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Structured Finance & Derivatives

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Law and Practice

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1. Structured Finance

1.1 Market Overview
In October 2018, the International Monetary Fund (IMF) forecast that Spain's GDP would grow by 2.7% in 2018 and by 2.2% in 2019, well above the European average of 2% for 2018 and 1.9% for 2019.

The improvement of the economic situation during the last decade, together with long-standing low interest rates in Europe and the expansive monetary policy implemented by the European Central Bank, has led to a substantial increase in bank financing, debt capital market deals, direct lending and structured finance transactions (where project finance has proliferated – especially in the energy and infrastructure markets – along with leveraged and asset finance transactions). The increase in liquidity and competition amongst lenders (primarily banks and debt funds) has led to borrower-friendly structures, especially in sponsor-driven transactions.

2. Acquisition Finance/Leveraged Finance

2.1 Transaction Structure, Players and Legal Regime
Transaction structures
Financial assistance, corporate restructuring and accounting rules play a key role in the Spanish acquisition/leverage finance market and the way in which transactions are structured in Spain. This ultimately requires a case-by-case analysis, inter alia, in order to determine how the existing indebtedness of the target, the financing needs of the target or the equity structure of both the target and/or the buyer can impact the acquisition/leverage financing structure and, along with that, the purpose of the loan or loans (as multi-tranche structures are commonly used in these kind of transactions), the way the indebtedness is scheduled to be repaid and/or the security package that the acquisition/leverage financing deal can benefit from.

Typical acquisition/leveraged finance transactions customarily entail multi-tranche structures, simultaneous corporate transactions (such as mergers, reverse mergers and/or global assignment transactions) and/or debt push-downs.

Although bank facilities still predominate in leverage transactions, there has been a significant increase in both direct lending and capital markets acquisition/leverage financing transactions in Spain in recent years. In general, Loan Market Association (LMA)-based documentation (previously amended to comply with Spanish general market standards and specific rules) is commonly used in Spanish transactions involving international financial sponsors. In sponsorless mid-market transactions, documentation tends to be that of standardised Spanish language agreements.

Trends
In the last couple of years, we have experienced an increase in direct lending acquisition/leverage transactions together with a significant increase in acquisition/leveraged finance transactions within the energy and infrastructure industries.

Laws and regulations
There is no specific law or regulation which exclusively covers acquisition and leveraged finance issues. There are, however, multiple laws and regulations which apply to these kind of transactions, including the Spanish Companies Act, the Spanish Code of Commerce or Act 3/2009 on structural amendments of commercial legal entities, which are taken into account when taking part in an acquisition or leveraged financing in order to avoid certain restrictions and/or limitations (among many others, regarding financial assistance, corporate benefit and/or thin-capitalisation rules or regarding the conditions which certain typical merger transactions between the target and the bidco which follow an acquisition/leveraged finance transaction are subject to).

The ECB guidance on leveraged transactions should also be considered by banks when participating in the leveraged finance market. This guidance does not apply to debt funds, which gives them an advantage in certain transactions.

2.2 Documentation
These transactions are normally documented by means of standard LMA-based documentation (duly adjusted to comply with Spanish local law provisions and market practices), especially when international financial sponsors are involved. In sponsorless mid-market transactions, documentation tends to be that of standardised Spanish language agreements.

2.3 Security
Type of Security
The standard security package granted in these kinds of transactions, which may vary depending on how the acquisition/leveraged finance transaction is structured, usually consists of pledges (normally over the shares/the stake in the bidco and the target, bank accounts or any other credit rights, such as intra-group debt). Other possible security interests may include mortgages over certain real estate assets of the borrower, although this is relatively infrequent given the tax cost of granting Spanish mortgages.

Regarding this point, a case-by-case analysis is carried out on the security package in order to avoid falling foul of the financial assistance prohibition, along with a cost-benefit analysis.

Restrictions/limitations
As set forth above, the granting of any security or guarantee in respect of the obligations assumed by bidco under the acquisition/leverage loan or tranche must be reviewed in accordance with the financial assistance rules on a case-by-case basis. Moreover, rules on corporate benefit established in Spanish case law must also be taken into consideration when providing upstream guarantees.

Moreover, the granting of security over certain assets may require the approval of public authorities or other third parties (for example, pledging or mortgaging public concessions).

Procedures
As a general rule, in rem rights of pledge (both possessory and without transfer of possession) and mortgages in Spain must be granted in notarised public documents (in the case of real estate mortgages, through the public deed "*escritura pública*"). As an exception, security over negotiable instruments or cash which falls within the scope of financial collateral rules may be granted in a private document, without the involvement of a Spanish notary.

Furthermore, certain security interests (such as real estate mortgages) must be registered with the relevant public registry (in the case of a real estate mortgage, the relevant land registry) for them to be validly granted and enforceable vis-à-vis third parties.

Moreover, Spanish privately held companies ("*Sociedades de Responsabilidad Limitada*") and publicly held companies ("*Sociedades Anónimas*") can, providing they do not contravene Spanish financial assistance rules, grant funds, loans and security interests to or in favour of shareholders and directors provided that the transactions are approved at a General Shareholders Meeting (or by the sole shareholder, as applicable) of these companies.

Notwithstanding the above (and provided no contractual negative pledge limitations and/or other similar limitations set out by law regarding, inter alia, public law assets such as public concessions are applicable), no other special consents (such as approvals of works by council authorities) are usually required.

Enforcement
Under Spanish law, Spanish security is enforceable upon the occurrence of an enforcement event as defined by the parties (eg, default, full acceleration, etc). As an exception, specific limitations may apply regarding the enforcement of real estate mortgages where additional legal limitations may apply (inter alia, a qualified payment default related to principal and/or interests may be requested in accordance with the terms set forth in Article 693.1 of the Spanish Civil Procedural Act).

