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New Securities Market Law: special purpose acquisition companies ("SPACs")

1. Introduction

Law 6/2023, of 17 March, on Securities Markets and Investment Services (the "**SML**"), constitutes the new framework law for securities markets, repealing Royal Legislative Decree 4/2015, of 23 October, approving the consolidated text of the Securities Market Law (the "**CTSML**"), which in turn was the successor to Law 24/1998, on Securities Markets.

The SML introduces the concept of special purpose acquisition companies ("**SPACs**") to Spanish law for the first time. In particular, the fifth final provision of the SML amends the consolidated text of the Spanish Companies Act, approved by Royal Legislative Decree 1/2010 of 2 July (the "**CA**"), by introducing a new chapter VIII bis entitled "Special features of Special Purpose Acquisition Companies" to Title XIV of the CA (which regulates listed companies), adding Articles 535 bis to 535 quinquies, which contain the details of the regime applicable to SPACs.

SPACs are newly created public limited companies whose purpose is to raise funds on the capital markets, mainly through a public offering made at the time of listing, either on a regulated market or in a multilateral trading facility, in order to subsequently use these funds in an integration operation between the listed SPAC and a target company, whether listed or unlisted (a process known as "**de-SPAC**"). The de-SPAC transaction must be concluded within a specified time period and, where applicable, in the sector predetermined by the SPAC's constitutional documents and/or the documents made available to investors at the time of the public offering.

The de-SPAC transaction may be formalised through a sale and purchase, merger (which is the most common mechanism), division, non-monetary contribution (including, especially, the exchange of securities), global assignment of assets and liabilities, other similar transactions, or even through a combination of any of these options. Until the de-SPAC is formalised, the funds raised by the SPAC in the public offering must be held in an account opened with a credit institution in the name of the SPAC (an escrow account, also referred to in the CA as a "transitional account"), which must comply with certain requirements depending on where the SPAC has been admitted to trading.

Although the SML regulates SPACs in Spain for the first time, these investment vehicles have existed in various legal forms for decades in the United States and other European countries, and have experienced a great boom in the US financial markets in recent years, as well as, in the European case, in the Dutch market in particular, with de-SPACs serving as an alternative to an IPO of newly created companies, whose valuation or historical financial information is insufficient to carry out a traditional IPO. According to the explanatory memorandum of the SML, the creation of SPACs could encourage the securitisation of the Spanish economy and, consequently, reduce dependence on bank credit, enabling companies to have alternative sources of financing at their disposal.

Prior to being expressly regulated, there were a series of limitations in Spanish law that prevented the development of SPACs in the Spanish market (such as, for example, the lack of specific redemption mechanisms for SPAC shareholders, the application of the maximum limit on treasury shares for listed companies, or the application of takeover bid rules to these vehicles). For this reason, according to the

explanatory memorandum of the SML, a prior legislative amendment was necessary to provide greater legal certainty to the regime applicable to SPACs and protect potential investors.

The main aspects of the regulation of SPACs contained in the CA (as amended by the SML) are analysed below.

2. Scope of application

The special provisions set out in the new Chapter VIII bis of the CA will apply to (i) SPACs that are Spanish public limited companies whose shares are admitted to trading on a Spanish regulated market; (ii) SPACs that are Spanish public limited companies whose shares are admitted to trading on a regulated market of another Member State of the European Economic Area or on a comparable market of a third State, and are not admitted to trading on a Spanish market (with the special provisions set out in Article 495.3 of the CA); and (iii) SPACs "that have securities admitted to trading on multilateral trading facilities" (we understand that the reference to securities should be understood as referring to shares). This type of market would currently include BME MTF Equity, which includes the BME Growth segment, and the Portfolio Stock Exchange in Spain.

The special provisions provided for in the new Chapter VIII bis of the CA will cease to apply once the de-SPAC transaction between the listed SPAC and the target company has been completed (for example, once the acquisition has been formalised or the merger has been registered), so that, from that moment onwards, the resulting company will be subject to the regulations applicable to it, depending on whether it is a listed company, a company regulated by Article 495.3 of the CA, or a company whose shares are admitted to trading on a multilateral trading facility.

3. SPAC shareholder redemption mechanisms

Since the SPAC has no business activity of its own, apart from the activities consisting of the IPO, the application for admission to trading of its shares, and those leading to the formalisation of the de-SPAC transaction, and since the target company is not yet identified at the time of the public offering, the SML regulates a series of redemption mechanisms in favour of SPAC shareholders, which are configured as mechanisms to protect these investors, since they enable them to choose for the value of their investment to be reimbursed. These redemption mechanisms therefore seek to encourage investment in such vehicles by offering investors a "money-back guarantee".

