CLIFFORD
CHANCE

Briefing note April 2015

New developments on securitisation in Spain

The recently approved Business Finance Promotion Act reforms, among other things, the legal regime governing securitisation in Spain with a view to increasing the transparency, quality and simplicity of securitisation and bringing the Spanish legal system closer to that of its European neighbours.

1. Introduction

Yesterday saw the publication in the Official State Gazette of the Business Finance Promotion Act (*Ley de fomento de la financiación empresarial*) which, with the exception of Title I in relation to improvements in bank financing for SMEs, enters into force today, 29 April 2015.

The Act, among other things, carries out a substantial reform of the legal regime governing securitisation in Spain. This aim of this publication is to briefly address the changes that the Act introduces to this area.

According to the Preamble of the Act, the reform of the legal regime governing securitisation in Spain is based on three pillars. First of all, it addresses the regulatory dispersion existing in Spain, which it restates (including the establishment of a single legal category of "asset securitisation funds" and "mortgage securitisation funds"). Secondly, the new Act seeks to bring the Spanish legal regime closer to that of other European countries and to that end makes the operation of the funds more flexible. Finally, it strengthens the requirements in terms of transparency and investor protection.

2. Definition of securitisation funds and creation of compartments

Section 1 of Article 15 of the Act defines securitisation funds in a very similar way to Article 1 of Royal Decree 926/1998 and briefly lists the elements that comprise their assets and liabilities.

It is precisely in relation to the latter where we find some of the new developments contained in the new Act, as:

(i) on the one hand, it removes the obligation that, in general terms, at least 50% of the financing of the fund is in the form of bonds; and

(ii) on the other, any third party (and not necessarily credit institutions as had been the case until now) can grant loans/credits to the fund.

The Act also removes the reference made in Royal Decree 926/1998 to the possibility for the funds' liabilities to be comprised of "*contributions from qualified investors* ".

Another of the main new developments in the Act contained in Article 15.2 is the possibility, when envisaged in the deed of incorporation, for the wealth of the securitisation funds (as is currently the case with FABs) to be divided into independent compartments, from which securities may be issued or different kinds of obligations assumed and liquidated independently. The creditors of one compartment will only be able to realise their credits against the wealth of said compartment.

3. Securitisation Fund Assets

Section 1 of Article 16 deals with the assets of the securitisation funds (distinguishing between present and future credit rights), without presenting major changes to the previous system (although the need for the assets to be of a "*homogenous nature*" is removed, in practice this requirement will continue to apply as long as investors intend on using the securitisation bonds as guarantees in Eurosystem financing operations and, in relation to the transfer of future credit rights, this must also be "duly" evidenced ("*de forma fehaciente*")).

It is established that securitisation funds may acquire ownership of assets by any means, "*either via assignment, acquisition, subscription on primary markets or via any legally permitted means*".

4. Transfer of assets

Article 17 of the new Act establishes the requirements that the "transfer" of securitisation fund assets must meet. In this regard, it is worth noting the removal (i) of the obligation for the assignment of assets to be full and unconditional and for the entire period remaining until maturity and (ii) of the prohibition of the assignor granting any kind of guarantee to the assignee or otherwise securing the successful outcome of the transaction. We can only celebrate the removal of this restriction, which we hope will lead to more widespread use of securitisation in the form of Spanish securitisation funds.

The obligation for the transferor (and, if applicable, the issuer) to have audited the accounts at the time of incorporation of the fund is maintained, although it is sufficient that they cover the last two financial years, and the regime regarding the existence of qualifications in the audit report is refined. The new Act exempts parties from meeting the audited account requirement when the securities issued by the fund are not going to be traded on an official secondary market or on a multilateral trading facility and are directed exclusively at qualified investors.

The transferor's duty to provide information in all the annual reports on the operations involving the transfer of future credit rights that affect the respective financial years is maintained, and is extended to include present credit rights.

5. Securitisation fund liabilities

Together with the new developments mentioned in section 2 above, the obligation for the bonds issued by the fund to be traded on a secondary market is removed, and trading is made optional. Of particular interest is the removal of the requirement for securitisation bonds to have a credit rating.

Finally, it is worth highlighting the inclusion of the possibility for securitisation funds to grant guarantees in favour of other liabilities issued by third parties in order to accommodate the covered bond structures existing on other markets in the Spanish legal system.