However, even if the parties are free to agree on the definition of an enforcement event, Spanish courts are reluctant to uphold enforcement clauses where the creditor enforces its rights based upon the occurrence of events of default which do not affect 'essential' elements of the loan agreement. Lack of payment is considered to be a material breach. However, Spanish case law is not settled in terms of which other events of default may qualify as material.

In order to exercise enforcement proceedings, the involvement of a lawyer is generally mandatory and, additionally, the parties must be represented by a court agent ("*procurador*"), for which a valid power of attorney must be granted. In this regard, the claim for enforcement must be accompanied by all the documents supporting the party's request (eg, agreements, invoices, communications, etc), and, after verifying that all the procedural and material requirements have been fulfilled, the court will grant a resolution for enforcement, granting the defendant a period of ten business days to oppose the enforcement.

Moreover, under the Spanish Civil Code, the following statute of limitation periods apply:

- 20 years for claims arising from in rem securities over real estate assets;
- 15 years for claims arising from personal securities over real estate assets; and
- six years for claims arising from in rem security interests over movable goods (eg, pledges over shares or bank accounts).

Likewise, in certain insolvency scenarios, enforcement actions (even in the event of a material breach of the underlying loan) against a Spanish obligor may not be permitted (and may be stopped, if already started) if such enforcement action affects assets which are "necessary for the continuation of the insolvent company's business".

The timings of the enforcement proceedings may vary significantly depending on the type of enforcement chosen. In this regard, there are three types of enforcement that may be carried out:

- judicial enforcement for mortgaged or pledged property established in Article 681 to 698 and related provisions of the Spanish Civil Procedure Act in conjunction with Article 635 of that same act;
- extra-judicial enforcement provided for in Article 1,872 of the Spanish Civil Code; and
- enforcement of financial security interest via Royal Decree 5/2005, of 11 March (when applicable).

Under Spanish law, the enforcement of a security right must be carried out in accordance with the procedures provided by Spanish law and referred to therein, and the beneficiaries

do not have the right to become owners of the assets subject to the specific security once a default of the secured obligations arising out of the underlying obligation has occurred. The beneficiaries have the right to be reimbursed from the proceeds of the public auction of the relevant assets and to act as bidders in said public auction themselves. Enforcement by means of set-off or direct application is also permitted if the security is subject to financial collateral rules – ie, Royal Decree Law 5/2005, of 11 March on urgent reforms to boost productivity and improve public procurement ("*reformas urgentes para el impulso de la productividad y para la mejora de la contratación pública*").

2.4 Restrictions and Limitations

Pursuant to Spanish financial assistance rules, publicly held companies ("*Sociedades Anónimas*") are not allowed to advance funds, grant loans, extend or grant guarantees or security interests, or provide any type of financial assistance to a third party for the purchase of its shares or those of its dominant company.

On the other hand, privately held companies ("*Sociedades de Responsabilidad Limitada*") are also prohibited from advancing funds, granting credits or loans, extending or granting guarantees or security or providing financing for the acquisition of a stake in their own company, or the shares of or a stake in a company within the same group.

The standard protection (especially for cross-border transactions) which is implemented for the purposes of mitigating the risk of financial assistance is to include guarantee limitation wording regarding unlawful financial assistance in the facilities agreement as well as in Spanish security documents. This inclusion is market standard and is generally accepted by all parties in this type of transaction. Notwithstanding the foregoing, prior case-by-case analysis is required in order to provide comfort to the finance parties on the legality, validity and enforceability of such guarantees and/or security interests.

Furthermore, Spanish rules on corporate benefit must also be taken into consideration when providing upstream guarantees. Although there is no express regulation under Spanish law addressing corporate benefit in the context of intragroup guarantees, recent Spanish case law has clawed back certain security interests granted by a subsidiary to secure a loan obtained by the parent company due to the subsidiary not receiving direct corporate benefit from such loan.

The standard protection is to expressly approve the granting of upstream guarantees at share-holder and board of directors level. It is also intended to include corporate benefit protection language in such corporate resolutions, contextualising the granting of the guarantees and justifying the creation of cash guarantees on the group's overall profit.

In any event, it should be noted that protective wordings on corporate benefit are not 'bullet-proof' protections and they do not eradicate claw-back risks or the risk of actions against directors.

Moreover, for tax periods commencing on or after 1 January 2012, Royal Decree Law 12/2012 of 30 March 2012 introduced a general limitation on the deduction of borrowing costs. This regime replaced the thin-capitalisation rules applicable before that date.

According to Article 16 of the Spanish Corporate Income Tax Law (CIT), interest deduction on debt is capped (whether granted by third or related parties) as follows:

- registered net financial expenses are only tax deductible up to 30% of the taxpayers' tax EBITDA or EUR1 million, whichever is greater. For entities taxed under the tax grouping regime, the above-mentioned limit shall apply to the tax group as a whole;
- non-deducted interest expenses in excess of the 30% limit can be carried forward indefinitely – carried-forward interest expenses would therefore be added to the fiscal year's financial expenses and the 30% limit would apply to the total;
- in the event that the net financial expenses for the fiscal year do not exceed the limit provided above in a given period, the positive difference between the 30% EBITDA limit and the effective net financial expenses deducted in that period can be added to the general 30% EBITDA limit for the immediately following five fiscal years.

This limitation does not apply to insurance and reinsurance companies, investment services companies, collective investment companies, managers of collective investment vehicles, of pension funds or of securitisation services, private equity firms, etc.

A specific limit is introduced for financial expenses generated from debts incurred to acquire interests in the capital or equity of any type of company. These expenses are deductible, subject to an additional limit of 30% of the acquirer's operating profits, excluding the operating profits of any company that may merge with the acquirer or that may join its tax group during the four years following the acquisition (besides this specific limit, the general limit on tax deductibility will also apply to these financial expenses).

