

The prohibition of financial assistance cannot be *instrumentalized*

Madrid, April 2025

The facts of the Supreme Court (SC) judgment¹ commented on this note are as follows: (i) the shareholders of Eurohouse purchased all the shares in Hotel El Hórreo, (ii) three months later Eurohouse took out a bank loan to purchase some properties of Hotel El Hórreo that were mortgaged as security, (iii) however, Eurohouse did not use the borrowed funds for that purpose but on-lent them to its shareholders for them to pay for Hotel El Hórreo's shares and (iv) Eurohouse failed to repay the loan.

Hotel El Hórreo sued SAREB², which had acquired the lender's claim, seeking a declaration of nullity of the mortgage because of an alleged infringement of the prohibition of financial assistance set out in the Spanish Companies Act (SCA)³.

The claim was dismissed by a court of first instance and by the Court of Appeal of Madrid (CAM) on the grounds that, even though the prohibition of financial assistance had been breached, (i) the nullity of the mortgage would necessarily entail that of the loan, since both agreements are "inseparable", but the claimant had not sought the nullity of the loan, and (ii) there was estoppel, as both the claimant and its new shareholders were involved in the transaction.

Eurohouse appealed the CAM's judgment before the SC. It argued that, according to settled case-law, (i) while a mortgage is ancillary to the loan it secures and thus cannot exist without it, a loan can still be valid despite the nullity of its mortgage, and (ii) the principle of estoppel is not applicable to cases of absolute nullity, as is the case with illegal financial assistance.

The SC dismissed the appeal after noting that the transaction at issue had "very special features", as the mortgage was indeed financial assistance, but only because the loan was not used to buy assets, as promised to the lender, but to buy shares in the company that had granted the mortgage.

The SC found that the nullity of the mortgage would not be an "appropriate" outcome in the case at hand because the claim was abusive, as such nullity would "benefit" those who "knew the unlawfulness of their actions" (the new shareholders of the mortgagor) and "harm" the one that "was unaware of the unlawful purpose of the transaction" (the lender). The SC added that the prohibition of financial assistance cannot be "instrumentalized" in such a way.

¹ Judgment 190/2025 of 6 February 2025.

² A State-owned company incorporated in 2012 to acquire the impaired assets of certain financial entities.

³ According to articles 143.2 and 150.1 of the SCA, a company cannot advance funds, grant loans or guarantees or provide any kind of financial assistance for the acquisition of its own shares or the shares in any company belonging to its group.