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# Financing and Restructuring

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## CASES AND TRANSACTIONS

- Abengoa group refinancing
- Adveo group: working capital financing and acquisition of production unit
- Event on new perspectives on alternative financing and special situations in Spain

## LEGISLATION

- New rules on prospectuses
- Directive on preventive restructuring
- Rise in stamp duty in Catalonia for mortgage lending

## CASE LAW

- Monitoring abusiveness of accelerated repayment clauses in mortgage loans
- Classification of credit claims made late
- Accrual of interest on specially privileged credits after insolvency declaration

## ADMINISTRATIVE DOCTRINE

- Taxpayers and exemptions from stamp duty on mortgage loans
- Sale of property subject to an unclaimed mortgage credit

## OTHER NEWS

- Report on syndicated loans and their impact on European Union credit market competition

# CASES AND TRANSACTIONS

## Abengoa group refinancing

Cuatrecasas advised the *ad hoc* committee of New Money 2 ("NM2") debt holders on refinancing the Abengoa group.

The features of the refinancing include: (i) the issue of a convertible bond (for shares of A3T project company) under Luxembourg law, together with an option on the bond or the converted shares; (ii) the novation and rollover of NM2 facilities, made up of syndicated financing and a bond issuance; (iii) the novation of the Abengoa group's guarantee lines; (iv) the novation of the financing agreements and of the Senior Old Money and Junior Old Money bonds, which were replaced by two issues of convertible instruments by their respective issuers; and (v) the issue of a new convertible bond.

The transaction was implemented through (i) a lock-up agreement signed by the creditors participating in the refinancing; (ii) the signing of a refinancing agreement that featured preliminary versions of the financing agreements and the terms and conditions of the various bonds; (iii) the signing of those debt instruments and additional contracts; and (iv) the court approval of the refinancing agreement. The various debt instruments were separated structurally through the parent company's hive-down structure, adopted in the 2017 refinancing, to which an additional layer was added on this occasion.

The approximate total amount of all the novated and new debt instruments is €3 billion. This refinancing transaction has enabled the Abengoa group to have enough liquidity to complete the debt restructuring process it started in 2015.

The transaction required legal advice from multiple jurisdictions, including the UK, the US, Luxembourg, Mexico and Spain.

## Adveo group: working capital financing and acquisition of production unit

Cuatrecasas advised Sandton Capital Partners on financing the Adveo group's working capital to meet its cash needs during the ongoing insolvency proceeding.

We also advised Sandton Capital Partners on the agreement it reached with the Adveo group and its financial creditors to restructure its viable businesses in France, Belgium and Holland. Those businesses now belong to Sandton Capital Partners in consideration for its assumption of outstanding bank debt following the enforcement of mortgage guarantees on Adveo group properties.

## Event on new perspectives on alternative financing and special situations in Spain

On May 22, 2019, at our Madrid auditorium, we held the second consecutive annual event on alternative financing and special situations in Spain. Together with the most prolific investors and financial advisors in Spain, we analyzed market trends, and the sectors and areas of opportunity where there is a growing interest in the future for alternative debt funds and special situations.

The panel on the latest trends in real estate financing in Spain discussed and reflected on the current buoyant state of the real estate market, and the most recent deals both involving bank and private financing. Real estate financing is constantly shifting, with banks and private debt funds operating side by side with an increasing degree of specialization, in a way that certainly helps the real estate market to grow.

On the panel addressing the latest trends in real estate financing were Walter de Luna (Ibero), Ignacio Ocejo (Kronos), José Luis Cortijo (Bankia) and Borja Oria (Arcano). During the discussion, there was consensus that margins are continuing to be squeezed, forcing funds to reposition themselves and be more creative in their capital

structuring, where banking finance may be the best option but is not always available. Funds, and particularly banks, continue to be highly selective and focused on cash flow as well as valuations. Loan-to-value ratio continues to be around 55-65%. Financiers are expected to be more prolific in refinancing and development or capex transactions than acquisitions. New players are also cropping up, including insurers and pension funds seeking long-term financing with attractive returns compared with fixed-income products.

Attendees agreed that the real estate cycle was stable and showed measured optimism for the coming years. Private financing in the real estate market will continue to grow in the coming years, in an increasingly competitive context. There are no signs of distressed deals in the near future.