This specific limit is not applicable when the debt associated with the acquisition of the interest reaches a maximum of 70% and is reduced, as of the time of the acquisition, by at least the proportional part corresponding to each of the following years until a level equal to 30% of the acquisition price is reached.

2.5 Lender Liability

Regarding acquisition/leveraged finance transactions, lender liabilities issues should normally be considered under Spanish law, inter alia, in three scenarios:

- in light of financial assistance provisions, as breaching these provisions could imply that the corresponding transaction, along with its security interest, is considered null (notwithstanding the imposition of certain financial penalties);
- the failure of the lender to fund its participation in the financing, involving damages to the borrower; and/or
- in light of certain insolvency 'shadow director' provisions (whereby, inter alia, the lenders' credit rights may be subordinated within the borrower's insolvency proceedings if it is evidenced that the lender acted as a 'shadow director' of the insolvent debtor – eg, carrying out the duties of the legal directors in a "consistent and systematic" manner, and not on an isolated and standalone basis).

2.6 Debt Purchase Transactions and Debt Trading

Debt purchase transactions

The debt purchase transactions carried out by the borrower or the sponsors are not generally subject to a special set of rules under Spanish law (other than the ones applicable to debt purchase transactions in general).

However, it is standard that the relevant facilities agreement and/or other finance documents by virtue of which the acquisition/leveraged finance transaction is documented (such as the relevant intercreditor agreement) may:

- contractually limit such possibility (either directly or by including pari passu payment provisions); or
- establish that the borrower shall not, under any circumstances, have any voting rights in respect of the acquired ticket within the lenders' majority rules as well as establishing subordination provisions regarding such tickets, among others.

Debt trading

Secondary debt trading transactions are common in Spain. Such trading transactions are typically carried out by means of:

- an assignment of the credit rights under the relevant facilities agreement (either by means of a 'true sale' or by means of a silent/sub-participation); or
- the transfer of the contractual position of the lender under the relevant finance documents (thus assuming all the rights and obligations of the lender of record).

However, it must be noted that there are certain restrictions under Spanish law which may impact debt trading transactions (such as, for example, certain limitations on the beneficiary of certain Spanish security interests – inter alia, regarding floating mortgages and/or security granted pursuant to the regime set forth in Royal Decree 5/2005, which implements the Financial Collateral Directive in Spain – which may limit the right of the purchaser to become the beneficiary of such security interests).

2.7 Certain Funds Concept

Key representations often include a cross-reference to the following standard representations (contained in standard Spanish LMA based documentation) in respect of any restricted holding companies or any borrower: (i) incorporation; (ii) power, authority, consents and filings, (iii) holding companies; and (iv) validity and admissibility in evidence.

Moreover, some of the most relevant undertakings which the certain funds concept refer to are typically the following (also contained in standard Spanish LMA-based documentation): (i) disposals; (ii) negative pledges; (iii) indebtedness; and (iv) guarantees – all of them, again, in respect of any restricted holding company or any borrower.

Furthermore, the list of major events of default which are normally linked to the certain funds concept usually includes:

- payment defaults;
- invalidity and unlawfulness of standard events of default clauses;
- clauses referring to insolvency and insolvency proceedings; and
- repudiation and rescission in the event of default clauses, again in respect of any restricted holding company or any borrower.

Finally, it is also standard to link the certain funds provision to the effectiveness of the acquisition of the target by bidco pursuant to the relevant acquisition documents after complying with the relevant conditions precedent in connection with such acquisition (such as, without limitation, obtaining the relevant governmental approvals, if applicable).

2.8 Financial Restructuring

Significant financial restructurings

Some examples of significant financial restructuring transactions that have been conducted recently include: the refinancing of the indebtedness of the special purpose vehicles holding a controlling stake in FCC in the context of the investment process carried out by Mr Slim and the Koplowitz family, and the subsequent takeover bid launched by Mr Slim's special purpose vehicles over the shares in FCC; the refinancing/restructuring transactions of the financial indebtedness of Abengoa, Inmobiliaria Colonial, Isolux-Corsán, URO Property Holding (the SPV owning the office branches of Banco Santander); and those regarding certain concessionaires of Spanish toll roads.

Main challenges for a successful financial restructuring
The (often opposed, even among lenders) set of rights and obligations of each of the parties involved in the financial restructuring transaction (where normally closing in time is of the essence) entail that insolvency homologation (official approval) and required majority provisions often represent a challenge in many restructuring transactions.

Having said this, from a purely legal perspective, being able to do the following is key in order to correctly structure and streamline the process and provide comfort to the parties involved in the deal:

- understand the way each kind of financial indebtedness (inter alia, secured or unsecured, short or long-term, performing or non-performing, etc) may be treated (from a legal perspective) within the financial restructuring transaction;
- identify the correct and proportionate lender protection measures which are advisable (in some cases, taking into account those available under the Spanish Insolvency Act, especially under Article 71bis and DA4 of the Spanish Insolvency Act) for a specific transaction (as well as taking into account any shadow director risks); and
- advise on the correct legal requirements for such financial restructuring transaction to be fully effective vis-à-vis third parties (even, in some cases, vis-à-vis the dissenting creditors of the credit pool) and document the restructuring transaction in a way which is fully compliant with the relevant insolvency provisions (if applicable).

2.9 Reform

To the best of our knowledge, there are currently no pending reforms that could have a material impact on acquisition and leveraged finance transactions in Spain.

However, in recent years, discussions have been held regarding a new Spanish Commercial Code which could potentially affect, directly or indirectly, these kinds of finance transactions; for instance, at some point, a draft was issued which amended the requirements for a report issued by an independent expert on merger transactions that could be affected by the financial assistance rules and which could eventually impact the way leverage finance deals are structured as per Article 35 of Act 3/2009 on structural amendments of commercial legal persons.

