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In-Depth: Acquisition and Leveraged Finance (formerly The Acquisition and Leveraged Finance Review) provides a practical overview of the most common structures and methods used to finance acquisitions in major jurisdictions worldwide, along with the most salient features of the relevant legal and regulatory frameworks. With a focus on recent trends and developments, it offers incisive legal and commercial analysis for practitioners and market operators.

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Spain

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Summary

Introduction

Spain is set to emerge as a significant player in the European economic arena by 2025 and 2026, buoyed by a resilient tourism sector, a robust export market, and substantial investments from the European Union. Despite these positive indicators, Spain faces ongoing challenges, including structural issues such as high unemployment.

In the acquisition and leveraged finance sector, Spain is expected to experience a resurgence in high-yield issuance, driven by refinancing needs, new corporate investments and increased private equity interest. Sectors such as telecommunications, consumer services, and renewables are expected to draw significant investor attention, supported by trends in digitalisation, tourism growth and renewable energy demand.

As we approach 2026, Spain's GDP is projected to grow by 2 per cent, with the tourism sector reaching unprecedented levels and manufacturing and exports enhancing economic competitiveness. However, to fully capitalise on its growth potential, Spain must address potential risks from political gridlock and structural vulnerabilities. With a maturity wall approaching in 2029, the outlook includes significant refinancing activities and strategic transactions, positioning Spain's acquisition and leveraged finance market for a dynamic and promising future.

Year in review

In the face of persistent inflationary pressures and global economic uncertainty, Spain's economic outlook is robust, with GDP growth forecast at 2.6 per cent in 2025 and 2 per cent in 2026, outpacing the Eurozone average. This growth trajectory is supported by strong domestic consumption, a thriving export sector, and EU-funded investment. Moreover-, Spain's economy is significantly bolstered by its thriving tourism industry, a key driver of GDP growth. In this regard, Spain's tourism sector is expected to reach an all-time high of approximately €261 billion in 2025, representing 16 per cent of GDP, according to the World Travel and Tourism Council (WTTC).[1]

In Spain, recent leveraged buyouts (LBOs) indicate a notable shift in financing structures, with equity contributions decreasing from a minimum of 65 per cent in 2023 to an average of approximately 40 per cent by 2025. This trend highlights a significant change in how these transactions are being financed, reflecting a broader reliance on debt over equity in the Spanish market.

The acquisition and leveraged finance sector in Spain is experiencing growth, driven by refinancing demands and fresh corporate investments. Private equity is a key player, with a substantial portion of Spanish companies under PE ownership. This trend is expected to persist, as investors are drawn to Spain's favourable economic conditions and strategic sectors, presenting ample opportunities for growth and expansion in the leveraged finance arena.

Regulatory and tax matters

General regulatory requirements

Generally, no regulatory permits or authorisations are required to act as a lender or security agent in acquisition finance deals in Spain. However, certain regulatory authorisations and registrations may be required to act as a credit entity for consumers according to Law 2/2009 of 31 March 2009, which regulates contracting with consumers for mortgage loans or credits and intermediation services for concluding loan or credit contracts, and Law 5/2019 of 15 March, which regulates real estate credit contracts.

Sanctions and anti-money laundering

Sanctions

As a member of the European Union and United Nations, Spain follows the sanctions imposed by the Security Council of the United Nations and by the EU authorities under the Common Foreign and Security Policy.

AML regulations

Anti-money-laundering (AML) regulations in Spain require that, prior to initiating any business relationship, the ultimate beneficial owner (UBO) of the parties involved in the deal must be clearly identified.

For legal entities, the UBO is defined, in simplified terms, as the natural person who ultimately owns or controls, directly or indirectly, more than 25 per cent of the share capital or voting rights of the legal person, or who by other means controls, directly or indirectly, the management of a legal person.

If a particular legal entity has no UBO, the Spanish anti-money laundering laws presume that the control is exercised by the directors and, therefore, their personal details should be disclosed. If a director is a legal person, the personal details of its representatives (or directors) should be disclosed.

These requirements are of particular significance in Spain because, while notarisation of a loan document is not required by law, it affords the lenders material enforcement advantages. In addition, as a general rule, Spanish security interests must be notarised. In any case, it is market practice to do so. A notary may refuse to grant the relevant deed if there is any failure to satisfy these UBO requirements.

Regulations of foreign investments in Spain

Act 19/2003 of 4 July on the legal framework of capital movements and foreign economic transactions and its associated regulations establish the regime for foreign direct investment (FDI) in Spanish companies.

Traditionally, Spain's FDI regime only applied in relation to investments directly related to Spanish national defence. However, in March 2020, within the covid-19-related measures adopted by the Spanish government, Act 19/2003 was amended to include a broader FDI screening regime (Article 7*bis*). Act 19/2003 has been recently developed by Royal Decree 571/2023, of 4 July 2023, on foreign investments, which clarifies the scope of application of the Spanish FDI regime.

Pursuant to Article 7*bis*, transactions that allow the foreign investor to directly or indirectly reach ownership of 10 per cent or more of the shares of a Spanish company or attain control of the Spanish company, or part of it, as understood under antitrust regulations, may require prior authorisation. This prior authorisation is required only if:

1. the target carries out activities that may affect public order, public security or public health in certain sectors that are considered strategic (strategic sectors); or
2. regardless of the sector of the target, the foreign investor meets certain characteristics (qualified investors).

Foreign investors include investors resident outside the European Union and the European Free Trade Association and investors resident in the European Union and the European Free Trade Association whose UBO is a non-EU or non-EFTA investor. Ownership by the UBO is understood to exist if it holds, directly or indirectly, a stake above 25 per cent of the share capital or voting rights of the company making the investment, or when the UBO exercises control by any other means.

Temporarily, and until 31 December 2026, the regime has been extended to investments carried out in the strategic sectors by investors resident in the European Union and the European Free Trade Association provided that the Spanish target is listed in a Spanish official secondary market (regardless of the value of the transaction) or if it is a non-listed Spanish target company, to the extent that the value of the transaction is greater than €500 million.

Strategic sectors include:

1. critical infrastructure (physical or virtual);
2. critical technology and dual-use products and key technologies for industrial leadership and training and technologies developed under projects or programmes that are of particular interest to Spain;
3. supply of critical inputs, in particular energy, fossil fuels and raw materials, as well as food supply and strategic connectivity services;
4. sensitive information, including access or control of personal data under the General Data Protection Regulation (EU) 2016/679; and
5. media.

Qualified investors are those who:

1. are directly or indirectly controlled by a government of a third country, including state bodies, sovereign funds or armed forces;
2.

have made an investment or have already been involved in activities affecting security or public order in an EU member state and in particular in the sectors listed above; or

3. pose a risk of carrying out criminal or illegal activities affecting public order, public security or public health.

The review period for the authorisation is three months.

Investments carried out without the required authorisation will be considered invalid and with no legal effect in Spain, pending clearance. Additionally, the foreign investor may be fined. The sanction may reach the full value of the transaction.

While FDI approval is principally a matter of concern from an M&A perspective, it is also relevant in a debt finance context as this approval may be required to enforce security documents granted directly or indirectly over the shares of Spanish companies.

