

THE REBELLION OF THE SPANISH REAL ESTATE MARKET FACING CHALLENGING COURT DECISIONS

Some recent rulings passed by the Spanish Supreme Court, the Constitutional Court and the European Court of Justice will significantly affect (in one way or another) the Spanish real estate market and available real estate financing structures. These are the hot topics and our prediction of potential consequences.

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THE SPANISH CONSTITUTIONAL COURT KNOCKS DOWN THE MUNICIPAL CAPITAL GAIN TAX

In Spain, the so-called plusvalía municipal is a direct tax levied and paid by the seller on the increase in the value of the land at the time of transfer.

The discussion came from the fact that there is always a tax charge, even if the taxpayer has incurred in losses when selling the property. The reason is because the basis for calculation of the plusvalía municipal is not indexed to or determined by the actual gain generated in the transaction. Instead, this is calculated on the cadastral value of the land –which is a theoretical value periodically reviewed with a consistent increasing trend not reflecting the real ups and downs of the market- and the number of years that the owner has enjoyed the property, with a maximum of 20 years.

As a matter of fact, the municipalities collected more than 2.6 billion euros through the plusvalía municipal in 2015, despite the number of transactions in which there was an actual loss for sellers.

Certain articles of the regional law of the territory of Guipúzcoa governing the taxable base of the Land Tax, used for the plusvalía municipal, have been declared inconsistent with the principle of economic capacity and the constitutional right of defense by the Spanish Constitutional Court in a court ruling issued on 17 February 2017.

This court decision only refers to a specific territory (Guipúzcoa), and hence it is not directly enforceable to other Spanish municipalities being necessary to wait until the Constitutional Court resolves other ongoing similar requests of unconstitutionality concerning the national tax. However, taking

into account that the wording of both legislations and principles are the same, the result is predictable.

The position of the Constitutional Court will have a significant favorable impact for those transactions to be carried out in the future but also those completed in the past, in which there is a chance to challenge this tax if the statute of limitation (4 years) has not elapsed. In addition, this will also lead to a modification of the legislation regulating the plusvalía municipal to reflect that this is only payable in case of real profit in the transaction.

THE EUROPEAN COURT AND THE MORTGAGE FLOOR CLAUSES

In a floor clause the lender sets a limit on how low the applicable interest rate can fall during the term of the loan. Most of the loans in Spain are tied to the euro interbank rate (Euribor). These clauses came into effect when the Euribor dropped sharply since 2009 and, as a consequence, consumers did not see a similar drop in the mortgage rates as a result of these floor clauses.

In 2013 the Spanish Supreme Court, in a controversial decision, only partially ruled against the validity of the mortgage floor clauses established by Spanish retail banks, limiting the nullity effects as from May 2013 onwards. This decision was challenged by borrowers in a way of class action, and the European Court of Justice rectified the interpretation made by the Spanish Supreme Court and ruled that this limitation is against the principles of the European Union legislation. As a result, Spanish retail banks are obliged to compensate their customers with the amount collected by application of this floor clause during the entire loan repayment term.



The Spanish Government reacted and passed the Royal Decree 1/2017, of 20 January, to establish an out-of-court settlement to facilitate the payment process and, for obvious reasons, allow banks to try to reduce the significant impact of these court decisions.

THE FINANCING TRANSACTION COSTS

The Supreme Court rejected a market practice in the real estate finance industry by virtue of which borrowers must assume all transaction costs incurred by the lender in the setting up of a loan secured by mortgage for the acquisition of a real estate property. This practice imposed all property valuation costs, notary and registry fees for the mortgage and applicable stamp duty on borrowers. The agreement was declared null and void by the Supreme Court in those financing schemes to customers.

The nullity of this clause was only deemed in the loan between a retail bank and a private customer; but for sure this will have an impact in the entire financing industry by increasing margins or reducing the amount available for new developments or acquisitions. Again, it will very much depend on the number of court claims banks will face on this particular subject. ♦