3. Securitised Debt

3.1 General

Laws and regulations
There are multiple Spanish laws that apply to securitisation transactions (including Act 2/1981, dated 25 March – *Ley 2/1981, de 25 de marzo, de regulación del mercado hipotecario*; Act 19/1992, dated 7 July – *Ley 19/1992, de 7 de julio, sobre Régimen de Sociedades y Fondos de Inversión Inmobiliaria y sobre Fondos de Titulización Hipotecaria*; or Act 5/2015, dated 27 April – *Ley 5/2015, de 27 de abril, de fomento de la financiación empresarial*). Such laws and regulations govern and, in the case of Act 5/2015, aim to unify the applicable rules governing securitisation transactions (in a way which is compliant with the relevant European regulation) and to strengthen transparency and investor protection in our market.

Real estate securitisation transactions may also be governed, inter alia, by Act 2/1981, dated 25 March, on the mortgage market, and the set of rules and regulations (such as the Spanish Royal Decree 716/2009, dated 24 April) which develop the aforementioned act may also be applicable.

Furthermore, Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 will apply to securitisation transactions under which securities are issued on or after 1 January 2019 and contains new transparency obligations and direct risk-retention rules for assignees, and due diligence obligations for institutional investors; among other amendments, it bans resecuritisation (with exceptions).

Moreover, Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 may also be applicable when referring to credit institutions and investment firms.

Assets/receivables
In Spain, almost all kinds of assets and/or receivables may be involved in securitisation transactions. In our experience, the most common type of asset/credit rights involved in these kinds of securitisation transactions are mortgage-backed loans.

The securitisation market in Spain is active both in performing debt and in non-performing debt although, in our experience, non-performing or distressed debt has predominated in the last couple of years.

Risk-retention requirements
As from 1 January 2019, Article 6 of Regulation (EU) 2017/2402 of the European Parliament and of the Council shall apply, providing a standardised set of risk-retention rules in this regard.

Other rules may also play a key role regarding risk-retention requirements for originators in Spanish transactions – such as: (i) the recent European Banking Authority (EBA) final draft of the regulatory technical standards specifying the requirements for originators, sponsors and original lenders relating to risk retention pursuant to Article 6(7) of Regulation (EU) 2017/2402; and/or (ii) Regulation (EU) 575/2013 of the European Parliament and of the Council of 26 June

2013 on prudential requirements for credit institutions and investment firms (CRR).

3.2 Asset Transfer

Transfers of receivables

Transfers of receivables through securitised debt transactions are documented in writing and are usually structured as an assignment of credit rights and, unless it is otherwise stated in the relevant underlying agreement whose credit rights are being assigned, they do not require either the consent of the underlying debtor or a notice sent to such underlying debtor (although this step is customary, as set forth in the following section).

Although granting such transfer agreements in a notarised public document is not generally required (as explained i the following paragraph), in order to provide evidence regarding the date of the transfer (which is required for the transfer to be fully effective vis-à-vis third parties and be considered as a true sale for insolvency protection reasons), it is customary for these kind of transactions to be formalised in a notarised public deed.

Moreover, and depending on the underlying security interests granted with respect to the transferred credit rights, the transaction may be subject to additional formalities in order to allow the purchaser to benefit from such security (such as documenting the transfer in a document notarised by a notary public or filing the transfer for registration).

Notwithstanding the above, there are certain securitisation transactions regarding, for instance, "*participaciones hipotecarias*" (mortgage securities), in accordance with Royal Decree 716/2009), that may require additional formalities and/or limitations in this regard.

Notification of sale/transfer of receivables

Under the Spanish Civil Code, the sale/transfer of receivables is immediately valid from the moment that it is executed, without it being necessary to notify the underlying debtor of such sale/ transfer.

However, underlying debtors are normally notified of any assignment in order to protect the purchaser's rights and obligations to, inter alia: (i) limit the reasons that the underlying debtor may have to challenge the payment to the assignee; and/or (ii) avoid the underlying debtor discharging its debt (inter alia, by paying or by means of set-off) vis-à-vis the original creditor (in the case of a loan, to the lender of record).

Consumer protection legislation

The sale and transfer of receivables may be subject to applicable consumer protection legislation, depending on how the securitisation is structured, the underlying assets and the purchaser of the relevant notes/bonds.

Notwithstanding the above, such rules do not require notification for the assignment to be valid. Moreover, as Spanish case law has recently established, unless otherwise provided in the underlying documentation entered into between the originator and the debtor, it is also not necessary for the assigned consumer-debtor to consent to the assignment of the lender's credit rights under a facility agreement.

However, it is important to note that, according to Article 1535 of the Spanish Civil Code, consumers may have the right of first refusal over disputed credits ("*retracto de créditos litigiosos*").

In this regard, if a disputed credit is assigned, the debtor is entitled to cancel the credit by repaying the assignee the price paid to the assignor under the relevant assignment agreement (together with any due and unpaid interest amounts owed to the assignee since the purchase date and any costs that such party had incurred). The debtor can exercise this right within nine days of the assignee claiming the payment of the credit.

However, according to some legal experts, the right of first refusal over disputed credits would only apply with respect to disputed credits that had been assigned on an individual basis.

Data protection legislation

The Regulation (EU) 2016/679 (GDPR) applies to the sale and transfer of receivables transactions, by means of which the buyer becomes responsible for the data file regarding the receivables that it has bought and shall implement the security measures required for data processing, depending on the nature of the data.

Moreover, under Articles 13 and 14 of the GDPR, the buyer (together with the seller) will inform the holders of the personal data that the person responsible for their personal data has changed, and will provide the following information set out in Article 13 of the GDPR:

- the contact details of the data protection officer, where applicable;
- the purpose of the processing of the personal data, as well as the legal basis for the processing;
- the recipients or the categories of the recipients of the personal data, if any;
- where applicable, the fact that the controller intends to transfer personal data to a third country or an international organisation, and the existence or absence of an adequacy decision by the Commission; and
- the period for which the personal data will be stored or, if it is not possible to provide that information, the criteria used to determine that period.