Tax matters

Deductibility of interest

Spanish corporate income tax (CIT) law does not provide for a thin capitalisation regime, but has an interest-stripping regime limiting the deductibility of net interest expenses to 30 per cent of adjusted operating profits (roughly speaking, earnings before interest, taxes, depreciation and amortisation (EBITDA[2])) in a given fiscal year, with a €1 million floor. The excess difference could benefit from a carry-over for an indefinite period. Where a taxpayer incurs net interest expenses not exceeding the €1 million floor, the difference between the interest cost and the floor amount will increase the applicable 'cap room' in the five subsequent years. These rules must be tested at a group level where the Spanish borrower belongs to a Spanish fiscal unity (subject to the anti-LBO rules described below).

The existence of a Spanish fiscal unity could have certain advantages. In general, a leveraged holding company may be able to shelter taxable income obtained by its subsidiaries belonging to the Spanish fiscal unity against interest expenses incurred at the holding company level.[3]

The Spanish interest-stripping rules are in line with the conclusions of Action 4 of the Base Erosion and Profit Shifting initiative.[4] These rules were amended (with effects from the fiscal year starting on 1 January 2024) to ensure their compatibility with the interest limitation rule provided under the EU Anti-Tax Avoidance Directive adopted by the Council of the European Union in July 2016. Such amendments led to the exclusion of dividends benefiting from the Spanish participation exemption regime from the concept of 'EBITDA' for purposes of such interest-stripping regime. Another noteworthy development from the 2024 reform was the inclusion of securitisation funds in the scope of the regime. Prior to 2024, securitisation funds were deemed similar to financial entities and insurance companies and, therefore, are not subject to the interest deductibility limitations.[5] That notwithstanding, securitisation funds should generally be in a break-even position from a CIT perspective, provided that the income they obtain is deemed to be financial income.[6]

Other features of the EU Anti-Tax Avoidance Directive have not been adopted by the Spanish legislator, such as an increase of the minimum interest deductibility floor up to €3 million, the introduction of safe harbours to public infrastructure financing projects and the introduction of a consolidated group ratio rule.

On the other hand, there are certain anti-abuse rules that may limit the availability of interest deductions within a fiscal unity or upon a post-acquisition merger. For instance, an anti-LBO rule imposes an additional limitation to the deductibility of interest accruing on debt incurred to make acquisitions of shares. Under this rule, where the bidco vehicle and the target company merge or form a fiscal unity in the four years following the acquisition, the above-mentioned 30 per cent EBITDA limitation should be tested taking into account only the bidco's stand-alone EBITDA and not the fiscal unity's (or the EBITDA corresponding to the merged entity, as the case may be). To the extent that the bidco is a special-purpose vehicle set up for purposes of performing the shares acquisition (and not an operating entity), this rule would, in practice, prevent acquisition interest from being tax deductible.

To dispel allegations that the anti-LBO rule puts private equity firms at a disadvantage as regards industrial groups, the Spanish lawmaker introduced an 'escape clause' to the anti-LBO rule, whereby the additional 30 per cent limitation would not apply if:

1. the level of leverage does not exceed 70 per cent of the purchase price of the shares acquired; and
2. the acquisition debt is reduced on a proportionate basis within the eight years following the acquisition, until the debt reaches a threshold of 30 per cent of the purchase price.[7]

Where the acquisition is financed through different kinds of loan facilities (e.g., junior, senior, mezzanine, vendor loans or other types of loans), the amortisation required under the anti-LBO rule may be performed in any of such facilities, provided that the combined outstanding principal amount of all of them does not exceed the maximum threshold for the year in question.[8] On the other hand, the indebtedness existing at the target company prior to its acquisition does not appear to fall under the scope of this rule.[9]

In addition, there are other anti-abuse rules under Spanish tax law that may limit the deductibility of interest incurred by a Spanish borrower. Interest expenses arising in connection with intragroup debt, where that debt is used to acquire shareholdings from other group entities or to perform equity contributions into other group entities are non-deductible, unless the borrower is able to evidence to the Spanish tax authorities that there are sound business reasons for the transactions.[10] Furthermore, interest accruing on profit-participating loans (PPLs) granted by group entities and interest giving rise to hybrid mismatches[11] are also non-deductible. Spanish transfer-pricing rules may also be used by the Spanish tax authorities to challenge interest deductibility in a related-party loan and to reclassify debt instruments into equity instruments (depending on the features of the instrument). The deductibility of interest incurred in connection with debt financing an equity distribution to the shareholders of the borrower entity (e.g., a dividend recap) should be reviewed on a case-by-case basis.[12]

Withholding tax

General rules

From a practical perspective, it is standard for foreign lenders to use EU-based vehicles to make loans to Spanish borrowers, as it is not market practice for borrowers to gross-up interest withholding tax (WHT) levied on payments made to lenders who are not 'qualifying lenders' (i.e., lenders entitled to an interest withholding exemption). As a general rule, payments of Spanish-sourced interest are currently subject to WHT at a 19 per cent rate. Tax haven-based lenders will be subject to this standard WHT rate. EU- and EEA-based lenders (or EU and EEA permanent establishments of EU- and EEA-based lenders)[13] may receive interest free from Spanish WHT, subject to the fulfilment of compliance requirements (e.g., holding a valid government-issued tax residence certificate, or certain alternative certification requirements applicable to pension funds, collective investment vehicles and alternative investment funds). Spanish-resident registered banks, registered Spanish permanent establishments of foreign banks and Spanish securitisation funds also benefit from the WHT interest exemption. Finally, certain tax treaties entered into by Spain may also provide for a WHT exemption on interest (e.g., the tax treaties entered into with Switzerland, the United Kingdom (which place UK lenders in a similar position to EU lenders following Brexit) and the United States), also subject to the fulfilment of compliance and specific eligibility requirements.

Anti-abuse

Spanish tax law does not provide for a definition of 'beneficial owner' in respect of interest. In fact, the above-mentioned rule exempting interest payments made to EU lenders from WHT does not provide for a 'beneficial ownership' provision. Notwithstanding this, the Spanish domestic rule derives from the transposition of Council Directive 2003/49/EC (the Interest Directive) and the Court of Justice of the European Union (CJEU). The CJEU has analysed in the 'Danish cases' (C-115/16, C-118/16, C-119/16 and C-299/16) the concept of 'beneficial owner' under the Interest Directive, and concluded that the notion of beneficial owner (to be interpreted in a way consistent with the OECD standards) may be applicable by member states regardless of the inclusion of a beneficial ownership requirement in the domestic laws. There is still uncertainty as regards to how this doctrine, as applied by the Spanish tax audit, will be interpreted by the Spanish courts of law (and the interplay between such doctrine and general anti-abuse rules).[14] However, given the scope of the Danish cases (which addressed related-party lending structures and no third-party financing structures) and the background of the Spanish exemption rule, which apply regardless of the existence of borrowing between associated entities (and therefore go beyond the scope of the Interest Directive), there are grounds for supposing that the impact of this doctrine might be limited in the context of third-party lending. In any event, back-to-back lending structures, shareholder loan financings and sub-participation arrangements should be carefully reviewed in light of these precedents and of anti-abuse principles generally. An assessment of the robustness of a lending structure against such potential challenges must be carried out on a case-by-case basis.