Participating in the second panel, discussing the direct lending market and special situations, were Jaime Lamo de Espinosa (Taconic Capital), Ignacio López del Hierro (Tikehau), Juan Manuel Muñoz (Atitlán) and Fernando de Santiago (Blantyre Capital). The panel highlighted the growth of direct lending (whether performing, stressed or distressed) and the importance that has acquired in the Spanish credit market as asset class. Recent deals showing the link between traditional banking and collaboration, the use of Spanish law and the deployment of double Luxco structures were among the topics of discussion. The panel also discussed the positive developments in court-approved refinancing in recent years, resulting in a large number of court-approved refinancing transactions in Spain. It stressed the need to improve guarantee enforcement mechanisms, both in terms of both process and time (particularly pledges on shares, which often are the only guarantees). Other topics discussed were the difficulty of injecting new money into struggling companies, as a result of the insufficient rules on privilege for new money under the Spanish Insolvency Act, and the major role that shareholders continue to play (even when their equity is worthless).
The event showed the great interest in alternative sources of financing, whether in terms of real estate or corporate, and underlined the role of Cuatrecasas as the firm of reference in the alternative real estate financing market, special situations and restructuring.

# LEGISLATION

## New rules on prospectuses

From July 21, the reform of rules on prospectuses, intended to establish a common rulebook across the EU to encourage financing through capital markets, will directly apply in Spain. Regulation (EU) 2017/1129, of June 14 will broadly apply directly from July 21, although certain exceptions to the prospectus have applied since July 20, 2017 and July 21, 2018.

The level two rules were published on June 21, developing the contents of Regulation (EU) 2017/1129: Delegated Regulation (EU) 2019/979, of March 14, and Delegated Regulation (EU) 2019/980, of March 14.

## Directive on preventive restructuring

After years of processing, on June 26, the Official Journal of the European Union published Directive 2019/1023 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 (the “Directive”). It must be transposed into Spanish law in two years (by July 17, 2021), excluding rules relating to the use of electronic media, which will have up to five or seven years to be transposed (July 17, 2024 or 2026).

The Directive establishes rules on (i) the preventive restructuring frameworks available for debtors in financial difficulties when insolvency is imminent, to prevent insolvency and guarantee the debtors' viability; (ii) procedures to discharge debts of insolvent companies; and (iii) measures

to increase efficiency in restructuring, insolvency and discharge procedures.

A special standing committee created in the Spanish General Legislation Committee ("Comisión General de Codificación"), by order of the Ministry of Justice of September 28, 2018, has spent months preparing (i) a proposed amendment to our pre-insolvency legislation, (ii) measures to make insolvency more efficient, and (iii) the rules for waiver of unpaid liabilities. The standing committee's work will include adapting Spanish legislation to the Directive. Its work is expected to be completed by December 2019, with the publication of a proposed change to the legislation and an explanatory report. Francisco Pérez-Crespo Payá, partner at Cuatrecasas and counsel for the state on leave, is a member of the standing committee.

The Directive gives Member States a wide berth to adopt it into internal law, so the scope of the amendments will not be known until the draft bill reforming the Spanish Insolvency Act is published.

However, some of the key issues that the review of Spanish insolvency law must include are:

- The definition of (i) the objective criteria (impending insolvency versus probability of insolvency) and subjective criteria of pre-insolvency institutions (debtor as legal entity/natural person/business owner); (ii) the affected creditors (maintaining or extending the only creditors expressly excluded by the Directive, not including creditors under public law) and criteria to form classes including, or excluding "holders of shares in the debtor" as a class and, therefore with the necessary consent (or not) of the debtor or of the debtor's shareholders; (iii) the content of the restructuring plan and the procedure to challenge it; (iv) the choice between the rules of absolute priority and the exceptional admission of the rule of relative priority of payments of creditors; (v) the maintenance or amendment of the current criteria of article 5bis of the Insolvency Act; and (vi) the new configuration of the benefit of waiver of outstanding liabilities.
- Likewise, in relation to the company directors' duties, Member States will ensure that, in the case of impending insolvency, company directors protect the interests of creditors, shareholders and other stakeholders, take measures to avoid insolvency and avoid harmful or grossly negligent conduct that endangers the company's viability.

Evidently, the greater or lesser use of the possibilities offered by the Directive will require (i) a reform of the insolvency procedure (for the sake of consistency, the same type of instruments must be offered to or imposed on debtors and creditors in pre-insolvency and insolvency situations), and (ii) the coordination of corporate mechanisms that may be affected (the nature and procedure of decisions made by shareholders in relation to the restructuring plan).

