Spanish portfolio acquisitions – recent trends, challenges and outlook for the future

Introduction

The general rule under Spanish law is that credit rights are freely transferable. In this context, there are no statutory provisions setting out special requirements for assignees of credit rights such as buyers of loan portfolios. This has been a key element for the development of the Spanish market for secured non-performing loans, which has become one of the largest and most active markets in Europe and a preferred jurisdiction for international investors. As such, the acquisition of most secured loan portfolios in Spain has been structured as a direct sale of credit rights to special purpose vehicles domiciled in different European jurisdictions (also in line with the free movement of capital promoted by the European Union).

Notwithstanding the above, we are recently witnessing certain trends which have somewhat challenged the general principle described above and are starting to test the legal certainty and stability required by investors. In particular, we are referring to the decisions by certain Land Registrars which have denied the registration of the assignment of mortgage loans to European vehicles, arguing that the assignee should have been registered with certain administrative registries and incorporated in Spain.

Before the entry into force of RE Credit Law 5/2019, a few decisions had started to be issued on such terms under an interpretation that an assignee of credit rights should be considered a lender for the purposes of Law 2/2009 and, therefore, subject to the special registration requirements contemplated therein. Nevertheless, to protect the stability of the market, generally a view was taken that the buyer was able to make the relevant Land Registrar rectify, on the basis that a registered servicer had been appointed to manage the loan and arguing also (where applicable) that the relevant loan had been already accelerated.

Unfortunately, following the entry into force of RE Credit Law 5/2019, the Bank of Spain issued a non-binding questionnaire (the "**Q&A**"), establishing that loans subject to such law (ie those secured by mortgages over residential assets where the borrower, the mortgagor or the guarantor is a natural person) must be acquired through companies domiciled in Spain and registered with a special administrative registry. The Q&A also requires that the management body of the buyer complies with certain suitability requirements (verified knowledge and skills, lack of criminal records, among others) regardless of whether a registered servicer has been appointed. As a result of this and in the absence of a clear legal regime, despite the non-binding nature of the Q&A, Land Registrars have been increasingly adopting the guidelines of the Bank of Spain by denying mortgage registration with the Land Registry in favour of buyers not meeting the above requirements (noting that registration with the Land Registry is a perfection requirement to complete the transfer of a Spanish mortgage). The only exception is specific situations where the Land Registries understand that the loan is under foreclosure, where the Land Registries are taking the view that the above requirements do not apply to the buyer. It should be noted however that the argument that the loan has been accelerated is no longer sufficient, and that stricter due diligence requirements apply to meet the test that a loan is in foreclosure.

Impact on the market

The new trend described above is affecting the ordinary course of the market and creating unnecessary uncertainty for investors. For different reasons, it is not reasonable to expect that the traditional special purpose vehicles used in Spanish loan portfolio transactions comply with the requirements set out above.

Having said this, the impact on the market differs depending on the type of transaction.

For primary sales by Spanish credit entities we are witnessing an increased use of mortgage participations (*participaciones hipotecarias*) and/or mortgage transfer certificates (*certificados de transmisión de hipoteca*) (jointly, the "**Spanish Mortgage Securities**") which are pass-through transferable securities traditionally used in Spanish securitisations and which have the effect of transferring to the participant the economic interest in the underlying mortgage loans. In these structures, given that the originator remains as lender of record, it is not necessary to re-register the mortgage in favor of the buyer (and consequently the above registration contraints are less relevant). In this context, from a tax structuring perspective, Spanish selling credit entities are also increasingly requiring that Spanish Mortgage Securities are acquired by investors pursuant to a Spanish securitisation fund (*fondo de titulización*).

In secondary sales between investors and, particularly, in those deals involving performing or re-performing assets, this matter has a greater impact, given that the issuance of Spanish Mortgage Securities is reserved to credit entities. In these cases, investors (and their finance providers as applicable) are having to reinforce their due diligence of the portfolio to assess and quantify the assets at risk and structure the transaction accordingly (eg including sub-participation arrangements which are less optimal). There are certain notary offices and service providers that are taking the lead by offering additional due diligence services for these purposes.

Finally, more SME portfolios are being launched. In principle, these transactions benefit from the fact that the borrowers are not natural persons and consequently not captured by the above-described registration requirements. However, there are certain loan classes in these portfolios which still require a deeper analysis (eg natural persons as guarantors or mortgagors to SME loans).

In general, the market is being pushed towards finding innovative solutions in the structuring and the documentation of loan transactions, often entailing added complexities and deviating from the traditional direct sale acquisition structures generally preferred by international investors and sellers alike.

The transposition of the Directive as a key milestone for unblocking

Directive (EU) 2021/2167 of the European Parliament and of the Council of 24 November 2021 on credit servicers and credit purchasers (the "**Directive**") is one of the measures which the European Union has put forward, as well as the action taken by the European Central Bank (ECB) and by the European Banking Authority, to create the appropriate environment for credit institutions to deal with non-performing loans ("**NPLs**") on their balance sheets and to reduce the risk of future NPL accumulation. Addressing high stocks of NPLs is essential to strengthening the banking union as it is indispensable for ensuring competition in the banking sector, preserving financial stability

and encouraging lending so as to create growth within the Union.

The market expectation (and the hope) is that, in the context of the transposition of the Directive, the Spanish legislator clarifies the requirements to be met by assignees of mortgage loans in a manner consistent with the European principle of free movement of capital and the use of EU acquisition vehicles. In this regard, the majority view in the market is that the transposition law should foresee that the appointment of a regulated servicer is sufficient for the mortgage loans to be registered with the Land Registries in the name of any buyer. As mentioned above, this is a principle that has already been used in the Spanish market and it is very sensible, as it provides certainty for all the parties involved including, notably, the borrowers, who would be protected by the standards applicable to a regulated servicer.

This is also in line with the spirit of the Directive, which puts the regulatory burden on the servicers and not on the credit purchasers.

By way of example, article 17 paragraph 2 states that "*Member States shall ensure that a credit purchaser is not subject to any additional requirements for the purchase of a creditor's rights under a non-performing credit agreement, or of the non-performing credit agreement itself [...]*", whilst according to paragraph 5 "*Member States shall ensure that the appointed credit servicer, [...] complies, on behalf of the credit purchaser, with the obligations imposes on the credit purchaser [...]*"; in addition, in Recital 40, after an acknowledgment that credit purchasers do not grant new credit, it is mentioned that it "*[...] is therefore not justified to require credit purchasers to apply for an authorisation [...]*".

In terms of timing, Member States are required to adopt and publish, by 29 December 2023, the laws, regulations and administrative provisions necessary to comply with the Directive. Having said this, it seems unlikely that Spain will be able to meet this deadline, in view of the current political turmoil. Although a general election date was initially set for December 2023, the poor results of the governing parties in the recent regional and local elections held in May 2023, led to an early dissolution of the parliament and the call for a snap general election on 23 July. Consequently, it cannot be ruled out that the awaited transposition of the Directive slips into next year.

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