Special regime for notes offerings

Spanish tax law provides for a special tax regime[15] applicable to, among others, qualifying notes offerings made by Spanish-resident companies and by wholly owned subsidiaries of Spanish companies resident within the European Union,[16] provided that certain additional requirements relating to the offering (e.g., the listing of the notes on a suitable exchange) are met, and certain compliance information is timely supplied by the paying agent involved. This regime provides for a WHT interest exemption on payments made to all foreign noteholders, regardless of their jurisdiction of residence (i.e., tax-haven investors are not penalised) and without requiring individualised tax documentation (such as government-issued tax residence certificates) to be supplied.

Horizontal tax groups

The tax consolidation regime for Spanish companies income tax (CIT) purposes mandatorily includes within a tax group the Spanish subsidiaries of a common non-Spanish resident parent company,[17] allowing the formation of a horizontal tax group that would include all Spanish-resident direct or indirect subsidiaries in respect of which such ultimate non-Spanish parent company had a qualifying shareholding (i.e., generally, 75 per cent of share capital and majority of the subsidiary's voting rights). The wording of the law (and, in particular, the rules governing the formation of horizontal tax groups) creates several pitfalls that may affect a wide array of industries (e.g., multinational groups with Spanish investments, private equity sponsors and financial institutions financing Spanish acquisitions).

For instance, under the horizontal group rules, a multinational group's parent company holding indirect investments in different businesses without any relationship whatsoever among them from an organisation standpoint (which is a fairly common situation in multinational conglomerates) could be deemed to be the parent company of a sole fiscal unity that should be automatically formed by all the Spanish entities it owns. Under the Spanish CIT Act provisions (which have already been interpreted by the Spanish tax authorities),[18] if these indirect Spanish subsidiaries already formed their own tax groups in Spain, one of the pre-existing tax groups should cease to exist, with the de-grouping charges that could derive from the termination (i.e., recapture of certain intra-group gains that were eliminated in the past owing to the applicability of the consolidated tax regime). Spanish law does not, however, determine which tax group should be terminated.[19]

Another example of unwarranted implications of the horizontal group rules may be followed in private equity structures. Generally, private equity sponsors have 'master' holding companies in an EU jurisdiction and make leveraged buyout acquisitions through Spanish bidco vehicles partly financed through loans granted by financial institutions. Once the Spanish bidco acquires the shares of the Spanish 'target' company, bidco and target generally form a tax consolidated group. In these structures, the second Spanish investment made indirectly from the same master holding company (with the same bidco–target structure) may turn out not to be eligible to form a stand-alone tax consolidated group. The fact that there is a common parent company for both the first bidco and the second bidco would mean that the entities related to the second acquisition (i.e., the second bidco and the second target group) should form a single horizontal tax group.

Such an unwarranted outcome may be a great inconvenience for the private equity sponsor (as the financial models prepared for the first acquisition – taking into account the features of the first target and the first bidco's leverage level – may be significantly changed)[20] and for the financial institutions (as the formation of a horizontal tax group may imply an additional exposure to tax risks associated with companies that did not fall under the perimeter of the acquisition that was financed).[21]

While there may be strategies to structure investments to avoid the adverse implications of this regime,[22] their implementation requires individualised tax advice.

Security and guarantees

Parallel debt

Parallel debt structures governed by Spanish law are not used in the Spanish market, as there is a risk of their being declared null and void pursuant to the Civil Code owing to the absence of a legal consideration supporting the creation of such autonomous, independent and abstract debt. Moreover, the legal concept of trust is not regulated under Spanish law. Therefore, it is not court-tested whether a security agent under a syndicated finance deal would be able to validly hold any debt or security interest on behalf of the lenders acting as trustee pursuant to a parallel debt structure. Accordingly, the relevant security interest must be granted in favour of each and every secured party. That being said, parallel debt structures have been recently recognised in other civil law jurisdictions (e.g., France); therefore, the possibility of future changes in Spain cannot be disregarded.

Limits to guarantees and security interests of Spanish guarantors

Limitations on guarantees provided by Spanish guarantors incorporated as SLs

Spanish guarantors incorporated in the form of *sociedades de responsabilidad limitada* (SLs) can only issue notes up to an aggregate maximum amount of twice its own equity (*recursos propios*), unless the issue is secured or guaranteed, as applicable, by a mortgage, a pledge of securities, a public guarantee or a joint and several guarantee from a credit institution. It is not fully clear if this limitation on SLs applies to the level of credit support that SLs can provide in respect of notes issued by any third party.

Financial assistance

When structuring acquisition finance deals or refinancing previous acquisition finance deals, it is important to bear in mind that neither SLs nor *sociedades anónimas* (SAs, which are the most common form of big Spanish corporations) may secure or guarantee, or participate, help or render any sort of financial assistance for the acquisition of their own shares or quotas, or those of their parent companies. Furthermore, SLs may not secure or guarantee, or participate, help or render any sort of financial assistance for the purchase of the shares or quotas of any company within their group. Any security interest or guarantee that constitutes unlawful financial assistance in accordance with the foregoing rules is null and void. Additionally, financial assistance may raise civil liability issues for the directors.

Unlike English law, Spanish law does not regulate a whitewash procedure and, therefore, in the past the traditional way to avoid financial assistance was the 'forward merger' between the bidco and the target, which should be backed by a valid economic reason for the merger to benefit from an advantageous tax regime.[23] Royal Decree-Law 5/2023 of 28 June, which approved a new regime on structural modifications, maintains the specific regulation to leveraged mergers consisting of a merger between two or more companies where any of them has incurred debt in the three years prior to the merger to acquire control of any of the other companies involved in the merger or to acquire assets of any of the other companies involved in the merger that are essential for normal operation or are significant for the equity value of the company. In this scenario, the following rules apply:

1. the merger plan will specify the resources and terms envisaged for payment by the resulting company of the debts incurred for the acquisition;
2. the directors' report on the merger plan must indicate the reasons that justify the acquisition and, if applicable, the merger. The directors' report must also contain an economic and financial plan setting out the resources and providing a description of the objectives to be achieved; and
3. the experts' report on the merger plan must contain an opinion on whether the aforementioned information is reasonable.

According to Article 42 of Royal Decree-Law 5/2023 of 28 June, an independent expert (appointed by the relevant mercantile registry) is no longer required to render an opinion on whether financial assistance exists.

Nowadays, the usual approach is to assume that these restrictions also apply to a refinancing of debt incurred in connection with a previous acquisition.

While there are practitioners that consider that the Spanish financial assistance limitations applicable to Spanish companies should be extended to foreign subsidiaries, the extra territorial application of the Spanish financial assistance limitations is usually not the approach followed by the market.

Corporate benefit

The corporate benefit concept is not expressly recognised under the Spanish legal system. Nonetheless, several points should be borne in mind:

1. if a Spanish company grants security interest or guarantees where the transaction pursuant to which the security interest granted is not found to result in the ultimate corporate benefit (direct or indirect) of said company, the directors of that company could be in breach of their fiduciary duties; and
2. to the extent that the power to grant security interest or a guarantee for the benefit of third parties is not included in the directors' powers, the directors may need to seek a special authorisation from the company's shareholders.