6. Closed securitisation funds

The new Act makes it possible for the deed of closed securitisation funds to include a warehouse period (that is, a period during which new assets and liabilities can be included up to a certain limit) of up to four months as of the incorporation of the fund, without the fund ceasing to be considered closed.

7. Open securitisation funds

The new development introduced by the Act in this area is the possibility for "active management" of open securitisation funds. The Act defines "active management" as that which, envisaged in the deed of incorporation, allows the fund's assets to be modified in order to (i) maximise profitability, (ii) guarantee the quality of the assets, (iii) carry out an appropriate risk treatment or (iv) maintain the conditions established in the deed of incorporation of the fund.

Main new developments

- The general obligation for at least 50% of the fund financing to be in bonds is removed.
- The loans/credits comprising the liabilities of the fund can be granted by any third party.
- The wealth of the funds can be divided into independent compartments.
- The Act removes (i) the obligation for the assignment of assets to be full and unconditional and for the entire period remaining until maturity and (ii) the prohibition of the assignor granting any kind of guarantee to the assignee or otherwise guaranteeing the successful outcome of the transaction.
- The obligation for the bonds issued by the fund to be traded on a secondary market is removed, and trading is made optional. The need for the bonds to have a credit rating is also removed.
- The possibility for the funds to grant guarantees in favour of other liabilities issued by third parties is introduced.
- The Act envisages the possibility of "active management" of the funds.
- In terms of its corporate object, the possibility for management companies to incorporate, administrate and represent funds and special purpose vehicles similar to securitisation funds incorporated abroad is worth highlighting.
- The creditors' meeting is introduced

8. Termination of the funds

In relation to the scenarios for the termination of funds:

(i) three of the existing ones are maintained with minor adjustments (full repayment of the asset, compulsory replacement of the management company or those envisaged in the public deed according to the procedure described therein);

(ii) two of the existing ones are removed (existence of circumstances that, in the opinion of the management company, make it impossible or extremely difficult for the financial balance of the fund to be maintained and a failure to make payment indicating a serious and permanent imbalance); and

(iii) two new ones are added:

  (a) when a three-quarters majority of the creditors' meeting decides to terminate it; and

  (b) when all liabilities have been paid in full.

9. Amendment of the public deed of incorporation of the securitisation fund

Article 24 of the new Act regulates the regime for the amendment of the public deed of incorporation of securitisation funds, with some minor new developments compared to the regime envisaged in Article 7 of Act 19/1992, including the possibility for the deed to be amended with the "consent of the creditors' meeting, in accordance with the procedure established in the deed of incorporation of the fund".

10. Legal regime of securitisation fund management companies

Chapter II of the new Act contains the legal regime for management companies of securitisation funds.

Among the new developments, it is worth highlighting, in terms of its corporate object, the possibility to establish, administrate and represent funds and special purpose vehicles similar to securitisation funds, incorporated abroad, in accordance with the applicable rules (Article 25 of the new Act).

11. Transparency regime and creditors' meeting

Chapter III of the new Act (Articles 34 to 37) regulates matters related to the transparency regime (including the obligation for management companies to publish certain information on the funds on their websites) as well as the new creditors' meeting (similar to the syndicate of bondholders).

The Spanish rules on securitisation did not contain such a concept until now, meaning that any matters that arose on an exceptional basis in relation to a securitisation fund were addressed by the management company as part of its duty to defend the interests of the bondholders and the other ordinary creditors of the fund.

The creation of the creditors meeting is voluntary and contingent on the corresponding deed of incorporation of the fund envisaging it. Both the composition and the powers and rules of operation of the creditors' meeting are to be contained in such deed, with different participation regimes for the different categories of creditors. The Act establishes that the creditors' meeting, duly convened, will be entitled to adopt any decisions in order to best defend the legitimate interests of the creditors of the securitisation fund.

Contacts

Clifford Chance
Paseo de la Castellana, 110
28046 Madrid
T. +34 91 590 75 00

José Manuel Cuenca
Partner
Capital Markets

E. josemanuel.cuenca
@cliffordchance.com

Eduardo García
Partner
Capital Markets

E. eduardo.garcia
@cliffordchance.com

Carlos Pérez Dávila
Senior Associate
Capital Markets

E. Carlos.perez
@cliffordchance.com

Jesús Quesada
Senior Associate
Capital Markets

E. jesus.quesada
@cliffordchance.com