## Rise in stamp duty in Catalonia for mortgage lending

Decree Law 12/2019, of July 8, by the Catalonian government, on urgent measures on taxation and combating tax fraud introduced two new developments.

First, article 9 of Act 14/2015, of July 21, on the tax on unoccupied housing, was amended to include as taxpayers the securitization funds governed in Act 5/2015, of April 27, on boosting business finance. The amendment will be effective for tax periods starting on July 12, 2019.

Second, article 7 of Act 21/2001, of December 28, on tax and administrative measures, is amended to introduce a 2% tax rate on documents to formalize mortgage loans or credits, when the taxpayer is the lender. This amendment came into force on July 12, one day after its publication.

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# CASE LAW

## Monitoring abusiveness of accelerated repayment clauses in mortgage loans

The Court of Justice of the European Union (CJEU), in two orders dated July 3, 2019 (cases C-92/16 and C-167/16), issued two preliminary rulings requested by the first instance courts no. 1 and 2 of Fuenlabrada and Santander, respectively, on annulling accelerated repayment clauses in mortgage loans signed with consumers, but which were pending a ruling when it issued Judgment (Grand Chamber) of March 26, 2019. The two orders reach the same conclusion and confirm the judgment's findings, i.e., that when an accelerated repayment clause is declared unfair, it is annulled. Click on the link to view the legal flash we published when the judgment was made:

Legal Flash | Monitoring abusiveness of accelerated repayment clauses in mortgage loans. Judgment of the CJEU (Grand Chamber) of March 26, 2019

In a third order, also issued on July 3, 2019 (case C-486/16), the CJEU issued another preliminary ruling, this time brought by first instance court no. 6 of Alicante in relation to the effects of declaring accelerated repayment clauses unfair. In that case, in initial mortgage enforcement proceedings, the accelerated repayment clause included in the mortgage loan agreement was declared unfair, leading to the dismissal of the foreclosure. Five months later, the bank tried again to enforce the mortgage. The court did not allow it to proceed, but the provincial court of appeals upheld an appeal and returned the case to the first instance court, leaving it to proceed with the enforcement. The first instance court then referred to the CJEU for a preliminary ruling on whether the principle of effectiveness in article 7(1) of Directive 93/13 should block the mortgage enforcement when the accelerated repayment clause had already been annulled in a previous proceeding.

The CJEU found that, as the bank brought the mortgage enforcement not based on the accelerated repayment clause (which had already been annulled) but exclusively on article 693(2) of the Code of Civil Procedure, it concluded that "*as long as the requirements of article 693(2) of the Code of Civil Procedure have been met (...) which is a matter for the referring court, the application for mortgage enforcement (...) would not mean that the unfair clause disputed in the main dispute continued to have binding effects,*" and therefore, "*article 7(1) of Directive 93/13/EEC (...) and the principle of effectiveness must be interpreted, in circumstances such as those of the main dispute, in the sense that there is no objection to a national first instance court being bound by a ruling handed down on appeal that orders an enforcement procedure to begin in the light of the seriousness of the non-compliance with obligations imposed on the consumer by the mortgage agreement, even if the agreement contained a clause that has been declared unfair in a prior final ruling, but for which national law does not recognize the force of res judicata.*"

## Classification of credit claims made late

Supreme Court ruling 280/2019, of May 22, 2019 (ECLI:ES:TS:2019:1627) interprets article 92.1 of the Insolvency Act in relation to the classification of a credit claim for tax withholdings that was made after the deadline, and consequently challenging the list of creditors. The question asked was whether (i) it should be classified as subordinated under the general rule of the subordination of credit claims made late, or (ii) an exception should be applied for "*credits whose existence is recorded in the debtor's documentation.*" The Supreme Court interpreted the exception and concluded that for it to apply, there had to be a clear record of the credit in the debtor's documentation to the extent that, in view of the circumstances of the case, it could not be overlooked by the insolvency administration when drawing up the list of creditors, because it was clear and unquestionable that the credit was due and outstanding.

In this case, the requirements to classify the claim for tax withholdings as privileged had been met.

### Accrual of interest on specially privileged credit claims after an insolvency declaration

The Supreme Court, in judgment 227/2019, of April 11, 2019 (ECLI: ES:TS:2019:1222), interpreted the regulation of the Insolvency Act on the accrual of interest on specially privileged credit claims after an insolvency declaration.