In view of the above, corporate upstream guarantees may be challenged to the extent that they do not result in a tangible and identifiable interest to the guarantor beyond the abstract group interest.

In a non-insolvency situation, the corporate benefit requirement still applies. However, it does not need to be quantified, and it will not prevent a guarantee from covering working capital facilities that are not linked to the acquisition of the company's or its holding company's shares or quotas.

SLs must obtain their shareholders' approval prior to providing security or guarantees in favour of their shareholders or directors, unless the beneficiary of the security or guarantee, as applicable, is a company that belongs to the same group of companies.

Although there are some practitioners that understand that the shareholders' meeting must approve the granting of security interest over assets that may be considered essential for the company, there is no market standard in this regard. However, this is typically seen as a condition precedent in the framework of LBOs in Spain.

Under the Spanish Insolvency Act,[24] any agreement entered into by a Spanish company within the two-year period immediately preceding the petition of insolvency or the notice of the initiation of negotiations with the creditors or the intention to initiate them to reach a restructuring plan (as well as the agreements entered into between any of the aforementioned events and the declaration of insolvency by the relevant commercial court) may be rescinded by the relevant insolvency court, provided that the insolvency receiver deems that the terms of the agreement are detrimental to the insolvent estate, even if there was no fraudulent intention. Likewise, any agreements entered into by a Spanish company within the two-year period immediately preceding the date of the communication of existence of negotiations with its creditors, or the intention to commence such negotiations, to reach a restructuring plan pursuant to Articles 585 et seq of the Spanish Insolvency Act may be also rescinded (even if there was no fraudulent intention) unless:

1. it is not approved a restructuring plan or being approved it is not sanctioned (-*homologado*) by the competent court; and
2. the insolvency is declared within the year following the end of the effects of the aforementioned communication or of the extension that would have been granted.

In addition to the foregoing, the Spanish Insolvency Act contains a presumption by virtue of which it will be deemed detrimental to the insolvency state, and therefore it will be declared null and void, any *in rem* security granted, within the clawback period, as collateral for either an existing obligation or a new obligation in replacement of an existing one.

However, any security interest and guarantee granted within the context of a sanctioned (*homologado*) restructuring plan will not be subject to the aforementioned presumption, to the extent that the relevant restructuring plan affects at least 51 per cent of the total liabilities of the debtor, unless it is proven that the security interest was granted in fraud of creditors.

Security

The most typical securities in the Spanish market are real estate mortgages and pledges over shares or quotas,[25] bank accounts and credit rights. Promissory mortgages are also not unheard of in the Spanish market, although they may not be considered security interest but just an undertaking to create security interest.

A universal floating catch-all security interest, similar to an English law debenture or US Uniform Commercial Code security interest, is not recognised under Spanish law. In contrast, each security interest over an asset class is documented in a separate deed and signed before a notary public. In this sense, Spanish law security documents must accurately describe the assets that are subject to a particular charge as well as the obligations they intend to secure.

The possibility of creating a single global pledge to secure multiple liabilities is not expressly regulated by the Spanish Civil Code; however, there are grounds to sustain the validity of security interests and guarantees being granted in respect of multiple liabilities. Royal Decree 5/2005, for example, allows for the creation of a single financial security interest to secure several obligations. The use of global real estate mortgages to secure multiple liabilities is also recognised and regulated by Article 153*bis* of the Spanish Mortgage Law dated 8 February 1946. Lastly, the use of personal guarantees to secure multiple liabilities was expressly recognised by Article 98 of Spanish Royal Decree Law 3/2011 of 14 November, which approved the Consolidated Text of the Public Sector Contracts Act. However, Article 98 of the former Public Sector Contracts Act was repealed by Act 9/2017 of 8 November, which approved the new Public Sector Contracts Act that entered into force on 9 March 2018. As a consequence of the above, there are also grounds to sustain the validity of global pledges, even though a different view from the competent courts cannot be disregarded.

Mortgages

As a general rule, pursuant to the principle of speciality, each mortgaged asset may secure the obligations arising from one debt instrument only. However, when all lenders are financial entities (as defined in Article 2 of the Spanish Mortgage Market Act)[26] and certain formal requirements are also met, the relevant mortgage may be created in the form of a maximum liability mortgage (*hipoteca de máximo*), which may secure several present or future obligations arising from debt instruments up to the said maximum liability.[27]

Spanish law mortgages can be created over real estate assets and over movable assets such as intellectual property rights, industrial machinery, aircraft, vehicles and business premises; as a perfection requirement, they must all be registered with the relevant public registry.

The mortgage deed must expressly mention, among others, the maximum amount of the underlying obligations that is secured by the mortgage. In this sense, it is important to carry out a cost-benefit analysis, given that stamp duty must be paid on the basis of the maximum secured amount. Currently, the stamp duty applicable to public deeds of mortgage may generally range between 0.5 and 2 per cent of the secured amount (depending on the region where the asset is located).

Since November 2018, following a long court controversy regarding the party who should be liable for stamp duty upon the grant of a mortgage loan, the Spanish government enacted legislation shifting taxpayer status to the lenders, regardless of the type of loan, the status of the lender (bank or otherwise) or the status of the borrower (e.g., consumer, individual or corporation). From a practical standpoint, however, lenders often demand that borrowers contractually bear the cost of stamp duties, although lenders will continue being liable for such payment before the Spanish tax authorities.

Assignments of commitments under the relevant facility agreement between lenders do not automatically result in the assignment of the assigning lender's participation in the mortgage. The assignment of the mortgage must be expressly documented and registered with the relevant public registry for the acquiring lender to become a mortgagee of record. Furthermore, stamp duty is levied based on the commitment being transferred.

The mortgage deed must include the Spanish tax identification numbers of all parties to enable the Spanish authorities to identify each party thereto.

Pledges

As stated above, Spanish law does not expressly regulate the possibility of creating a single global pledge to secure several obligations. However, Royal Decree 5/2005 allows the creation of single financial collateral interest to secure several obligations and global real estate mortgages (*hipotecas de máximo*) are expressly regulated by Article 153 *bis* of the Spanish Mortgage Law dated 8 February 1946. In this sense, based on the acceptance of the application by analogy of the mentioned regulations, it is a widespread market practice to grant a single global pledge to secure several obligations, which is generally considered acceptable in Spanish academic literature.

There are two main types of pledges under Spanish law: pledges with transfer of possession and pledges without transfer of possession.

Pledges with transfer of possession

Pledges with transfer of possession require the possession of the pledged asset to be transferred to the creditor or to a third party for the purposes of perfecting the pledge. For assets that are not physically transferable, there are presumptions that certain actions (e.g., granting the pledge as a Spanish deed and delivering notices) are equivalent to transferring possession of the relevant asset.

