

Recent Amendment to the Insolvency Regime applicable to claims held by Sareb

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This paper intends to briefly describe the amendment to article 36(4)(h) of the Restructuring and Resolution of Credit Institutions Act 9/2012 ("**Act 9/2012**"), introduced by Royal Decree Act 14/2013, passed on 29 November 2013 and published in the Official Journal of Spain on 30 November 2013 (the "**Amendment**").

The prior wording of section 36(4)(h) of Act 9/2012 stated that claims transferred to the Spanish Bad Bank SAREB (*SOCIEDAD DE GESTIÓN DE ACTIVOS PROCEDENTES DE LA REESTRUCTURACIÓN BANCARIA, S.A.*) would not be considered subordinated in the event of debtor insolvency proceedings, even if SAREB was a shareholder of the debtor. Therefore, SAREB was vested with non-subordination privilege applicable to those cases where SAREB had acquired the claim from an insider of the debtor (i.e. a person or entity "specially related to the debtor" according to article 93 of the Spanish Insolvency Act).

However, it was unclear (according to such wording) if the non-subordination privilege would also apply to any institution acquiring claims from SAREB - in other words, if it only protected claims acquired by SAREB from an insider of the debtor when held by SAREB. It was reasonable to assume that the

non-subordination privilege should generally protect the assets of SAREB (including the possibility of selling those claims to third parties as non-subordinated), and this was the interpretation supported by some of the players in the market. But given that it was not fully supported by the letter of the law, the situation had in fact created significant problems over the past months when analysing subordination risks in debt-trade transactions related to SAREB portfolios.

Now the Amendment has introduced an additional paragraph in article 36(4)(h) of Act 9/2012, which expressly states that the non-subordination privilege also applies to transferees or assignees of SAREB. Therefore, in a second transfer, claims (including loans or credit facilities) acquired from SAREB are unaffected by subordination risks arising from the fact that SAREB had initially acquired the claim from an insider of the debtor. However, it is important to point out that the Amendment states that the non-subordination exception will not apply if the assignee of SAREB is considered a party specially related to the debtor according to article 93 of the Spanish Insolvency Act (an insider). Therefore the claims will be regarded as subordinated if the assignee itself can be regarded as an insider of the debtor according to the Spanish Insolvency Act.

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