In addition, the data controller will provide the new data subjects with an address which can be used to exercise their rights of access, rectification, erasure, restriction of processing, data portability, objection, and objection to automated individual decision-making.

Moreover, as established above, there are certain situations in which the transfer of the receivables requires the prior written consent of the counterparty, as agreed upon in the underlying agreement by the parties.

Deferred purchase price
It is not uncommon that a deferred purchase or a price adjustment mechanism is agreed under certain securitisation transactions (inter alia, where no or very limited due diligence has been carried out in relation to the transferred assets).

In these cases, the deferred purchase price is normally calculated as an adjustment of the initial price taking into account, among others, amounts effectively received from the transferred assets (with respect to the initial estimated received amounts) and/or a fee over the recovered amounts (with respect to the initial estimated fees).

'True sale'
One of the main advantages of this kind of transaction is that the sale of receivables for purposes of a securitisation transaction is typically recognised as a 'true sale' in Spain, which tends to protect the purchaser in the event that the underlying debtor is subject to insolvency proceedings (as long as no other third party is in a better position to claim its rights over the assigned receivables – inter alia, if they were previously transferred by any means to such third party).

3.3 Issuance Vehicle

Structures involving issuances via an SPV/trust
It is standard in our jurisdiction for these transactions to involve an SPV or a securitisation fund or trust ("*fondos de titulización*") in order to isolate risks (bankruptcy remoteness) and to constrain any upstream liabilities.

Securitisation structures involving SPVs are also permitted under the applicable European legislation and SPVs are normally involved in this kind of transaction until the corresponding securitisation fund is finally incorporated and the receivables (or the corresponding asset) are then assigned to it.

Regarding SPVs, a 5% risk may be retained by an entity that purchases a third party's exposures of its own accord and then proceeds to securitise such exposure. Therefore, as a general rule, a non-credit entity may be considered an originator (pursuant to Article 2.3(b) of Regulation 2017/2402). Notwithstanding the foregoing, there are certain limitations included in Regulation 2017/2402 regarding the use of SPVs as originators (specifically, SPVs that have been recently incorporated for the sole purpose of securitising exposures).

In this sense, depending on the assets subject to the transaction, there are cases in which the SPV is considered a professional investor in order to be allowed to operate in a securitisation transaction (for instance, mortgage transmission certificates – "*certificados de transmission hipotecaria*" – shall only be transferred to qualified investors, in accordance with the thresholds established under the Market Financial Instruments Directive II (MiFID II) or any other applicable legislation). In this case, the regulator may consider (on a case-by-case basis) whether an entity is a qualified investor or not, taking into consideration, inter alia, whether it belongs to a corporate group.

Moreover (and among other limitations affecting other securitisation transactions), mortgage bonds ("*cédulas hipotecaria* s") or mortgage securities ("*participaciones hipotecarias*") require the issuer to be a credit institution.

Minimum capitalisation requirements for an SPV
Securitisation funds have no minimum capital requirements themselves but the companies managing them must have a minimum capital of EUR1 million (which may be increased in certain scenarios in which the volume of managed assets exceeds EUR250 million).

In any case, where the securitisation transactions require the involvement of credit institutions (inter alia, regarding "*cédulas hipotecarias*" or "*participaciones hipotecarias*"), such credit institutions must have the minimum capital requirements set forth by the applicable laws and regulations.

Required/desirable aspects of the SPV
As a general rule, the required or desirable aspects of the SPV would depend on the securitisation transaction at hand. However, and although these aspects would not differ materially from those affecting SPVs in other jurisdictions involved in similar deals, it is important to remember that many (if not most) of the SPVs involved in certain Spanish securitisation transactions are normally incorporated abroad.

In any case, as stated above, a case-by-case analysis should be carried out when, inter alia, the SPV must be considered a professional investor in order to be allowed to operate in the relevant securitisation transaction (for example, regarding "*participaciones hipotecarias*").

Multi-issuance vehicles/compartment companies
The assets of the securitisation funds may (where provided for in the by-laws) be divided into separate compartments out of which securities (or bonds) of different classes may be issued and may be liquidated separately.

The portion of the securitisation fund's assets allocated to each compartment shall be exclusively responsible for the costs, expenses and obligations expressly allocated to that compartment and for the costs, expenses and obligations that have not been expressly allocated to a compartment in the proportion laid down in the incorporation deed of the fund. Creditors of a specific compartment may only enforce their claims against the assets of that specific compartment.

Consolidation of assets of SPV with those of the originator

In general, the assets of the SPV may not usually be consolidated with those of the originator (with the exception included in Article 6(4) of Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 for certain entities).

3.4 Bankruptcy Remoteness

It is customary to incorporate an SPV or a fund ("*fondo de titulización*") as a bankruptcy-remote entity in order to mitigate the risk that an insolvency of the originator could legally affect the transferred assets.

In claw-back actions, there is substantial risk that any sale and transfer of assets may be reversed, avoided or otherwise set aside in an insolvency of the originator. According to the Spanish Insolvency Act, any act or agreement reached during the two years before the date of the debtor's declaration of insolvency may be subject to claw-back if it is considered 'detrimental' to the debtor's assets (which requires a case-by-case analysis, as this does not apply exclusively to securitisation transactions). However, it must be noted that when the securitisation transaction is made via a securitisation fund, the general rule set forth above shall not apply and, therefore, the transaction can only be rescinded when made fraudulently (which is a legal incentive to use this kind of vehicle).

3.5 Reform

The most important reform currently being discussed in our jurisdiction refers to a proposal (currently under public consultation) to amend the current Spanish rules and regulations on this topic, mainly to adjust such local regime to fit Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017, which will apply as from 1 January 2019.