Under certain circumstances, pledges with transfer of possession may be subject to RDL 5/2005,[28] which incorporated the European Financial Collateral Directive[29] into Spanish law and aims to facilitate the enforcement of financial collateral arrangements. To benefit from this regime, the following requirements, among others, must be met:

1. at least one of the parties must be a public entity, a central bank, a credit institution, an investment services company, an insurance company, a real estate collective investment undertaking or any of its management companies, mortgage securitisation funds, asset securitisation funds or any of the management companies of a securitisation fund, pension fund or other financial institution, as defined in Article 3(22) of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 or secondary market bodies and management companies of those secondary markets, clearing system companies, entities

referred to in Law 41/1999, and equivalent entities operating in the options, futures and derivatives markets;

2. the pledged asset must be cash (i.e., the money credited to an account in any currency), marketable securities[30] and other financial instruments, or specific receivables (i.e., money claims arising out of an agreement whereby a credit institution grants credit in the form of a loan agreement or a credit line); and
3. the financial collateral arrangement must have been formalised in writing.

The main advantages of RDL 5/2005 for lenders are as follows:

1. no formalities (e.g., registration and notices) are required other than documenting the arrangement in writing, the provision of the collateral, to either the beneficiary or any person acting on its behalf, and constancy of such provision in writing or in a legal equivalent manner;
2. it allows for the direct sale or appropriation of the pledged asset;
3. it provides certain protections against insolvency, given that the initiation of insolvency proceedings is not considered sufficient grounds to declare null or to rescind or to suspend the enforcement of a financial collateral arrangement; and
4. set-off agreements subject to RDL 5/2005 will not be affected by a declaration of insolvency.

In light of a judgment issued by the CJEU on November 2016,[31] there is a risk that a pledge over bank accounts may not qualify as a financial collateral arrangement if the account holder may freely dispose of the monies deposited in the account. This does not mean that pledge would become null or unenforceable, but that the relevant beneficiary would not benefit from the advantages provided by the RDL 5/2005 for the financial collateral arrangements.

Finally, certain Spanish regional rules may apply depending on where the pledged assets are located.

Pledges without transfer of possession

Pledges without transfer of possession do not require the possession of the pledged asset to be delivered. However, they must be registered in the relevant movable assets registry as a perfection requirement.

Unlike mortgages, provided the pledge is granted as a Spanish commercial deed and not as a notarial deed, no stamp duty will be levied, but it attracts certain other costs such as notarial and registration fees. However, the deed of pledge must still include a reference to the maximum amount of obligations that is secured by the pledge without transfer of possession. Spanish tax identification numbers are required to have the pledge registered.

As regards assignments between lenders, similarly to mortgages, the assignment of a lender's position under a pledge without transfer of possession must be expressly documented and registered with the relevant public registry.[32]

Similar to pledges with transfer of possession, Spanish regional rules may apply depending on where the pledged assets are located.

Market participants structure pledges over credit rights as pledges with transfer of possession to avoid registration requirements.

Promissory mortgage

Promissory mortgages are not unusual in Spanish finance deals. A promissory mortgage does not create an *in rem* right of mortgage, but rather an obligation for the grantor in relation to the relevant lenders party thereto to create an *in rem* right of mortgage upon the occurrence of the agreed trigger event.

Promissory mortgages are typically used when the amount of stamp duty that would be levied on the relevant mortgage deed is too large compared with the risk of default or, generally, with the benefit of creating a mortgage upon closing a deal.

In any case, lenders should bear in mind that the conversion of the promissory mortgage into a legal mortgage requires the payment of the stamp duty that was initially avoided, and that it may entail significant insolvency limitations and a rescission risk.

Irrevocable powers of attorney

It is usual in the Spanish market to have the mortgagor or pledgor grant a special power of attorney in favour of the security agent (or even the secured parties) to carry out certain actions on its behalf. Pursuant to an irrevocable power of attorney, the security agent is typically authorised to carry out perfection, further assurance and enforcement actions on behalf of the relevant mortgagor or pledgor with respect to the relevant security documents. To ensure that the mortgagor or pledgor may not unilaterally revoke the power of attorney, the security agent is usually party to the deed of power of attorney, and certain specific language is included.

It is worth mentioning that the scope of the powers granted in favour of the security agent or secured parties should be carefully defined to avoid their potential classification as shadow directors in an insolvency proceeding of the grantor.

Finally, under Spanish common law, powers of attorney, appointments or authorisations granted, regardless of whether they are stated to be irrevocable, are generally revocable by the grantor, provided that the revocation is in good faith. Moreover, irrevocable powers of attorney become unenforceable in insolvency.

Priority of claims

Types of claims

Once insolvency has been declared, the court receiver draws up a list of acknowledged claims and classifies them according to the following categories.

Claims against the insolvency estate

These claims are payable when due according to their own terms (and, therefore, are paid before all other claims under insolvency proceedings – see below). Claims against the insolvency estate include:

1. a certain amount of the employee payroll;
2. the costs and expenses of the insolvency proceedings;
3. certain amounts arising from services provided by the insolvent debtor under reciprocal contracts and outstanding obligations that remain in force after insolvency proceedings are declared, and certain amounts deriving from obligations to return and indemnify in cases of voluntary termination or breach by the insolvent debtor;
4. amounts deriving from the exercise of a clawback action during the insolvency proceedings regarding certain acts performed by the insolvent debtor and corresponding to a refund of consideration received by it (except in cases of bad faith);
5. certain amounts arising from obligations created by virtue of law or from tort after the declaration of insolvency and until its conclusion;
6. 50 per cent of the funds lent under a refinancing arrangement entered into in compliance with the requirements set forth in Article 614 et seq (restructuring plans) of the Spanish Insolvency Act;[33] and
7. certain debts incurred by the debtor following the declaration of insolvency.

Insolvency claims

Insolvency claims are subject to the insolvency proceedings and, unlike the claims against the insolvency estate, are paid in accordance with the waterfall set forth in the Spanish Insolvency Act. In principle, the insolvency waterfall applies mandatorily; that said, the waterfall may be altered among the creditors that are party to a contractual subordination agreement to the extent the debtor is party to such agreement and it does not cause any prejudice to any third parties.

Insolvency claims, in turn, are classified as follows:

1. special privilege claims, referring to claims that benefit from security interest on certain assets (essentially *in rem* security, to the extent secured by *in rem* security);[34]
2. general privilege claims, referring to, among others, certain labour debts and debts with public administrations corresponding to tax debts and social security obligations (recognised as generally privileged for half of their amount), and debts held by the creditor applying for the corresponding insolvency proceedings (to the extent such application has been approved) up to 50 per cent of the amount of such debt. Up to 50 per cent of the amount of either any interim financing[35] or new financing[36] provided within the framework of a sanctioned (*homologa-*

do) restructuring plan also qualify as general privilege claims, to the extent that the claims affected by the relevant plan represent at least 51 per cent of the total liabilities of the insolvent debtor. In the same line, if the interim financing or new financing is provided by parties who are specially related to the debtor, 50 per cent of the amount of such financings will also benefit from general privileges to the extent that the claims affected by the relevant restructuring plan represent at least 60 per cent of the total liabilities of the insolvent debtor (deducting the claims held by any specially related person to the insolvent debtor to calculate the aforementioned majority);

3. ordinary claims (unsubordinated and non-privileged claims); and
4. subordinated claims; debts subordinated by virtue of law include, among others, claims that have been notified late by the creditors (other than claims of mandatory recognition), fines, profit participation loans, claims related to accrued and unpaid interest unless and to the extent they are secured by an *in rem* right, as well as, in particular, credit rights held by parties that are specially related to the debtor (discussed further in Section IV.ii).

