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Gómez-Acebo & Pombo

The concept of financial institutions in maximum-amount mortgages and the anachronism of the Spanish legislator

Reyes Palá Laguna
Chair Professor of Corporate & Commercial Law, Universidad de Zaragoza
Academic Counsel, GA_P

Article 153 bis *of the Land Registration Act restricts the granting of maximum-amount mortgages to credit institutions and financial credit establishments. Subsequent legislation allows other financial institutions to engage in these transactions.*

In 2007, the Land Registration Act ('LH') was amended to include, among other things, a new Article 153 *bis* relating to the maximum-amount mortgage. The justification for the amendment is, in the words of the legislator (Part VI of the preamble to Act 41/2007), as follows: "[t]he ancillary nature and determination that governs ordinary mortgages excludes from our current legal system's ordinary or simple mortgages, those mortgages wherein the secured obligations are diverse or wherein present and future obligations are mixed. This necessarily means that as many mortgages must be arranged as obligations are to be secured, which, in addition to making the transaction more expensive, is not competitive in banking practice. *What this amendment seeks is to generalise the possibility of securing other very diverse legal relationships with a maximum-amount mortgage, although it has been deemed convenient to limit said mortgage to credit institutions, not any creditor, given the special supervision legislation to which said institutions are subject*" (our italics).

In addition to the cases provided in Article 153 LH (current account mortgage), Article 153 *bis* provides for the arrangement of a maximum-amount mortgage "in favour of the financial institu-

tions referred to in Article 2 of the Mortgage Market (Regulation) Act 2/1981 of 25 March to secure performance of one or several obligations, of any kind, present and/or future, without needing addenda for the same".

The financial institutions referred to in Article 2 of Act 2/1981 of 25 March 1981 are "*a*) banks and, where their respective articles of association so permit, official credit institutions, *b*) savings banks and the Spanish Confederation of Savings Banks, *c*) credit co-operatives, *d*) financial credit establishments". It should be recalled that there are currently only two savings banks, that the Spanish Confederation of Savings Banks is a banking association that defends the interests of its member institutions and that the legal category of 'official credit institution' has disappeared.

With regard to financial credit establishments, their role and rules are found in Articles 6 et seq. of the Business Finance (Promotion) Act 5/2015 of 27 April. For our purposes, it is interesting to recall Article 6: "1. Subject to authorisation from the Minister of Economy and Competitiveness, companies that do not qualify as credit institutions may be incorporated as financial credit establishments if they engage professionally in one or more of the following business activities: *a*) [t]he lending of money, including consumer credit, mortgage credit and financing of commercial transactions [...]".

Financial credit establishments are governed by solvency rules "contained in the Credit Institutions (Unified Regulation, Supervision and Solvency) Act 10/2014 of 26 June and its implementing regulations, as well as transparency, mortgage market, insolvency and anti-money laundering and counter terrorist financing legislation covering credit institutions" (Art. 7 of Act 5/2015), with the exceptions provided for in Article 12 of said Act 5/2015.

That said, it seems that an interpretation of the pre-2008 financial crisis Land Registration Act in respect of the granting of maximum-amount or floating mortgages is called for in the light of the current reality, a reality where other financial institutions may lend money or invest in mortgage loans or in other forms of financing linked to movable and immovable property, or even grant mortgage loans to legal persons. We are referring, for instance, to free investment collective schemes ('IICILs'), many of which can be subsumed under the category of hedge funds. Pursuant to Article 73 of the Collective Investment Schemes Regulations, approved by Royal Decree 1082/2012 of 13 July, schemes carrying out this type of investment can only be marketed to professional clients. As indicated by the Spanish Securities Market Authority ('CNMV'), "in accordance with the end-cause spirit of this legislation, IICILs may create or acquire instruments commonly used in the financing of companies even if the foregoing could lead to the unexpected acquisition of a movable or immovable asset in which the collateral supporting the financing operation is materialised" (see the Q&A document *Preguntas y respuestas de la Comisión Nacional del Mercado de Valores sobre la normativa de IIC, ECR y otros vehículos de inversión colectiva cerrados*, available on the CNMV's website and updated on 28 November 2018).

Article 153 LH's strict restriction of the granting of maximum-amount mortgages to credit institutions and financial credit establishments was introduced into our law in 2007 by Act 41/2007

of 7 December, an Act that could not logically take into account subsequent shadow banking regulation, basically Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers, whose content was incorporated into Spanish law under the Private Investment Entities, Collective Investment Firms of a Closed-Ended Type and their Managers Act 22/2014 of 12 November.

Currently, we find ourselves with a prohibition on the granting a maximum-amount mortgage "to secure performance of one or several obligations, of any kind, present and/or future, without needing addenda for the same" (Art. 153 *bis* LH) by undertakings that do not have the status of credit institution or financial credit establishment, and on the other hand, with the possibility that hedge funds (IICILs) may grant mortgage credit facilities or loans within the investment-policy limitations established by the legislator in Article 73 of the Collective Investment Schemes Regulations (for example, the aforementioned prohibition contained in Article 73.5d of the Collective Investment Schemes Regulations: "IICILs shall not grant loans or invest in loans granted to natural persons [...]").

As the law governing hedge funds is a *lex specialis*, we believe that the restriction to credit institutions and financial credit establishments of Article 153 *bis* LH must be deemed overridden, making it necessary to interpret said article in the sense of admitting the granting of maximum-amount mortgages by other financial institutions whose specific legislation allows them to carry out these transactions.

The qualifications set out for these mortgages in Article 153 *bis* LH, when referring to the content of the mortgage deed, shall apply where the financing is granted to an undertaking by a financial institution other than a credit institution or a financial credit establishment.