4. Other Asset-based Lending

4.1 Factoring

Factoring transaction laws

Under Spanish law, there are no laws or regulations that specifically govern factoring transactions, but all transactions involving the transfer and sale of assets must comply with the general provisions established, inter alia, in the Spanish Commercial Code and Civil Code for the transfer of receivables.

Main features of factoring transactions

Notwithstanding the fact that the specific terms and conditions regarding factoring transactions may vary from one transaction to another (as this will eventually depend on the agreement reached by the parties), the main features of said factoring agreements are the following.

- Factoring agreements without recourse involve assigning a company's receivables against its debtors without recourse against the assignor of said receivables, even if the debtor fails to pay – ie, the 'factor' (the assignee) assumes the risk of insolvency of the debtor. It is important to note that, according to Spanish law, if not stated under the relevant factoring agreement (which would be very unlikely), any assignment and/or factoring agreement shall be understood to be entered into on a non-recourse basis. Therefore, standard protection clauses for lenders who enter into this kind of transaction include:
  - (a) representations and warranties on the existence, legality, due dates and enforceability of the underlying transferred credit rights and on the validity of the transfer (and that these are not subject to any potential set-off, counterclaim, retention, security or charge);
  - (b) representations on the existence of the services or assets to which the relevant credit rights refer (excluding any which are subject to any litigation procedure, conditional sales or regarding which the credit rights have been deposited or consigned);
  - (c) the agreement of the underlying debtor prior to the assignment or transfer of any credit right; and
  - (d) the existence of a credit insurance policy covering such credit rights.
- Regarding recourse factoring agreements, such assignment is made on a "pro solvendo" basis (ie, if the debtor does not satisfy the assigned credit rights under the underlying receivables, the assignee shall have the right to claim such amounts from the assignor).
- In advance factoring agreements, the assignee pays a certain percentage of the transferred receivables to the assignor in advance (ie, prior to the date upon which the receivables are due).
- In maturity factoring (or collection factoring) agreements, the assignment price (ie, the nominal value of the receivable minus the relevant discount) is paid by the

assignee on the maturity date of the relevant transferred receivable or following such maturity date.

Transfer of receivables legalities
As mentioned above, unless the agreements containing the terms and conditions of the transferred receivables state otherwise (normally this risk is mitigated by conducting a brief due diligence and including the relevant representation inside the factoring agreement), the factoring agreement only needs to be formalised in writing and correctly identify the relevant receivables subject to transfer.

Giving the factoring agreement public status by means of a public deed is only required when the receivables are secured by real estate mortgages (which is uncommon in this kind of transaction) but it may be necessary (and is standard in the market) to have access to executive enforcement proceedings in order to provide proof of the date of the transfer during the insolvency proceedings of the underlying debtor or the assignor, as the case may be.

Notification to the underlying creditors
Although notification (as set forth above) is not legally required for the validity of the assignment/transfer, it is customary that the underlying debtor is notified of the assignment, inter alia (please refer to **3.2 Asset Transfer**, above), to avoid the possibility of said underlying debtor discharging its debt vis-à-vis the assignor.

'True sale'
As a general rule, the sale of receivables for purposes of a factoring transaction is typically recognised as a 'true sale' under Spanish law.

According to some scholars, a transfer made under a factoring agreement may not be considered a 'true sale' in certain situations where the lender does not advance funds, does not assume the risk of the receivables and is used only to collect the receivables on their due date.

Pending reform
While there is not any pending reform that may particularly impact factoring transactions, a new draft bill for the Spanish Commercial Code is currently being negotiated. Unfortunately, the status of such draft is currently uncertain.

Moreover, a proposal for a regulation of the European Parliament and of the Council on the applicable law for enforcement vis-à-vis third parties regarding the assignment of claims is currently being negotiated (which may impact these transactions from an inter-national private law perspective).

4.2 Covered Bonds

Specific legislation for statutory covered bonds
Apart from the relevant applicable legislation mentioned above in Section **3 Securitised Debt** (and, especially, in terms of exclusively Spanish laws, Act 2/1981, dated 25 March and Royal Decree 716/2009, dated 24 April), the most relevant legislation, rules and guidelines specifically regarding statutory covered bonds are: (i) Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as it relates to depositary functions, remuneration policies and sanctions; (ii) Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms (CRR); and (iii) the European Banking Authority Guidelines of 1 July 2014.

Also, it is important to note that when dealing with covered bonds, the Bank Recovery and Resolution Directive and the European Market Infrastructure Regulation may be applicable.

Issuances of contractual (structured) covered bonds
Issuances of contractual (structured) covered bonds are uncommon in Spain.

Types of assets/loans in the cover pool
According to EMF-ECBC sources, the most typical asset in the cover pool is mortgage-secured debt. Other typical underlying assets/loans may comprise public debt and ship/aircraft loans.

Investors' recourse to the cover pool
As established in the UCITS Directive, bondholders must have a priority claim on the cover asset pool in case of default by the issuer. This priority claim is limited to the complete fulfilment of the payment obligations attached to the covered bond.

However, and in those situations where the cover pool is insufficient to completely fulfil the payment obligations attached to the covered bond, the investor should be granted a claim on the covered bond issuer's insolvency estate, which ranks pari passu with, but not senior to, the claims of the issuer's unsecured creditors.

Lastly, regarding the collateralisation of covered bonds (governed by Article 2(17.1) of Act 41/2007 and Article 129 of the CRR,) credit institutions cannot securitise nor include mortgages with a loan-to-value ratio higher than 80% in the cover pool of covered bonds. Furthermore, the present value of the mortgage covered bonds must be at least 2% lower than the present value of the affected mortgage loans and credits.

On the other hand, for "*cedulas hipotecarias*" the abovementioned regime would affect the eligible assets, but the cover pool would be composed of the total mortgage portfolio.

