

New developments in asset securitization under the Spanish Business Finance Advancement Act

Fernando Herrero Suárez

Senior Associate, Banking And Capital Markets Law Practice, Gómez-Acebo & Pombo

The new Business Finance Advancement Act is an effort by legislators to collect in a single body of law (specifically, Title III of the Act) the rules governing securitization in Spain, which heretofore was scattered throughout several pieces of legislation, differing in force and effect. Thus, this new act of parliament brings together asset securitization funds¹ and mortgage securitization funds², and also regulates synthetic securitisation³ (which is now available to any type of entity, not only credit institutions, insurance undertakings or other licensed entities), expressly repealing all previous legislation.

The main virtue of the new text is that it affords greater flexibility to securitization transactions, allowing parties to define with greater freedom the structure of the same. Below follow some of the main changes:

- *Fund's assets*

The new law still limits securitization to (present and future) receivables despite requests from the industry to extend the permitted use of this instrument to assets of every other kind. However, some prerequisites have been removed, such as uniformity of assets held by a fund, where the lack of legal definition of such uniformity caused difficulties when it came to structuring transactions.

- *Assignment of assets to the fund*

The assignment to the fund need no longer be complete and unconditional or for the whole period left until maturity. Neither is the assignor any longer forbidden from collateralising or securing payments under the transaction, which effectively opens the door in Spain to securitizations with recourse. Nor does the presumption that the assignor retains the administration and management of the assigned receivable apply. The new law also allows assets to be acquired not only by assignment, but also by purchase, whether or not in primary markets, or by any other means permitted in law, giving room, among other things, to the so-called "securitization of liabilities" (e.g., mortgage bonds/debenture or other covered bonds) purchased by funds directly without the interposition of an assignor.

- *Fund's liabilities*

Important restrictions are removed, such as that at least half of the fund's liabilities are made up of securities quoted on an official secondary market and that the securities are rated by a credit rating agency. Moreover, the new law allows (though without clear rules to accompany this provision) securitization funds to collateralise third-party liabilities, which, in combination with

¹ Heretofore regulated in Royal Decree 926/1998.

² Regulation that was contained in Act 19/1992.

³ Concisely regulated under art. 97 of Act 62/2003.

securitizations with recourse, is expected to enable the issue of debt securities by assignors backed by specific assets on their balance sheets, creating covered bonds (such as bonds covered by a mortgage, government-debt or internationalised company-debt) in practice, but without the need for specific rules regulating them and granting first-priority over the relevant portfolio.

The new law also provides for the possibility of funds establishing a meeting of creditors, the shaping of which is left to the fund's incorporating documents, in such a way that the holders of securities issued by the fund and other creditors may defend their legitimate interests.

- *Fund's structure.*

The new law provides a more flexible distinction between open and close funds, although this distinction will probably have scarce effect in practice. More important is the possibility for managers of actively managing the assets incorporated into the fund, in accordance with the terms provided in the fund's incorporating

documents, which will afford much flexibility to securitization structures. The new law also expressly includes the possibility of compartmentalisation within the funds, although this structure has already been accepted despite legislative silence on the matter.

- *Managers*

The new law also includes certain obligations in respect of the managers of securitization funds, in particular the requirement of equity dependent on the value of assets managed. On the other hand, it allows the management of securitization funds or similar vehicles incorporated in other jurisdictions.

In short, the new rules on securitisation have the merit of eliminating various restrictions on the same. As operators have been very imaginative under the earlier rigid legislation, designing many schemes that were not envisaged by the same, interesting transactions and new structures are to be expected under the right market conditions with the latest more flexible legislation.

For further information please visit our website at www.gomezacebo-pombo.com or send us an e-mail to: info@gomezacebo-pombo.com.

Barcelona | Bilbao | Madrid | Valencia | Vigo | Brussels | Lisbon | London | New York