consultation V0017-18, of January 9, 2018, analyzes stamp duty in a similar transaction, and the DGT limits itself to indicating that the taxable base *"is made up of the total of the mortgage liability,"* without specifying that this means the loan amount pending payment, as it did in the consultations mentioned from 2015. Consultation V3109-18 of November 29, 2018, is in line with the previous consultations and includes this specification.

OTHER DEVELOPMENTS

Agreement on the directive on preventive restructuring

The EU Council confirmed the agreement reached with the European Parliament on the proposal for a directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures (the "Directive").

The commitment by the two institutions largely respects the principles of the Council's position. The Member States are given more flexibility to (i) adapt their internal legislation to decide on the cases in which the involvement of judges is mandatory; (ii) set the conditions to carry out a prior valuation of a business, as well as the rules determining when a creditor class can be crammed down; and (iii) have a longer suspension period for individual enforcements for courts to confirm particularly complex restructuring plans.

We highlight the following main new developments regarding the Council's position:

- It introduces provisions regulating the duties of directors in insolvency procedures: (i) they must have due regard to the interests of creditors, shareholders and other stakeholders; (ii) take reasonable steps to avoid insolvency; and (iii) avoid deliberate or grossly negligent conduct.

- It introduces an article on workers' rights that obliges Member States to safeguard those rights, e.g., the workers' rights to collective bargaining and to consultation and information, in the case of a preventive restructuring procedure.

- It includes specific cases in which it is required to appoint a practitioner to help the debtor and the creditors with the restructuring. This would be the case, for example, in restructuring agreements in which there is a cross-class cram-down, i.e., when the agreement is adopted against the will of one creditor class or several classes affected as established by the wording of the Directive if certain conditions arise. It will also be necessary to appoint a restructuring practitioner when the debtor or majority of creditors requests this or when the judicial authorities decide so in case of a general stay of individual enforcement actions. The directive establishes that the appointment of these practitioners must be decided on a case-by-case basis depending on the circumstances of the case, excluding those cases in which the Member States require a mandatory appointment.

When the linguistic review has been completed, the text will be formally adopted by the two institutions and published in the Official Journal of the European Union. From then, the Member States will have two years to transpose the new rules into their domestic legislation.

Special division of General Codification Commission on pre-insolvency measures

Under an order by the Ministry for Justice of September 28, 2018, a special division is created in the General Codification Commission to draft a report and a legislative proposal on pre-insolvency law, measures for increasing efficiency in insolvency proceedings and the benefit of outstanding debt relief.

Among other things, the special division will propose the amendments it considers most appropriate to adapt the preventive rules or alternatives to insolvency proceedings and the benefit of the outstanding debt relief to the regulations proposed by the EU and which are reflected in the directive mentioned in the section above, as well as proposing the appropriate legislative measures to try to achieve efficiency in insolvency proceedings.

The special division will be made up of a chair and six members, including Francisco Pérez-Crespo Payá, partner at *Cuatrecasas* and counsel for the state on leave.

Authorization to approve consolidated text of Insolvency Act

Second final provision of the Trade Secret Draft Bill authorizes the government to draft and approve a consolidated text of the Insolvency Act incorporating all the amendments that have affected this regulation since it came into force. It has eight months from introduction of the Trade Secret Act to complete this task. Note that, on December 14, the commission with full legislative competence approved the text of this bill that is pending voting by the plenary session of the Spanish Congress of the Deputies and processing by the Spanish Senate.

Regulation of credit agreements relating to immovable property

On December 20, 2018, the plenary session of the Congress of Deputies approved the commission's opinion on the draft bill regulating credit agreements relating to immovable property, a regulation that transposes Directive 2014/17/EU of the European Parliament and of the Council of February 4, 2014, on credit agreements for consumers relating to residential immovable property into Spanish law. Next, the Senate will process the draft bill via the urgent procedure.

The scope of application foreseen in the draft bill is restricted to loan agreements granted by individuals or legal persons that carry out this activity professionally, when the lender or the guarantor is an individual, and the purpose of the agreement is (i) granting mortgage loans on a residential property or (ii) acquiring or retaining ownership rights over plots or buildings or future buildings provided that the lender or the guarantor is a consumer.

We summarize below the main new developments in the draft bill that we consider most relevant:

- Early maturity: the bill establishes that it will only take place when the payments due and unpaid equal (i) at least 12 months or 3% of the principal, if the default takes place in the first half of the term of the loan; or (ii) 15 months or 7%, if it takes place in the second half of the term of the loan. The lender must also have requested payment and have granted one month for compliance.

- Default interest rate: it will be the remuneration interest rate plus three points, and it may not be capitalized.

- Distribution of expenses:

  a) Appraisal: payable by the borrower.

  b) Administrative management fees: payable by the lender.

  c) Notary fees: the lender will assume the costs of the mortgage loan deed and of any copies requested.

  d) Registration in the registry: corresponds to the lender.

  e) Transfer tax and stamp duty: in line with the applicable tax laws.