Required/desirable aspects of the SPV
The aspects of an SPV which is used to insulate the cover pool from the financial risk of the originator would not be materially different from those which affect SPVs in other jurisdictions involved in similar deals. Many (if not most) of the SPVs involved in certain Spanish securitisation transactions are incorporated abroad.

Notwithstanding the above, it is advisable to incorporate a publicly held company ("*Sociedad Anónima*") as they are more flexible and are subject to fewer restrictions that may impact this kind of transaction.

Insolvency law aspects concerning investors' recourse to the cover pool
Bankruptcy regulation provides for special treatment regarding the holders of covered bonds if the issuer becomes insolvent.

In this sense, according to Article 14 of Act 2/1981, dated 25 March, covered bondholders of certain mortgage secured bonds ("*cédulas y bonos hipotecarios*") shall have special privileged claims ("*créditos con privilegio especial*") within the insolvency proceedings.

Furthermore, principal and interest payments under the abovementioned type of covered bonds (issued and pending repayment prior to the insolvency request and up to the amounts so received by the issuer by the underlying debts and/or the underlying assets) shall be treated as credit rights against the insolvency estate ("*créditos contra la masa*") and paid within the insolvency proceedings.

Moreover, this kind of covered bond also benefits from specific judicial stay (moratorium) rules.

Pending reform
Please refer to **3.5 Reform**, above.

4.3 Other Secured Bonds
Bond issuances secured by a pledge of assets by the issuer are not common in Spain.

5. Credit-linked Notes

5.1 Main Structures
The main structure used for Credit Linked Notes (CLN) transactions is an SPV or securitisation scheme.

5.2 Parties Acting as Protection Seller/Issuer/Investors
The institution (typically a credit institution) which wants to sell the CLN (the "CLN seller") sells protection by agreeing to enter into a credit derivative contract – usually, a Credit Default Swap (CDS) – with an entity (the reference entity). Once the CLN seller has sold protection, they can issue the CLN for the investors to buy (the CLN buyer).

In the example above: (i) the protection seller would be the CLN seller; (ii) the protection issuer would be the reference entity; and (iii) the protection buyer or investors would be the CLN buyer. Please note that the CLN buyers are also essentially selling credit protection in the sense that they are buying the CLN and playing the opposite role in the CDS.

5.3 Structures Involving Issuances via an SPV and/or a Trust
SPV and trusts ("*fondos de titulización*") are the most typical structures used when building up a CLN. Typically, CLNs are embedded in structured note programmes so the issuance is similar to a bond. The cash-flows are distributed in the following manner: (i) the investor pays a principal to enter into the note programme; (ii) the issuer pays a fixed or variable coupon to investors.

On the other hand, the reference entity and the issuer may settle the amounts due in accordance with the CDS arrangement which exists between them.

5.4 Reference Portfolios
The type of reference portfolios that the transactions typically include may depend on the purpose of the securitisation. It can be reliant on, among others, the portfolio backing a medium-term note programme, a corporate issuers index, a single corporate issuer or a hedging operation in relation to a financial institution high-risk weighted assets portfolio.

5.5 CLN Transactions
As a general rule, CLN transactions do not lower the risk-weighted assets in relation to loans, but they can be taken into account as eligible hedges in the Credit Valuation Adjustment (CVA) calculation as expressed in Article 386 of CRR (EU Regulation 575/2013).

CLN, CDS and Total Return Swaps (TRS) can be taken into account when assessing counterparty risk obligations under CRR and CRD IV legislation. However, only CLN and CDS on a single-name reference entity or an index can be considered as eligible hedges according to Article 386 and therefore taken into account for the CVA calculation.

5.6 Privately Placed or Publicly Offered CLNs
CLNs are made to be publicly negotiated in trading venues. Even though they are made to diversify the credit risk

throughout the market and provide underlying protection, they can be privately negotiated.

5.7 Main Transparency Requirements
In relation to CLN issuances, the originator, the sponsor of the CLN or the issuer (SPV) must disclose some information or make it available to investors. The following are the main documents to be disclosed: (i) information on the underlying exposures on a quarterly basis, (ii) all underlying documentation that is essential for the understanding of the transaction, and (iii) a prospectus.

5.8 Pending Reform
Apart from those mentioned above in **3.5 Reform**, the full transposition of MiFID II in relation to customer protection, the Regulating Technical Standards (RTS) as well as the Implementing Technical Standards (ITS) in relation to securitisation regulation, and the Packaged Retail and Insurance-based Investment Products Regulation (PRIIPS) in relation to packaged and insurance based products, is pending.

Moreover, in addition to EU legislation, financial regulators must implement and develop the new International Financial Reporting Standards, which will oblige financial institutions, who are key players in the CLN market, to implement these reporting and accounting standards.

6. Structured Products – Notes, Warrants and Certificates

6.1 General
Typically, the most used and issued credit structured products in our jurisdiction are secured structured deposits.

Regarding credit structured products, the main active players are credit institutions. On the other hand, regarding equity structured products, the main active players are financial institutions.

6.2 Legal and Regulatory Regime
In relation to the issuance of structured products in Spain, when configured to be negotiated in a trading venue and to be offered to all type of investors, the product must be presented to the Spanish Securities Market Commission (CNMV) with a prospectus and its particular term and conditions. In general, structured products offered to retail clients must also meet the requirements set out in Article 19 (3) of the MiFID II Directive or the suitability and appropriateness obligations. In relation to some structured products, their marketing will also have to comply with the Key Information Document (KID) from the PRIIPS Regulation.

In order to be able to offer or market structured products to retail clients or investment firms, the entity willing to render that service must be authorised by the CNMV for those activities. Furthermore, it must be noted that under Spanish legislation credit institutions may render any financial service (apart from insurance services).

