

Financial assistance

Madrid, May 2023

Case law on the prohibition of financial assistance set out in the Spanish Companies Act (SCA)¹ is scarce, but the Spanish Supreme Court (SSC) has issued an interesting ruling² that clarifies somewhat its scope.

The case refers to an investment agreement whereby MCIM Capital, S.L. (MCIM) committed to subscribe for a number of new shares of the listed company Grupo Ezentis S.A. (Ezentis) at a price of EUR 0.197 per share and to maintain its shareholding in Ezentis for at least one year. The parties agreed that, should the average price per share in the last thirty days before the first anniversary of the subscription be below EUR 0.223, Ezentis would pay the difference to MCIM.

Since the shares did not reach the guaranteed value one year after the investment, MCIM claimed the difference (about EUR 800,000) from Ezentis, but the latter refused to pay arguing that it would amount to financial assistance prohibited by the SCA.

MCIM then sued Ezentis, but its claim was dismissed by a commercial court in the first instance and eventually by the Court of Appeal of Madrid (CAM). Both found that Ezentis had guaranteed MCIM a minimum return on its investment and concluded that such a guarantee entailed financial assistance and was, therefore, null and void.

MCIM appealed the CAM's judgment before the SSC on the grounds that (i) the SCA does not prohibit all sorts of guarantees by a company to an acquirer of its shares, but only guarantees of payment of the shares price and that, (ii) anyway, the purpose of the Ezentis' obligation was not to favour the acquisition of its shares but to compensate MCIM for its commitment to remain as shareholder for a year.

The SSC dismissed the appeal as it found that an agreement by which a company guarantees an acquirer of its shares a certain return after a period, even though not specifically mentioned in the SCA's provisions on financial assistance, is also prohibited.

It noted that the disputed clause provided MCIM a hedge against the risk that the shares would not reach a certain value, a risk which is inherent to the ownership of the shares that the parties intended to pass on to Ezentis. Thus, Ezentis assumed a contingent liability (that ended up materializing) to the benefit of MCIM.

Finally, whereas the SSC found that the Ezentis' guarantee could partially compensate MCIM for keeping its shareholding in the company for a year, it

¹ 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.

² Judgment of the SSC 582/2023 dated 20 April 2023.

concluded that its main purpose was to facilitate the acquisition of the Ezentis' shares by MCIM.

Pursuant to the case law on financial assistance³, the subscription by MCIM for the Ezentis' shares was not annulled, but only the specific clause on the guarantee.

Acquirers of shares and their financiers should be wary about obligations assumed by the target company that might be construed as a guarantee, since in that case they could be annulled by courts while the acquisition and its financing would remain valid and enforceable, being both the acquirers and their financiers worse off than before the acquisition of the shares.

³ See, for instance, the judgment of the SSC 541/2018 dated 1 October 2018: the purpose of the legal provisions on financial assistance (preserving the company's solvency and the integrity of its equity and share capital) is fully safeguarded through the annulment of the financing granted to the acquirer and, thus, the transfer of the shares does not need to be annulled.