In this regard, the CA makes it compulsory to include at least one of the following SPAC shareholder redemption mechanisms: (i) the inclusion of a right of withdrawal in the SPAC's articles of association; or (ii) the issuance of redeemable shares without the limits set out in Articles 500 and 501 of the CA applying. This is the case unless a commitment is made by the SPAC to carry out a capital reduction by acquiring its own shares for redemption, as discussed below.

It is worth noting that, irrespective of which of the two redemption mechanisms is chosen by the SPAC, the redemption value of the shares will always be the portion of the cash amount held in the escrow or transitional account.

With regard to the first redemption mechanism provided for in the SML, i.e. the statutory right of withdrawal, this can only be exercised from the moment the SPAC has announced the de-SPAC transaction. The application of Article 346.1 a) of the CA is expressly excluded, i.e. the substitution or substantial modification of the objects of the SPAC as a result of the de-SPAC transaction will not give rise to the legal right of withdrawal provided for in that article. Furthermore, it is established that

shareholders will be able to exercise this right irrespective of whether they vote for or against the de-SPAC transaction at the relevant meeting. However, there is a certain lack of coordination with the articles of the CA that regulate certain aspects relating to the exercise of rights of withdrawal that have not been regulated, namely the time limits set out in Article 348 of the CA and the possibility of having recourse to an independent expert regulated in Article 354 of the CA.

The SML therefore allows shareholders to vote in favour of the de-SPAC transaction at the meeting and subsequently exercise their right of withdrawal (a mechanism known in the US as "approve and redeem"). In this respect, it is worth noting that, although it is common for SPACs to issue shares and warrants together, the SML does not include any mention of them. It could therefore be assumed that SPAC shareholders could vote in favour of the SPAC transaction and be redeemed only for the shares, while retaining the warrants.

The second means of redemption established in the new Article 535 ter of the CA is the issuance of redeemable shares, in relation to which an exemption has been established in relation to the maximum limit that they represent being a nominal amount not exceeding one quarter of the share capital, established in Article 500 of the CA, as well as the rest of the provisions established in Articles 500 and 501 of the CA. Redemption may be exercised within the period provided for by the SPAC, at the request of shareholders who were shareholders on the date established for this purpose, whether or not they voted in favour of the de-SPAC transaction at the relevant meeting.

The SML provides an exception to the need to incorporate one of the two redemption mechanisms explained above consisting of a commitment by the SPAC to carry out a capital reduction through the acquisition of its own shares for redemption, which will entail the obligation to launch a takeover bid, in the terms explained in section 4 below. In this scenario, it is established that the maximum limit on treasury shares established in Article 509 of the CA will not apply to SPACs, provided that the acquisition of treasury shares by the company is carried out as a mechanism for reimbursing shareholders once the target company for the integration operation has been determined. Therefore, treasury shares could either be redeemed or used as an exchange delivery to the target company's shareholders as full or partial consideration for the de-SPAC transaction.

It should be borne in mind that, if a large percentage of shareholders choose to exercise their redemption rights, this may result in a drastic reduction of the funds available to the SPAC to carry out the corresponding integration operation, and there may even be a risk that the SPAC will not be able to meet its objective. In the US market in recent years, SPACs have faced an increasing average percentage of shareholders choosing to exercise their redemption rights. A recent example is the SPAC called JAWS Mustang Acquisition Corporation, which had raised a total of $900 million by February 2021 following its public offering. According to information published on the website of the Securities and Exchange Commission ("**SEC**") in January this year, approximately 98% of shareholders of this SPAC opted to exercise their redemption rights.

In view of this, SPACs can try to protect themselves in a number of ways. To begin with, as is standard practice in the United States, sponsors, directors and executives of US SPACs generally waive their rights of redemption in relation to their shares. On the other hand, while in some markets there is an obligation to offer redemption rights to all shareholders, SPACs also sometimes set a limit on the percentage of total outstanding shares over which any individual shareholder (or shareholders acting in concert) may request redemption. This limit, in those markets where it is permitted, is usually between 10% and 20% of total shares.

In addition, in the event that there is a minimum level of funds necessary to complete the de-SPAC transaction, the transaction itself could be conditional on the redemption rights not being exercised at a level that would leave the SPAC without sufficient funds.

Another way of ensuring that a SPAC achieves its objective is the raising of additional capital or funding. Equity investment can take the form of private investment in public equity (**"PIPE"**) and/or the execution of binding contracts with certain investors at the time of the IPO of the SPAC whereby they commit themselves with varying degrees of firmness to subscribe for shares in the eventual merged entity (known as forward purchase agreements), or any other type of bank financing (e.g. bridge financing). PIPEs and investment by those who have entered into forward purchase agreements (typically institutional investors close to the SPAC promoters) will subscribe for SPAC shares at market value or at a discount immediately prior to carrying out the de-SPAC.