Regarding the kind of interest that can accrue after an insolvency declaration, the Supreme Courte concluded that default interest, unlike remuneratory interest, does not accrue after the insolvency declaration. It argued that it makes no sense that during the insolvency, late payment interest and surcharges continue to apply, because their purpose is to incentivize the prompt payment of obligations, which is legally impossible at that point. Therefore, when article 59.1 of the Insolvency Act allows interest on credits with securities in rem to accrue up to the limit of the guarantee, it is to be understood to refer only to remuneratory interest.

## ADMINISTRATIVE DOCTRINE

### Taxpayers and exemptions from stamp duty on mortgage loans

The Directorate General of Taxation (DGT) has issued two binding tax rulings on May 23, 2019 (V1133-19 and V1134-19), resolving queries on the interpretation of the condition of taxpayer in variable stamp duty on notarial deeds for mortgage loans, and the exemptions that apply on mortgage loans.

The queries arose following amendments to the Consolidated Text of the Act on Asset Transfer Tax and Stamp Duty, introduced by Royal Decree Law 17/2018, of November 8, and Act 5/2019, of March 15, regulating real estate loan agreements.

Pursuant to the tax rulings, the lender will be the taxpayer for stamp duty purposes not only regarding deeds documenting mortgage loans, but also deeds that document the following acts related to mortgage loans: (i) constitution of loans or credits with pledge or antichresis; (ii) constitution of mortgage rights not linked to loans or credits; (iii) financial lease agreements; and (iv) cancellation of guarantees related to loans or mortgage loans.

In addition, the tax rulings state the following in regard of the stamp duty tax exemptions: (i) the tax exemptions of an objective nature remain valid even if the taxpayer has become the lender and (ii) exemptions of a subjective nature cease to apply when they refer to the borrower.

### Sale of property subject to an unclaimed mortgage credit

An insolvent company sold a property with a mortgage being enforced as part of a liquidation plan approved by an insolvency judge. The sale price was below the appraisal in the mortgage deed. The property registrar suspended the entry of the sale because the specially privileged creditor had not expressly authorized it, based on article 155.4 of the Insolvency Act. The insolvent company argued that that article does not apply, and that the mortgage creditor's consent is not required because it is not specially privileged, as it did not make its claim during the insolvency.

In its judgment of June 5, 2019, the Directorate General of Registries and Notarial Affairs (DGRN) (Official Gazette of the Spanish State of June 24, 2019) dismissed the appeal, concluding that the mortgage lender must give its consent under article 155.4 of the Insolvency Act, as the sale price was below the appraisal value. The DGRN argued:

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- That it is a credit secured by collateral that is entered in a public register and therefore the insolvency administration must automatically recognize it (article 86.2 of the Insolvency Act).
- According to doctrine of the Supreme Court (judgment 655/2016 of November 4, 2016) and of the DGRN itself (July 20, 2018 and April 29, 2019), the fact that the claim is not included in the list of creditors or insolvency liabilities means that it cannot be settled from the available assets in the insolvency, because it is a non-concurrent insolvency credit. However, that does not mean that the credit claim is quashed or that it loses its specially privileged status.
- Accordingly, the mortgage creditor must give its consent before the sale can be registered.

The DGRN ruled along the same lines in its decision of April 29, 2019 (Official Gazette of the Spanish State of ,March 13, 2019).

# OTHER NEWS

## Report on syndicated loans and their impact on European Union (EU) credit market competition

On April 5, 2019, the European Commission published the report by Europe Economics on syndicated loans in the European Union and their affect on competition. The report focuses on leveraged buyouts, and project and infrastructure financing in six Member States (France, Germany, Netherlands, Poland, United Kingdom and Spain), and aims to (i) analyze how the syndicated credit market works in the EU, and (ii) identify potential competition law risks. Click here to read the report:

EU loan syndication and its impact on competition in credit markets

The report concludes that the European syndicated finance market offers few risks of encouraging anti-competitive conduct, as it is well distributed and is not plagued by information asymmetries. The report identifies certain (i) higher risk practices (e.g., the exchange of commercially sensitive information at origination stage before the final mandate), which could encourage anti-competitive practices in the process of negotiating and granting the syndicated financing; and (ii) safeguards and mitigating measures that could be deployed in the credit market to alleviate risk (e.g.,the establishment of internal communication protocols to avoid sensitive information being disclosed to competitors).

For additional information, please contact Cuatrecasas.

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