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Briefing note May 2015

New regime applicable to the issuance of notes

On 28 April 2015, the Spanish Business Financing Promotion Act (*Ley 5/2015, de 27 de abril, de Fomento de la Financiación Empresarial* or "**LFFE**") was published in the Spanish Official State Gazette. The LFFE introduces a series of measures with two objectives in mind. On one hand, it aims to make bank financing more accessible and flexible for small and medium-sized enterprises in order to boost the recovery of bank credit; and on the other, its aim is to advance the development of alternative means of financing, establishing the necessary regulatory framework required to enhance sources of direct corporate financing or non-bank financing in Spain.

The LFFE has changed significantly the legal regime for the issuance of notes through several amendments to the Restated Text of the Spanish Companies Act (*Texto Refundido de la Ley de Sociedades de Capital*) passed by Legislative Royal Decree 1/2010, of 2 July (the "**LSC**"), the Cooperatives Act (*Ley 27/1999, de 16 de julio, de Cooperativas* or "**Cooperatives Act**") and the Securities Market Act (*Ley 24/1988, de 28 de julio, del Mercado de Valores* or "**LMV**"), in order to adapt such regime to reflect the way the capital markets currently function, facilitating access to debt markets for Spanish companies.

The main amendments introduced by the LFFE on the regime applicable to the issuance of notes are the following:

1. Removal of the maximum issue limit

The general issue limit preventing public limited companies (*sociedades anónimas*) and partnerships limited by shares (*sociedades comanditarias por acciones*) issuing notes in excess of their own funds has been removed (although such limit did not apply in a number of cases (including, amongst others, issues by listed companies, issues made under Law 10/2014 and issues addressed to qualified investors, amongst others)).

2. Removal on the prohibition on issues by limited liability companies ("SLs")

The prohibition on SLs issuing notes has been removed, although some restrictions have been introduced in relation to the regime for the issuance of notes by public limited companies. In particular, the limit set for issues by SLs is twice their own funds, unless the issue is secured by a mortgage, a pledge of securities, a public guarantee or a joint and several guarantee from a credit institution.

In the event that the issue is guaranteed by a joint and several guarantee from a mutual guarantee company (*sociedad de garantía recíproca*), the limit and other conditions of the guarantee will be determined by such

company's capacity to guarantee at the moment it does so, in accordance with the specific rules applicable to such entity.

Likewise SLs cannot issue or guarantee securities convertible into SLs' participations.

3. The requirement to appoint a commissioner and constitute a syndicate of noteholders only applies in certain cases

The creation of a syndicate of noteholders and the appointment of a commissioner will only be necessary in those scenarios envisaged in the special legislation on issues of notes or other debt instruments.

In this regard, according to Article 30 quáter LMV, issuers are only obliged to create a syndicate of noteholders and appoint a commissioner for an issuance of notes whenever the following two conditions are met:

(a) the terms and conditions of the notes are governed by Spanish law or by the law of a State that is not a member of the European Union or of the OECD; and

(b) there is an initial public offering of the notes in Spain, or they are listed on a Spanish regulated market or a multilateral trading system established in Spain.

In all other cases, the law to which the issuance is subject will determine the collective organisation of noteholders.

Pursuant to the above, issues of securities governed by English or New York law will no longer require the creation of a syndicate of noteholders or the appointment of a commissioner

4. International issues of notes by Spanish companies

New Article 405 LSC expressly recognises that Spanish companies may issue notes or other debt instruments abroad, although without defining exactly what should be understood by "issuing abroad". Two legal systems will have to be taken into account in relation to such issues:

(a) Spanish law, which will determine the capacity, the competent body and the conditions for adoption of the resolutions approving the issuance; and

(b) the law to which the issuance is subject, which will be that which governs the rights of the noteholders vis-à-vis the issuer, their forms of collective organisation and the regime for the repayment and redemption of the securities.

The possibility of issuing abroad is also recognised in relation to convertible notes, in which case:

(a) Spanish law will determine the issue value of the notes, limitations on conversion and the system for exclusion of pre-emption rights; and

(b) the relevant foreign law will govern the content of the right of conversion, albeit within the limits established by Spanish law as the governing law of the company.

Main new developments

- The issue limit on public limited companies (*sociedades anónimas*) and partnerships limited by shares (*sociedades comanditarias por acciones*) has been removed.
- The prohibition on limited liability companies (*sociedades de responsabilidad limitada*) issuing notes has been removed. So such companies will be able to issue notes subject to certain issue limits.
- The creation of a syndicate of noteholders and the appointment of a commissioner will only be necessary in certain scenarios.
- It is expressly recognised that Spanish companies may issue notes or other debt instruments "abroad".
- The law to which the issuance is subject will be that which governs the form of collective organisation of noteholders.
- The management body of the issuer will be able to authorise the issue of notes (other than convertible notes and profit participating notes), unless the issuer's by-laws provide otherwise.
- The obligation to publish the announcement of the issue in the Official Gazette of the Mercantile Registry (BORME) has disappeared.
- The requirement to execute a public deed of issuance (*escritura de emisión*) is maintained, although the requirement for such deed to be registered at the Commercial Registry before the notes can be released into circulation has been removed.

5. Competent body for authorising the issue

Capital companies (*sociedades de capital*)

With a view to speeding up the adoption of issue resolutions and to equate the issuance of notes to other forms of financing, new Article 406 of the LSC establishes that the management body of the company will be able to authorise the issue and listing of notes as well as the granting of guarantees, unless the issuer's by-laws provide otherwise.