There are no restrictions on the type of structured products being issued and offered in Spain, but competent authorities have product intervention powers, which we have recently seen regarding the ban of Contracts for Difference (CFDs) related to structured products. Moreover, according to Articles 40, 41 and 42 of the Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (MiFIR), the European Securities Markets Authority (ESMA), the European Banking Authority (EBA) and the competent national authorities can intervene in the issuance of structured products. In Spain, the national competent authorities are the CNMV and the Bank of Spain.

6.3 Documentation
The typical documentation for the issuance and offering of structured products depends on the product and on the activity carried out. In relation to the issuance (when required), the main documentation necessary is the prospectus, which will include, among other things:

- a brief presentation of the expected term of the investment (including the legal form);
- the Member State in which it was issued;
- the investment information, including investment objectives and strategy;
- risks and performance;
- financial information, including costs and taxes; and
- commercial information, including how to buy and sell, as well as additional contacts to obtain further information.

Regarding the marketing of the product, as mentioned above, the following may be required: pre-contractual documentation (ie, KID), contractual documentation, information on costs, and any other documentation required under the PRIIPS regulation and MiFID II (which has recently been transposed into Spanish law and whose RTS are due to be implemented shortly).

Notwithstanding the abovementioned, institutions usually rely on a base prospectus that has already been admitted and registered by CNMV when issuing structured products and, therefore, only have to issue the final terms and conditions of the issuance of the structured product.

6.4 Distribution
Distribution agreements are not uncommon in Spain (either on a syndicated or on a non-syndicated basis) and their content is similar to the distribution agreements normally entered into for European deals.

The duties of the distributor in this kind of agreement are based on the applicable European regulation.

It is very common for distributors to be compensated by the issuer for their distribution activities.

6.5 Listing and Trading Distribution

Many structured products in relation to debt are publicly traded on the Association of Intermediaries of Financial Assets (AIAF). The AIAF has its own transparency regulation in order to maintain its status as a regulated market, and promote security with in its borders. The main obligation is to fulfil all CNMV requirements and register the prospectus.

6.6 Prospectus Liability, Regulatory and Criminal Sanctions

The prospectus liability regime is set forth in the Royal Decree 1310/2005, which makes the issuer or the offeror and its directors responsible for the prospectus. In addition to the prospectus liability regime, the sponsor or distributor will also be held liable when the due diligence obligation has not been fully complied with.

The infringement can be considered severe or very severe and will lead to significant financial and nonfinancial penalties, such as:

- financial penalty – a minimum of EUR300,000 for severe infringements, and a maximum of EUR600,000 for very severe infringements;
- suspension or restriction of the type or volume of operations or activities;
- inability to issue in regulated markets, multilateral trading facilities (MTF) or organised trading facilities (OTF) trading venues for at least one year.

6.7 Reform and Trends

National Competent Authorities are currently working on improving our prospectus regulation. They are also proposing content for the full transposition and development of MiFID II and PRIIPS (as mentioned in **5.8 Pending Reform**, above).

7. OTC Derivatives

7.1 Regulatory Restrictions

Buying OTC or entering into OTC derivatives negotiation does not imply a licensing obligation, but rendering any financial services under Annex I, Section A of MiFID II is subject to a licence from the CNMV authorising the activity.

Notwithstanding the above, there are some OTC derivatives that are subject to regulatory development and that are currently limited when offered to retail clients (ie, CFDs).

Under the European Market Infrastructure Regulation (EMIR), OTC derivatives must now be cleared by central counterparties (CCPs).

Specific restrictions have not yet been implemented in relation to entering into OTC derivatives for specific counterparties. Notwithstanding the foregoing, unless they are authorised and licensed to render financial services, entities may enter into OTC negotiation in order to manage their risk but may not market nor act as a direct counterparty (ie, pensions funds, insurance companies).

Finally, regarding certain regulated entities such as banks or insurers, holding certain OTC derivatives may affect their total Risk-Weighted Assets (RWA) and therefore increase their regulatory cost.

7.2 Standardised Master Agreements/Security Agreements

Master Agreements for Financial Transactions (“*Contrato Marco de Operaciones Financieras*” or CMOF) which have been duly adapted to Spanish laws and market practices are common in the Spanish market.

These agreements are typically used, among others, in national hedging transactions (regarding interest rates and/or commodities).

A legal opinion regarding the legality, validity and enforceability of these agreements is customary and both insolvency (inter alia, regarding how such credit rights would be described within the insolvency proceeding) and procedural qualifications (inter alia, regarding the scope of Article 572.2 of the Spanish Civil Procedure Act and the possibility of benefiting from certain enforcement procedures) are normally included (and drafted on a case-by-case basis).

7.3 Netting and Close-out Provisions

Even from a conservative point of view, the close-out netting provisions set forth in the ISDA Master Agreements are normally found to be enforceable in Spain.

The election of automatic early termination is recommended on a case-by-case basis.

Regarding bankruptcy automatic early termination clauses, Article 61 of the Insolvency Law establishes that the declaration opening the insolvency proceedings alone will not affect the validity of contracts with reciprocal obligations pending fulfilment, by either the insolvent debtor or the other party. As a consequence, clauses enabling a party to terminate a contract upon the declaration of insolvency of the other party (or upon the triggering of other events such as the filing for insolvency, the appointment of a receiver, and so forth) may not be upheld by Spanish courts.

There is no standard country opinion on the enforceability of the netting and close-out provisions available – this will ultimately depend on the firm issuing such legal opinion.

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7.4 Stay Acknowledgment

In Spain, there are no specific regulations requiring the inclusion of an acknowledgment of the stay powers of any regulator/governmental body.

The circumstances or events in which the relevant regulator/governmental body may invoke the stay powers are included in Article 44.3 of the Bank Recovery and Resolution Directive 2014/59/EU (BRRD).