Subordination

Credit rights may be subordinated by virtue of law, by contractual agreement or as a result of the structure of the debt. Contractual subordination must be accepted by all of the creditors whose claims are affected by the relevant subordination.

Contractual subordination agreements are now recognised within insolvency proceedings provided that the insolvent debtor is party to those agreements and they do not cause prejudice to any third parties. Contractual subordination agreements are binding to the insolvency administrators, who will make the payments in accordance with the relevant rules or waterfalls set out in the agreements. Contrary to what happens in an insolvency scenario, contractual subordination agreements have not been expressly recognised for the purposes of class formation to vote the approval of a restructuring plan.

Pursuant to the Spanish Insolvency Act, credit rights held by parties that are specially related to the debtor are subordinated. In the case of individuals, this includes their relatives. In the case of legal entities, this includes:

1. shareholders, group companies and their common shareholders, provided that:
    - they are personally liable for the debtor's debts;
    - they owned directly or indirectly over 5 per cent (for companies that have issued securities listed on an official secondary market) of the entity's share capital when the relevant debt was incurred; or
    - they owned directly or indirectly over 10 per cent (for companies that have not issued securities listed on an official secondary market) of the entity's share capital when the relevant debt was incurred; and
2. directors and de facto (shadow) directors, liquidators and attorneys holding general powers of attorney, as well as those who held such positions within the two years immediately preceding the initiation of insolvency proceedings.

In addition to the above, there is a presumption that any persons who have acquired credit rights from the specially related persons described above within the two years immediately preceding the initiation of insolvency proceedings are also specially related to the debtor. Therefore, their claims will become subordinated.

Notwithstanding the above, it is noteworthy that creditors who have capitalised all or part of their claims pursuant to a sanctioned (*homologado*) restructuring plan in accordance with Article 635 et seq of the Spanish Insolvency Act are not deemed specially related persons as a result of said restructuring, and any creditors who are party to a sanctioned (*homologa*do) restructuring plan are deemed not to be de facto directors because of the obligations assumed by the debtor pursuant to the restructuring plan (although evidence to the contrary may be admitted).

Jurisdiction

Choosing the laws of any jurisdiction other than Spain will generally be given effect by the Spanish courts subject to, among other things, the terms of the Rome I and Rome II Regulations[37] and in accordance with the exceptions and provisions of the laws of Spain, provided that the relevant applicable law is evidenced to the Spanish courts pursuant to Article 281 of the Spanish Civil Procedure Act,[38] and pursuant to Article 33 of the Act on International Legal Cooperation in Civil Matters.[39]

Furthermore, the recognition and enforcement of a final judgment obtained against any debtor or guarantor in a country other than Spain is subject to:

1. Regulation (EU) No. 1215/2012 [40] if the judgment was rendered by a court of a member state of the European Union;
2. the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters if the judgment was rendered by a court of a non-EU member state having signed such convention;
3. the Hague Convention of 30 June 2005 on Choice of Court Agreements or the Hague convention of 2 July 2019 on the recognition and enforcement of foreign judgments in civil or commercial matters, if the judgment was rendered by a court of a non-EU member state having signed the referred conventions, where applicable;
4. any other applicable bilateral or international treaty relating to the mutual recognition and/or enforcement of judgments if the judgment was rendered by a non-EU member state court of a state having signed such treaty with the European Union or Spain; and
5. the Act on International Legal Cooperation in Civil Matters[41] if the judgment was rendered by a court of a state to which none of the foregoing applies.

The party seeking enforcement should initiate the recognition proceedings in Spain before the relevant court of first instance or commercial court, as the case may be. According to Article 46 of the Act on International Legal Cooperation in Civil Matters, 'a final foreign judgment would not be recognised:

> (a) if the judgment contravenes Spanish public policy rules (*orden público*); (b) if the judgment was rendered infringing the rights of defence of either party. If the judgment was rendered by default, it would be understood that the rights of defence have been clearly infringed provided that the defendant was not served with the document that instituted the proceedings in a timely manner that allowed for adequate defence;(c) if the judgment addresses a matter over which Spanish courts have exclusive jurisdiction or, in relation to other matters, if the jurisdiction from the court of origin over the matter is not clearly connected to said country of origin in which the judgment was rendered; (d) if the judgment is irreconcilable with a judgment rendered in Spain; (e) if the judgment is irreconcilable with an earlier judgment rendered in any other State provided that such judgment complies with the applicable conditions to be recognised in Spain; (f) if there is judicial proceeding outstanding in Spain between the same parties and in relation to the same issues in Spain, instituted before the foreign proceeding.

The Act on International Legal Cooperation in Civil Matters expressly prohibits that a foreign judgment is reviewed as to its substance by the Spanish competent court.

Finally, any judgment obtained against a debtor or guarantor in any country bound by the provisions of Regulation (EU) No. 1215/2012 would be recognised and enforced in Spain in accordance with the terms set forth therein. In addition, pursuant to Article 25 of Regulation (EU) No. 1215/2012, if the parties to an agreement have agreed to submit to the jurisdiction of the courts of an EU member state, such courts would have jurisdiction and such jurisdiction would be deemed exclusive (as currently interpreted by the European Court of Justice). To date, there is no Spanish case law issued by the Spanish Supreme Court confirming the validity and effectiveness of the possibility of non-exclusive or asymmetric jurisdiction clauses.

Acquisitions of public companies

Loans financing tender offers are not that different from non-public acquisition finance deals, although lenders need to focus on the bank guarantees that the Spanish National Securities Market Commission (CNMV) requires as evidence that the relevant acquirer will be able to comply with its obligations under the public offer to purchase, to make sure that these are adequately integrated in the financial documents and to consider the unconditional nature of these guarantees at the time issued. That said, there are a series of specific provisions that are normally included in this kind of financing, such as:

1. undertakings related to the offer that could prevent the bidder from amending certain terms or conditions to which voluntary offers may be subject to;
2. a mechanism regulating the replacement of the aforementioned guarantees if additional lenders join the original guarantee providers once the aforementioned guarantees have been deposited with the CNMV;
3. a 'deemed-utilisation' mechanism by means of which the enforcement of the guarantees by the CNMV would constitute an automatic drawdown under the financing for the relevant claim amount; and
4.

the obligation of the bidder to pledge the target shares in favour of the lenders once the offer is settled.

The offer prospectus must give details about how the tender offer is going to be financed, and therefore certain details of the relevant debt instruments will need to be made public.

Spanish stock corporations are governed by the Spanish Securities Market Act[42] and Royal Decree 217/2008 of 15 February on the legal regime applicable to investment services companies. The Spanish authority responsible for approving any takeover bid launched is the CNMV.

When someone directly or indirectly acquires control over a publicly listed company (i.e., has at least 30 per cent of the voting rights), a tender offer for all outstanding shares in that company is mandatory. The mandatory takeover bid will also be triggered when someone does not hold more than 30 per cent of the voting rights but has appointed, within 24 months following the acquisition, a number of directors that together with those already appointed by the bidder, if any, represents more than half of the members of the board of directors.