4. Special provisions concerning SPACs in relation to the takeover bid regime

In line with the above, the reformed CA also includes a number of specific provisions regarding takeover bids that are applicable to SPACs, which are detailed below.

Two exceptions to the obligation to launch a takeover bid are provided for: (i) situations in which a shareholder acquires, directly or indirectly, a controlling interest (as defined in Article 4 of Royal Decree 1066/2007, of 27 July, on the regime governing takeover bids) in the company resulting from the de-SPAC transaction, as a result of the de-SPAC transaction itself; and (ii) situations in which a shareholder acquires, directly or indirectly, a controlling interest in the SPAC itself, as a result of the execution of any of the redemption mechanisms that may be set up.

The first exception seeks to prevent shareholders from being obliged to launch a mandatory takeover bid simply because they acquire a controlling stake as part of the de-SPAC process, while the second exception has the same purpose, albeit applicable to the situation where a shareholder acquires a controlling stake in the SPAC itself involuntarily and unexpectedly, following the implementation of the corresponding redemption mechanism. It should be noted that the legislature has opted for these two exceptions to apply automatically, so that in no case will an agreement to this effect be required from the National Securities Market Commission (using the Spanish acronym, the **"CNMV"**).

Finally, a series of particularities are established in the event that the SPAC carries out, as a redemption mechanism, a capital reduction through the acquisition of its own shares for their redemption through a takeover bid. The special provisions discussed below will only apply to capital reductions carried out as a shareholder redemption mechanism prior to or in the context of the de-SPAC transaction, and will not be applicable once the process has been formalised.

The first of the special features is that the price of the takeover bid for own shares will be the amount equivalent to the portion of the effective amount held in the escrow account at the time of executing the redemption mechanism. This simplifies and determines the way in which the price of the takeover bid is set for this specific situation.

Second, instead of redeeming the acquired shares, the SPAC may choose to deliver the shares acquired in exchange to the shareholders of the target company in the de-SPAC transaction, as full or partial consideration for the acquisition. This mechanism allows the SPAC to "reuse" the shares subject to the capital reduction, so that it can use them as consideration in the acquisition of the target company without having to issue new shares.

Finally, the third special feature is the non-application of the existing right of creditors to oppose capital reductions in general, provided that the SPAC has limited its activities to the offer of shares and activities leading to the formalisation of the de-SPAC transaction. Once again, the legislature has sought to protect SPAC shareholders by opening the door for them to leave the SPAC prior to the de-

SPAC process by reducing the capital reduction time limits, provided that the SPAC has effectively performed only the functions inherent to companies with these characteristics.

5. Other special provisions concerning SPACs

The new Chapter VIII bis of the CA includes a number of other special provisions applicable only to SPACs, in particular:

(a) The SPAC must include "Special Purpose Acquisition Company", or its abbreviation, "SPAC, S.A." as part of its corporate name until the de-SPAC transaction is formalised and approved by the general meeting of shareholders of the SPAC.

(b) The articles of association of the SPAC must provide for a maximum period of 36 months for the conclusion of the relevant de-SPAC transaction agreement. This period may be extended, up to a maximum of a further 18 months, by resolution of the general meeting of shareholders of the SPAC (subject to the same requirements as for an amendment to the articles). These time limits are longer than those generally set in practice in foreign markets. It is also common practice for SPACs to offer their shareholders the possibility to exercise the right of redemption in the event that such an extension is approved, which, according to the wording of the new SML regime, would not be mandatory.

(c) Where the de-SPAC transaction consists of a merger between the listed SPAC and the target company, to which the exemptions from the obligation to publish an issue prospectus and admission prospectus, referred to in Articles 1.4 (g) and 1.5 (f) respectively of Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (the **"Prospectus Regulation"**), apply, the CNMV may also require the preparation and publication of a prospectus, taking into account the nature and complexity of the transaction.

It is worth noting that, in any case, for merger transactions eligible for the above-mentioned exemptions from the Prospectus Regulation, the preparation and publication of an exemption document (the **"Exemption Document"**) is required in accordance with Commission Delegated Regulation 2021/528 of 16 December 2020, supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the minimum information content of the document to be published for a prospectus exemption in connection with a takeover by means of an exchange offer, a merger or a division. However, the Exemption Document does not constitute a prospectus within the meaning of the Prospectus Regulation, and it is not necessary for the Exemption Document to be reviewed and approved by any competent authority.

Therefore, we understand that the power granted by the SML to the CNMV in this regard refers to the possibility for the CNMV to require the preparation of a prospectus within the meaning of the Prospectus Regulation, which would require the corresponding review and approval by the CNMV.

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