Nevertheless, approval of the general shareholders' meeting will be required to authorise the issue of (i) notes convertible into shares and (ii) notes that grant holders a participation in the company's earnings ("**profit participating notes**").

In summary, unless the issuer's by-laws provide otherwise, a resolution of the general meeting will no longer be necessary to authorise an issue of notes (other than convertible notes or profit participating notes).

Cooperatives

Similarly to the amendment to the LSC, in the case of cooperatives, the power to authorise an issue of notes and other forms of financing by means of issues of negotiable securities (provided they are not participative instruments or special participations) now corresponds to the Governing Council (*Consejo Rector*) of the issuer instead of to the General Assembly, unless the issuer's by-laws provide otherwise. Moreover, the issue of notes will be governed by the LSC, with any adaptations that may be necessary.

6. Formalities

Disappearance of the BORME announcement

With the derogation of Article 408 LSC, the obligation to publish the announcement of the issue in the Official Gazette of the Mercantile Registry (BORME) has disappeared.

Deed of issuance, yes; Commercial Registry, no

The general requirement to execute a public deed of issuance (*escritura de emisión*) is maintained, although the requirement for such deed to be registered at the Commercial Registry before the notes can be released into circulation has been removed. Therefore, in our opinion, the requirement to register the public deed of issuance at the Commercial Registry has been removed. As a result, the timeframe for issues subject to the requirement of granting a public deed of issuance can be shortened.

Pursuant to the new wording of Article 30 ter LMV, it will not be necessary to execute a public deed for the following issues of debt securities:

(a) those that are to be listed on a regulated market or subject to an initial public offering that require the preparation of a prospectus to be approved by and filed with the CNMV; or

(b) those that are to be listed on a multilateral trading system established in Spain.

For the above purposes, equity securities (such as convertible bonds) will not be considered as debt securities.

As for the content of the deed, it is worth mentioning the following new developments:

(a) if the issuer has notes in circulation, it must state which issues of notes are in circulation and the nominal amount of such notes; and

(b) if the notes being issued have personal guarantees, the guarantor will have to be present at the execution of the deed of issuance.

7. Ranking

Art 410 LSC, which established a system of ranking by dates, is derogated. As a result, the debate generated by this article on the application of the same in the event of insolvency disappears: in the case of insolvency, the rules on collection established in the Spanish Insolvency Act will apply.

8. Modification of the regime governing the commissioner and the syndicate of noteholders

The LFFE modifies some aspects related to the role of the commissioner and the regime governing the syndicate of noteholders, the most noteworthy of which are the following:

(a) The role of the commissioner is made professional, with the requirement that it be a natural or legal person with recognised experience in legal or financial matters whose remuneration will be set by the issuer.

(b) There is no longer an obligation for the commissioner to call the general assembly of noteholders to approve or reject its appointment, confirm its position and establish the internal rules of the syndicate. Pursuant to new Article 421 LSC,

it is the commissioner who will establish the internal rules of the syndicate, in accordance with the regime established in the deed of issuance.

(c) The liability of the commissioner is regulated, establishing that it will be liable vis-à-vis the noteholders and, if applicable, vis-à-vis the issuer for any damage caused by acts performed in the discharge of its duties without the required level of professional diligence.

(d) The commissioner's intervening powers are restricted, as it is no longer entitled to examine the issuer's books or attend board meetings with the right to speak but not to vote.

(e) It is no longer necessary to convene the syndicate of noteholders in the manner established in the LSC for general meetings of shareholders when the assembly has to address matters related to the modification of conditions or other matters of similar importance. Pursuant to Article 423 LSC, the general meeting of noteholders will be convened in the manner envisaged in the syndicate regulations, with the requirement that noteholders are duly aware of such meeting.

(f) With regard to the attendance of noteholders at the general assembly, the noteholders may attend in person or be represented by another noteholder. They cannot be represented by the directors of the issuer, even if such directors are noteholders. The commissioner must attend even if it has not convened the meeting.

(g) In relation to the right to vote, it is established that each note will give the noteholder a right to vote proportionate to the outstanding nominal amount of the notes it holds.

As for the system for adopting resolutions, the LSC stipulates that as a general rule, resolutions will be adopted by the overall majority of votes issued, irrespective of the number of noteholders which are present or represented. Notwithstanding this, a reinforced majority consisting of the favourable vote of two thirds of the notes in circulation for the adoption of certain resolutions has been established (this is in relation to those resolutions involving modifications to the term or conditions of repayment of the face value of the notes, or in relation to conversion or exchange).

9. Derogation of Act 211/1964

The LFFE derogates Act 211/1964, which regulated issues of notes by companies other than public limited companies (*sociedades anónimas*), associations or other legal persons.

Additional provision five sets out the new regime applicable to these entities which indicates that, in the case of companies other than corporations (*sociedades de capita*l), the maximum limit on notes issuances is equivalent to the amount of paid-in capital and, in the case of associations or other legal entities, the limit is the valuation figure of the assets. These limits do not apply in those cases in which the issue is secured by a mortgage, pledge of securities, a public guarantee or a joint and several guarantee from a credit institution.

In the event that the issue is guaranteed by a joint and several guarantee from a mutual guarantee company (*sociedad de garantía recíproca*), the limit on the nominal value of the issuance and other conditions of the guarantee will be determined by such company's capacity to guarantee at the moment it does so, in accordance with the rules applicable to such entity.

The LSC will apply on a supplementary basis, with any amendments that are necessary.

Nevertheless, for those issues already issued in accordance with Act 211/1964, the LFFE establishes a transitional regime until their cancellation, stating that they will be governed by the provisions of that Act.

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