The aforementioned threshold can be obtained:

1. by means of an acquisition of shares or other securities that confer, directly or indirectly, voting rights in the company;
2. through shareholders' agreements; or
3. as a result of indirect or unexpected takeovers.

Without prejudice to the above, the Spanish Securities Market Act provides for certain exceptions for the launching of a mandatory offer upon gaining control of a listed company; for instance, creditors acquiring the control of a listed company as a result of the capitalisation of their debt within the context of a sanctioned (*homologado*) restructuring plan that is favourably informed by an independent expert will not be obliged to launch a mandatory tender offer without the necessity of getting an exemption from the Spanish Stock Exchange Commission.

Mandatory takeover bids must be made at an 'equitable price'; that is, an equal price to the highest price that the party required to launch a takeover bid (or those persons acting in concert with it) has paid for the same securities during the 12 months prior to the announcement of the bid. Contrary to this, in a voluntary takeover bid, the bidder is free to offer whatever price it wishes.

Outlook and conclusions

Spain is poised for significant economic expansion, fuelled by a robust tourism sector and substantial EU investments enhancing its infrastructure and renewable energy capabilities. These developments are positioning the country as a key player in the European economy. To fully capitalise on this potential, Spain must address challenges such as political gridlock and unemployment. The European Central Bank's projection of inflation stabilising at 1.9 per cent by 2026 further supports a favourable economic outlook.

In the acquisitions and leveraged finance sector, Spain is undergoing a transformation. There is a resurgence in mergers and acquisitions, particularly in mid-sized and minority investments, alongside a strategic shift towards increased debt financing in leveraged buyouts. This shift is driven by active private equity investment in sectors such as telecommunications, technology and healthcare.

The volume of merger and acquisition (M&A) and leveraged buyouts (LBOs) transactions remains moderate, but emerging sectors offer promising opportunities for growth. With a focus on innovation and sustainability, Spain's financial landscape is set for a dynamic future, offering substantial opportunities for investors looking to leverage the country's economic strengths and strategic position.

Endnotes

1 Europe’s brightest spot? — Assessing Spain’s LevFin market (9fin) ^ Back to section

2 Please refer to the Resolution dated 16 July 2012, issued by the Spanish General Directorate for Taxes. ^ Back to section

3 In fiscal year 2023, the ability to offset current-year tax losses incurred by a group member entity for purposes of the tax group's consolidated CIT was limited to 50 per cent of stand-alone tax losses, by virtue of a temporary tax measure. We cannot rule out that such measure becomes definitive and, therefore, becomes applicable in respect of fiscal year 2024 and subsequent fiscal years. ^ Back to section

4 Sponsored by the OECD and sanctioned by the G20. ^ Back to section

5 Regulated financial institutions and insurance companies (and their holding companies, to the extent they are subject to the oversight of the financial or insurance regulators) may not be subject to the interest-stripping rules and the anti-LBO rule (described below). ^ Back to section

6 Financial income may be fully offset against current-year financial expenses, without limitations. ^ Back to section

7 The Spanish tax authorities, in binding tax ruling V1664-15, dated 28 May 2015, have addressed certain queries made by a private equity firms association regarding the practical applicability of the anti-LBO rule. According to the tax authorities, the fulfilment of the second requirement should be tested on an annual basis, by comparing the level of indebtedness of the bidco at the end of each fiscal year with the acquisition debt. Even if the acquisition debt accounted for less than 70 per cent of the purchase price, its principal amount should be nevertheless reduced proportionally on annual basis over an eight-year period until it reaches 30 per cent. Nonetheless, if in a given year the acquisition debt is reduced at an amount exceeding the minimum amount required to be amortised as per the amortisation schedule of the anti-LBO rule, the taxpayer may not be required to reduce it further in subsequent years until the remainder of the debt catches up with the amortisation schedule. ^ Back to section

8 See binding tax ruling V1664-15. The failure to meet the mandatory amortisation requirements in a given fiscal year does not jeopardise the taxpayer's ability to deduct interest on the debt in future fiscal years, provided that the taxpayer catches up with the amortisation schedule in the subsequent years. ^ Back to section

9 In the context of LBOs, it may be possible to refinance existing acquisition debt deemed to be 'tainted' by operation of the anti-LBO rules without running afoul of the anti-LBO rules, although this possibility should be analysed on a case-by-case basis and bearing in mind the legal ramifications of refinancing. In binding tax ruling V4487-16, dated 18 October 2016, the Spanish tax authorities concluded that the swapping of tainted acquisition debt by refinancing debt used to finance a 'dividend recap' distribution to shareholders might, in some circumstances, not be tainted for purposes of anti-LBO rules. Should the transactions performed involve the performance of several interconnected steps, an analysis of the transaction as a whole, bearing in mind its ultimate economic purpose, must be carried out (see binding tax ruling V1854-24). ^ Back to section

10 In that regard, there are good grounds to defend (as per the criterion set forth by the Spanish tax authorities in certain binding tax rulings – such as V0775-15, dated 10 March 2015) that there are 'sound business reasons' where the leveraged intra-group acquisition is performed in a connection with a post-acquisition debt push-down plan (e.g., following the acquisition of a multinational group, partly financed with bank debt, the purchaser group sets up a structure that would allow a portion of such acquisition debt to be allocated to Spain), provided that the portion of the debt pushed down to Spain is reasonable. ^ Back to section

11 The Spanish CIT Act provides for an anti-hybrid rule transposing the contents of the ATAD 2 Directive (Council Directive (EU) 2017/952, dated 29 May 2017, amending Council Directive (EU) 2016/1164 as regards hybrid mismatches with third countries). In a nutshell, the ATAD 2 regime aims at, among others, avoiding situations where deductions may be claimed by a Spanish CIT taxpayer and by another person in a different jurisdiction (a double deduction outcome) or where deduction does not lead to the inclusion of matching income in another jurisdiction, as a consequence of a conflict in the characterisation of financial instruments, payments or entities. The scope of ATAD 2 is generally limited to related-party transactions, although such measures may apply in respect of third-party arrangements that are deemed to be 'structured arrangements' (i.e., an arrangement where the tax mismatch is priced into its terms or that was designed to produce such an outcome). These rules apply in respect of all tax years ending after 11 March 2021. ^ Back to section

12 Several Supreme Court decisions ruled in favour of taxpayers in cases where the tax audit challenged the deductibility of interest accruing in connection with loans taken to finance distributions to shareholders, on the grounds that the interest was incurred for the benefit of the recipient shareholder and was unrelated to the business activity of the borrower. The courts rejected this view. Nonetheless, an anti-abuse report issued by the Spanish tax authorities in July 2022, addressing a structure where loan financing funded a share premium repayment following an intra-group reorganisation, suggests that the tax authorities may scrutinise certain leveraged distributions on anti-abuse grounds, through the application of general anti-abuse rules. ^ Back to section

13 Except for EU- and EEA-based lenders resident in or obtaining interest through a permanent establishment located in Spain or in a non-cooperative (i.e. tax-haven) jurisdiction. Currently, no EU or EEA member states are blacklisted from a Spanish tax perspective, but the Spanish tax authorities may revisit the blacklist depending on certain factors (e.g., where there is no effective exchange of tax information, or where the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes identifies a jurisdiction as a tax haven). ^ Back to section

