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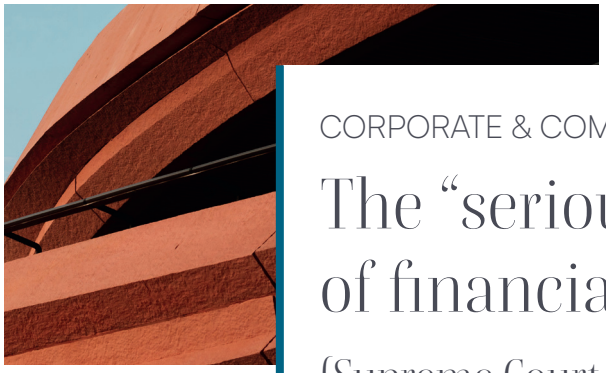

CORPORATE & COMMERCIAL

The "serious risk" of financial assistance

(Supreme Court (First Chamber) Judgment of 5 May 2026)

This paper critically analyses the Supreme Court ruling of 5 May 2026, which applies the prohibition on financial assistance to a case involving the sale of treasury shares with deferred payment to the shareholders of the assisting company.

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June 2026

1. The case

The facts referred to in the judgment in question can be summarised as follows:

1.st) The company Aura begins acquiring small blocks of shares in its competitor Active until it comes to control 31.39% of the share capital. In the latest acquisitions, the price paid reaches 14 euros per share.

2.nd) The Board of Directors of Active (an insurer) characterises this conduct as a "hostile takeover" and attempts to prevent Aura from gaining control of the company. To that end, it decides to call a general meeting to make an offer to all of the company's shareholders for the acquisition by them of the company's treasury shares (17.95%) in proportion to their shareholding, with a second round also directed at shareholders for shares not acquired in the first round.

3.rd) The price is set at 5 euros per share, half paid in cash and the other half payable within one year without providing collateral or charging interest.

4.th) A general meeting of shareholders is convened for this purpose, where the resolution to sell the treasury shares on the terms proposed by the Board of Directors is passed by majority vote, even though, during the meeting itself, both Aura and other dissenting shareholders offered to pay 14 euros per share.

5.th) Aura contests the general meeting resolution on the grounds that the deferral of payment of the price in the sale of treasury shares constitutes a violation of the prohibition on financial assistance (Art. 150(1) of the Companies Act [LSC]) and because the resolution is detrimental to the best interest of the group of shareholders that controls the company.

2. Court ruling

2.1. *The lower court rulings*

The Business Court upholds the claim and declares invalid the resolution on the grounds that it was prejudicial to the company's interests, but does not uphold the claim of a violation of the statutory prohibition on financial assistance for three reasons: *a*) the offer was not directed at certain shareholders, but at all of them; *b*) the deferral of payment of the price in the sale of treasury shares is not equivalent to the granting of a loan, credit facility, or other acts of financial assistance, and *c*) a shareholder cannot, under any circumstances, be considered a third party for the purposes of Article 150(1) LSC.

The Valencia Provincial Court (Ninth Chamber) Judgment of 8 November 2022 reversed the judgment of the court of first instance and rejected the action contesting the company resolution on the grounds that *a*) there was no detriment to the company's interests; *b*) the resolution benefited all shareholders equally, and *c*) "the shareholders of a company are not considered 'third parties' with respect to it (the company), and furthermore, the subject matter requirement of the provision does not apply in this case".

The 'cassation' appeal to the Supreme Court was based exclusively on the appellant's contention that the Provincial Court's judgment had violated Article 150(1) LSC (prohibition on financial assistance).

The first ground was based on the fact that deferring payment of the purchase price in the sale of treasury shares constitutes prohibited financial assistance for the acquisition of the company's own shares, since from a financial standpoint it involves assuming a risk of default, exactly as when a loan is made.

The second ground argued that, for the purposes of applying Article 150 LSC, shareholders, if they acquire shares in the company, are also third parties, contrary to the findings of the appealed judgment.