- Commission for early payment: This can only be collected in the following cases:

  a) In variable interest rate agreements: if during the first five years of validity of the loan agreement, the lender's financial loss is reimbursed with the limit of 0.15% of the capital reimbursed early; and during the first three years, with the limit of 0.25% of the capital reimbursed early.

  b) In the case of novation of the applicable interest rate or subrogation that, in both cases, entails the application of a fixed

interest rate during the rest of the contractual term, with the limit of 0.15 % of the capital reimbursed early, during the first three years of the term of the loan agreement.

c) In fixed-interest loan agreements: during the first 10 years, with the 2% limit; after this period, with the 1.5% limit.

- Out-of-court mortgage foreclosure: the appraisal requirement established in article 129.2 of the Spanish Mortgage Act is modified, and it is required that, to make use of this procedure, the value at which the interested parties appraise the property to use as the benchmark in the auction must not be lower than the value stated in the appraisal (currently, it cannot be lower than 75% of that value).

Regarding the transitional scheme, the regulation will affect those loan and credit agreements that fall within its scope and that have been signed after its coming into force, or previously when they are renewed or subrogated after that date. The regulation on early maturity will not apply to those maturities that take place before the coming into force of the act, regardless of whether a mortgage foreclosure procedure has been started or suspended. The limits on the commission for early repayment in the case of novation or subrogation of variable-interest loans (section b) will apply in all cases.

Reform process of interest rate benchmarks in Eurozone

The EURIBOR and the EONIA, interest rate benchmarks for many financial instruments in the Eurozone, are being reformed or replaced to meet the provisions of Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 (better known as the "Benchmark Regulation"), expected to come into force on January 1, 2020.

For now, discontinuing the EURIBOR is not being considered, rather a reform of its calculation method.

This is not the case for the EONIA, which is expected to cease to exist shortly, as its calculation method does not guarantee compliance with the Benchmark Regulation.

Reform of EURIBOR

The European Money Markets Institute ("EMMI"), responsible for providing the EURIBOR and EONIA interest rate benchmarks, is making progress with the process to reform the EURIBOR calculation method with the aim of adapting this benchmark to the Benchmark Regulation.

In the framework of this process, on October 17, 2018, EMMI submitted the results of a test phase it carried out between May and July of 2018 on the new hybrid calculation methodology for EURIBOR in the publication *Second Consultation Paper on a Hybrid Methodology for EURIBOR*. EMMI carried out a series of proposals relating to the different methodology parameters and once again asked for opinions from market operators.

Through the hybrid EURIBOR determination methodology, calculation of the benchmark would be based on euro money market transactions carried out by a panel of banks and other related market pricing sources when necessary, and it would follow a hierarchical three-level cascade approach.

This hybrid methodology would entail a development of the current calculation methodology exclusively based on the values supplied by the market.

EMMI expects to implement the new methodology in 2019.

Risk-free rates

Simultaneously to the reform of EURIBOR, a working group created by the European Central

Bank ("ECB") and other EU bodies and authorities is working to identify and recommend to financial market operators the use of risk-free rates ("RFRs") for every financial instrument marketed in the Eurozone, and which meet the Benchmark Regulation and can serve as an alternative to the current EURIBOR and EONIA benchmarks should these cease to exist or be changed.

Particularly, the ECB proposes the new benchmark ESTER (euro short-term rate), whose calculation methodology, based on data available on euro transactions, has been designed based on public consultation and is aligned with the standards of the International Organization of Securities Commissions ("IOSCO").

The ECB expects to publish the new benchmark ESTER in October 2019 at the latest. In the meantime, it is publishing figures referred to as pre-ESTER.

- Regarding EONIA, the working group recommends ESTER as a replacement benchmark because, as we have mentioned, EONIA's calculation method would not meet the Benchmark Regulation.

  Therefore, it would not be possible to use EONIA once the Benchmark Regulation comes into force.

  The working group's objectives focus on ensuring a smooth transition from EONIA to ESTER in line with the deadlines established in the Benchmark Regulation (for more information, see the document "On the transition from EONIA to ESTER", published by the ECB in December 2018).

- Regarding EURIBOR, it is assumed that its reform process will end successfully and that ESTER will be recommended as its fallback (for more information see "Second public consultation by the working group on euro risk-free rates," published by the ECB in December 2018).

In addition, the working group's work in this field is aimed at identifying best practices for financial contracts to ensure that new contracts are robust and resilient to the possible material alteration or cessation of the underlying benchmark, as required by the Benchmark Regulation (for more information see the document "Guiding principles for fallback provisions in news contracts for euro-denominated cash products," published by the ECB in January 2019).

OUR ARTICLES

"Banking Regulation 2019. Spain". MÍNGUEZ, Fernando; DE LUISA, Iñigo; MÍNGUEZ, Rafael. Global Legal Insights, to be shortly released.

For additional information, please contact Cuatrecasas.