14 The Spanish Economic-Administrative Court (TEAC), in a resolution dated 8 October 2019, involving a cross-border, shareholder loan structure (in which a Spanish entity was financed through back-to-back loans ultimately granted by an Andorran entity), echoed the Danish cases and concluded that the Spanish interest WHT exemption can only be claimed by the beneficial owner of the interest. This decision was later confirmed by the Spanish National Court in a decision dated 17 October 2024. The Spanish tax authorities, in binding tax ruling V1827-24, have also expressed the view that beneficial owner status is an implicit requirement that should be deemed to be embedded in the Spanish WHT rule providing for a WHT exemption on interest paid to EU/EEA lenders. It remains to be seen whether the criterion applied therein may ultimately be confirmed by the Spanish Supreme Court or whether it may be extended further to non-related party lending transactions. ^ Back to section

15 Act 10/2014, dated 26 June, on the organisation, supervision and solvency of credit entities. ^ Back to section

16 Notes offerings carried out by non-Spanish issuer vehicles, where the offering proceeds are ultimately used in Spain, should be carefully reviewed in light of the criterion set forth in binding tax ruling V4139-15, dated 28 December 2015, where the Spanish tax authorities took the view that interest accrued under these notes could be deemed to be from Spanish sources for Spanish WHT purposes. In such cases, it would be crucial to ensure that the offering meets the criteria to be a qualifying note offering from a Spanish tax perspective, and that the applicable compliance obligations are duly met by the paying agent involved. ^ Back to section

17 According to the CIT Act, a Spanish parent company (or permanent establishment) holding a direct or indirect participation in a Spanish subsidiary through intermediate holding companies resident in any country other than Spain could form a tax group including indirect Spanish subsidiaries, provided that the indirect shareholding of the Spanish parent company represents at least 75 per cent of the share capital of the Spanish subsidiary (70 per cent if the subsidiary has its stock listed in a regulated stock exchange) and the majority of the subsidiary's voting rights. Parent companies resident in a tax-haven jurisdiction or not subject to a corporate-level tax are not eligible to be an ultimate parent company for purposes of the tax group regime. ^ Back to section

18 Temporary Provision 25, Subsection 2. This provision has been interpreted by the Spanish tax authorities in binding tax ruling V2037-15, dated 30 June 2015. The case described in the mentioned ruling was the case of two Spanish consolidated tax groups that had a common parent company resident in Luxembourg. According to the Spanish tax authorities, from the fiscal year 2015 both groups should be combined into a single tax group (as the qualifying parent company of both groups was the same Luxembourg entity). ^ Back to section

19 See binding tax ruling V2037-15. This means the taxpayer may choose to terminate the pre-existing group that could trigger fewer de-grouping costs. ^ Back to section

20 Several Spanish CIT rules ask for the fulfilment of requirements at the tax group level (for instance, the rules limiting the deductibility of interest), and the enlargement of a tax group may lead to unexpected tax inefficiencies (and to a greater tax compliance burden). ^ Back to section

21 Entities belonging to a tax group are jointly and severally liable for the CIT debts of the group. In addition, the inclusion of entities in a tax group means that these entities may have accounts payable and receivable as regards other group entities, depending on whether an entity benefits from tax credits or attributes of another entity of the tax group. This aspect may also be troublesome from the perspective of the financial institutions involved. ^ Back to section

22 For instance, the Spanish tax authorities have interpreted that certain investment structures with features designed to ensure that a 'master' holding company could not meet the requirements set out under the Spanish CIT Act to be regarded as a parent entity that could have the status of a head of a consolidated tax group (see, e.g., binding tax rulings V1813-16, dated 25 April 2016, and V1083-16, dated 17 March 2016). However, the use of these structures should be approached with caution and on a case-by-case basis. ^ Back to section

23 In addition, the performance of a post-LBO merger requires analysis from a Spanish tax perspective, as it is key that the merger can be performed in a tax-neutral fashion (which requires, among other things, that the reorganisation is deemed to have been performed because of sound business reasons and not for tax-driven ones). These mergers have been contested by the Spanish tax authorities in the past (especially in structures where the merger could give rise to certain tax advantages, and given the potential implications of a busted reorganisation – that is, taxation at the merged company level in respect of the assets transferred to the merging entity – these transactions should be approached with caution). ^ Back to section

24 Royal Legislative Decree 1/2020 of 5 May 2020, as amended by, among others, Law 26/2022 of 5 September (by means of which the Directive (EU) 2019/1023 of the European Parliament and of the Council 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 transposed into Spain. Law 26/2002, by virtue of which the restated Spanish Insolvency Act was approved to organise, harmonise and clarify the insolvency law, which had suffered numerous root-and-branch amendments. It does not include substantial amendments although, as mentioned above, the legislator has taken advantage of the recast to clarify certain provisions that could lead to false interpretations. ^ Back to section

25 The share capital of an SL is represented by 'quotas', whereas the share capital of SAs is represented by 'shares'. This distinction is especially important in the application of RDL 5/2005 (see below). ^ Back to section

26 Act 2/1981 of 25 March, on the regulation of the mortgage market. ^ Back to section

27 Article 153*bis* of Spanish Mortgage Law dated 8 February 1946. ^ Back to section

28 Royal Decree Law 5/2005 of 11 March on urgent reforms for boosting productivity and to improve public procurement. ^ Back to section

29 Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements. ^ Back to section

30 Quotas in an SL do not qualify for these purposes. ^ Back to section

31 Judgment dated 10 November 2016 in the Matter No C-156/15 (*Private Equity Insurance Group (SIA) v. Swedbank AS*) in response to a request for a preliminary ruling from the Supreme Court of Latvia. ^ Back to section

32 See Section III.ii. ^ Back to section

33 From 2 October 2016, 50 per cent of the new funds under a formal refinancing are regarded as a claim against the insolvency estate and the remaining 50 per cent as a generally privileged claim. ^ Back to section

34 For the purposes of a composition or a restructuring plan, the special privilege will be limited only to the reasonable or fair value of the charged asset. The amount in excess of such reasonable or fair value will not be considered as a special privilege claim. This limitation does not apply to the right of the secured creditor to recover the amount secured or guaranteed by the relevant security interest or guarantee, as applicable. ^ Back to section

35 Interim financing is referred to in the Spanish Insolvency Act as any financing provided to the debtor while the debtor is negotiating a restructuring plan with its creditors, to the extent such financing is reasonably needed to ensure the continuity of the debtor's business or professional activity during negotiations or preserve or improve the value that the business, as a whole, or of one or several productive units, had at the time of the commencement of negotiations. ^ Back to section

36 New financing is referred to in the Spanish Insolvency Act as financing that is foreseen in the restructuring plan and is necessary for its fulfilment. ^ Back to section

37 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). ^ Back to section

38 Act 1/2000 of 7 January on Civil Procedure. ^ Back to section

39 Act 29/2015 of 30 July on International Legal Cooperation in Civil Matters. ^ Back to section

40 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. ^ Back to section

41 The Act on International Legal Cooperation in Civil Matters repealed Articles 951–958 of the former Spanish law civil procedural of 1881. ^ Back to section

42 Law 6/2023 of 17 March on securities markets and investment services. ^ Back to section

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