2.2. *Supreme Court case law*

The Supreme Court disagrees with the lower courts but ultimately rejects the appeal and, therefore, affirms the decision that dismissed the contest to the resolution through a teleological interpretation of the provision governing the prohibition on financial assistance, which is summarised in the following paragraph:

> ...the equity-holding and governance risks that the prohibition on financial assistance seeks to avert are not significantly affected, as it does not seriously jeopardize the company's financial stability and solvency or negatively impact minority shareholders.

The arguments of the judgment are analysed below.

2.2.1. Shareholders are indeed third parties (Arts. 150(1) and 149(2) [LSC])

The Supreme Court rejects the idea that shareholders cannot be considered *third parties* for the purposes of applying the rules on the prohibition of financial assistance:

> ... for the purposes of the prohibition on financial assistance, shareholders are third parties, as they have a legal personality distinct from that of the company itself. The reference to "third party" contained in Article 150(1) LSC includes any person other than the company, including those who are already shareholders. We have held this in judgments 541/2018, of 1 October, and 582/2023, of 20 April.

The legal reasoning of the judgment is correct, and it is difficult to understand why the lower courts viewed the matter differently. The prohibition on financial assistance applies not only to purchases made by third parties who become shareholders but also to acquisitions made by those who are already shareholders of the company.

A separate issue is whether the prohibition on financial assistance should apply to the sale of treasury shares by the company, especially when the purchasers are the shareholders themselves.

2.2.2. Deferral of payment of the purchase price constitutes financing

Similarly, the court agrees with the appellant that deferring payment of the purchase price constitutes a financing arrangement which, in this case (sale of treasury shares), is integral to the sale itself:

> The transaction exhibits the characteristics of a financial assistance transaction: the company has extended credit to all its shareholders by allowing them to acquire treasury shares while deferring payment of half the price for one year, without requiring collateral and without charging interest.

The ruling then addresses an argument that was likely raised by the defendant company in its response to the 'cassation' appeal. This argument asserts that the rules governing the prohibition on financial assistance presuppose the existence of two distinct legal transactions: the company may not provide financial assistance (the financing transaction) "for" the acquisition, under any title, of its own shares (the sale transaction). In the case at issue, there are not two legal transactions, but only one: the sale with deferred payment.

The Supreme Court also rejects this argument:

> For financial assistance to exist, it is not necessary, as the respondent claims, for there to be two distinct legal transactions; it is sufficient that the legal transaction (in this case, the sale with deferred payment) involves the granting of credit by the company for the acquisition of its own shares.
>
> Nor is the argument upheld in the lower court judgments correct that the objective requirement of the provision is not met, since the saving clause of the prohibition contained in the provision ("nor provide any type of financial assistance") includes cases such as a deferred-payment sale without collateral or interest accrual, as was the case in Judgment 541/2018, of 1 October, and we so declared in Judgment

582/2023, of 20 April, which we have partially transcribed.

The underlying legal doctrine is clear: financing the sale of treasury shares through deferred payment constitutes financing for the acquisition of treasury shares and is prohibited. Whether this doctrine aligns with a systematic interpretation of the regulations on treasury shares and financial assistance is another matter.

2.2.3. The "serious risk" to financial stability and solvency

Although it considers that the deferred-payment sale of treasury shares is prohibited by Article 150(1) LSC, the Supreme Court ultimately rejects the contest to the resolution based on the following arguments set out in subpoint 4 of the second point of law:

a) Because a declaration of invalidity is not always required: the invalidity of the financial assistance transaction is not provided for by law, but rather derives from Article 6(3) of the Civil Code (violation of a prohibitive provision) and is not "appropriate" for all cases of financial assistance (citing the Judgment of the Supreme Court, First Chamber, of 6 February 2025).

b) Because there is no financial risk: the terms of the credit were not particularly onerous; therefore, the impact on solvency "was not serious" (deferral of half the price for one year), and the assets did not suffer any significant harm (the price was "reasonable," ownership of the shares was replaced by a cash payment of half their value and credit for an amount equivalent to the remaining half).

c) Because the sale of treasury shares must not be hindered: the legal system views the treasury shares situation with "suspicion," and the resolution allowed for "ending" the treasury shares situation on "equitable" terms, while respecting the principle of equal treatment (all shareholders, including the appellant, were able to acquire the treasury shares in proportion to their share of the share capital).

d) Based on a teleological interpretation: the court considers that, in a teleological interpretation of Article 150(2) LSC,

the financing should not be declared invalid because the transaction involved a "minimal impact on the company's assets" and pursued "legitimate objectives" (preventing a takeover by a competitor), such that "the equity-holding and governance risks that the prohibition on financial assistance seeks to avert are not significantly affected, as it does not seriously jeopardize the company's financial stability and solvency or negatively impact minority shareholders".

3. Commentary

a) This is the first time the Supreme Court has ruled out the application of the prohibition on financial assistance because it does not perceive a "serious risk" to the company's financial stability or solvency. This is an argument that cannot be generalized because the existence of risk is not provided for by law and cannot be introduced through an interpretation of the rule.

b) The precedent set by the 6 February 2025 judgment is not valid because the mortgage in that judgment was not granted to finance the acquisition of shares, but rather to purchase land. The fact that the company used the funds obtained from the mortgage loan for a prohibited purpose is not sufficient (logically) to invalidate the financing provided by a third party acting in good faith.

c) The ruling is substantively correct (the resolution was not unlawful), but the reasoning is not sound in this case. The technical problem lies in the (complex) relationship between the treasury shares regime and the financial assistance regime, which is a matter of systematic interpretation. The reasoning is provided by the judgment itself when it states the following:

> ... when the parent company provides financial assistance to a subsidiary so that the latter may acquire shares of the parent company, or conversely, when the subsidiary provides financial assistance to the parent company so that the latter may acquire its own shares, the prohibition on financial assistance does not apply, and the legality of the transaction must be assessed in accordance with the rules governing the acquisition of treasury shares.

Understanding the relationship between the rules on treasury shares and those on financial assistance is not straightforward. When the law permits the acquisition of treasury shares, it also permits incurring debt to make such an acquisition possible. The same applies to the sale of treasury shares: the legality of the transaction must be assessed in accordance with the rules governing the disposal of treasury shares (Arts. 139(1), 141,

145, and 147 LSC). Treasury shares must be disposed of under reasonable market conditions to avoid harming the company and, ultimately, its creditors. If offered to shareholders, the principle of equal treatment must be respected.

d) Resorting to a "teleological" interpretation of a provision is only appropriate when the terms of the law are unclear, and here there is no need for interpretation whatsoever: financial assistance cannot be provided for the acquisition of the company's own shares or those of the parent company. The point is that it makes no sense to apply the prohibition on financial assistance to the sale of treasury shares because, just as its acquisition is permitted, its disposal must be facilitated; otherwise, a systematic contradiction arises. What is appropriate is to make a teleological reduction of the scope of application of the rule (Articles 150(1) and 149(2) LSC): its literal wording is excessive and should not apply to the sale of treasury shares.

e) Caution is warranted regarding the scope of this ruling. The Supreme Court has not relaxed the prohibition on financial assistance nor has it introduced any additional requirement for analysing the prohibition (the "serious risk") in general terms. This ruling refers exclusively to the sale of treasury shares with deferred payment of the purchase price, and its practical outcome will be that the sale must be conducted in a manner that is "equitable" to the company (market conditions) and to the shareholders (equal treatment), which is correct. That said, it is clear that the court of last resort has not been aware of the number of "legal opinions" that will be issued based on this idea of requiring, as a prerequisite for applying the prohibition, the existence of a "serious risk" to the solvency and assets of the assisting company—a requirement that is not implied by the literal wording of the provision and that is contrary to the regulatory approach of Spanish law. And this should have been considered.