Informative note on the approval of the Law on the fostering of corporate financing

1. Introduction

On 28 April 2015 Law 5/2015, dated 27 April, on the fostering of corporate financing (the "**Law**") was published in the Official State Gazette ("**BOE**"). The Law entered into force the day after its publication except in respect of certain matters (among others, securitisation amendments) subject to a transitional regime.

The purpose of this informative note is to set out the main issues introduced by the Law which are relevant for the Corporate practice. The Law introduces changes to several matters, among others:

a) Debt issuances: (a) removal of the limitation on the amount of debt issuances applicable to public limited companies (*sociedades anónimas,* "**SAs**") and shares partnerships (*sociedades comanditarias por acciones*, "**SComAs**"), under which SAs and SComAs could not issue debt negotiable securities beyond their own funds; (b) removal of the prohibition on limited liability companies (*sociedades de responsabilidad limitada*, "**SLs**") to issue debt negotiable securities (with certain exceptions in order to avoid excessive indebtedness);

b) Securitisation: the Law unifies the applicable regulation and establishes a more flexible regime;

c) Financial credit institutions (*establecimientos financieros de crédito,* "**EFCs**"): the Law establishes a new legal regime for EFCs. EFCs no longer qualify as credit entities but are still financially monitored and regulated;

d) Spanish Alternative Secondary Market (*Mercado Alternativo Bursátil*, "**MAB**"): the transition from the MAB to the Stock Exchange has become more flexible for those companies whose development and growth requires the listing of its shares on this official market;

e) Measures to improve the conditions of small and medium companies ("**PYMEs**")' bank financing; and

f) The legal regime of crowdfunding through crowdfunding platforms.

2. Improvement of the conditions of the bank financing of PYMEs: Prior notice for the termination or decrease in the flow of financing

Credit entities must give at least 3 months prior notice to PYMEs of their intention not to extend or terminate financing granted to them, or their intention to reduce the financing by at least 35%. The Law includes some exceptions to this obligation, among others:

(a) Insolvency declaration of the PYME;

(b) Commencement of negotiations with the PYME to reach a refinancing agreement;

(c) Mutual agreement between the PYME and the credit entity;

(d) Unexpected and significant worsening of the PYME's financial conditions. In this case, the credit entity must justify its decision on objective grounds.

3. Issuances

(a) In general, Spanish companies are now allowed to issue and secure debt negotiable securities (until now only SAs and SComAs were allowed to do so).

(b) SLs can only issue debt negotiable securities up to twice the company's net equity (*fondos propios*) (unless the issuance is secured).

(c) SLs cannot issue or guarantee bonds convertible into SL shares (*participaciones sociales*).

(d) The limitation on the amount of debt issuances applicable to SAs and SComAs, under which SAs and SComAs could not issue debt negotiable securities beyond their own funds, is removed.

(e) The obligation to establish a bondholders' syndicate is rationalised (under the former regulation, it was mandatory for any issuing company incorporated in Spain). The establishment of a bondholders' syndicate pursuant to the Spanish Companies Act will be mandatory only if necessary to adequately protect Spanish investors. In particular, the requirement to establish a syndicate will be applicable to issuances which qualify as public offerings for subscription, when the following two conditions are met: (i) their terms and conditions are governed by Spanish law or by the law of a State other than an EU member state or an OECD country; and (ii) the issuance takes place within the Spanish territory or the securities are admitted to trading on an official Spanish secondary market or a multilateral trading system established in Spain.

(f) The management body is authorised to approve the issuance and admission to trading of standard debt negotiable securities, as well as to grant guarantees in favour of standard debt negotiable securities (unless otherwise established in the by-laws).

(g) The general shareholders' meeting will decide on the issuance.

4. Securitisation Regime

The Law removes the distinction between mortgage-backed securitisation funds (only comprised of credit rights arising from mortgage loans) and asset-backed securitisation funds (whose assets could be made up of other credit rights). The new regulation provides that securitisation funds may be comprised of underlying credit rights of a different nature. Therefore, the assets transferred to a securitisation fund no longer need to be of the same kind.

The main points on the new regulation are as follows:

(a) Fund Assets

- Securitisation funds may acquire assets directly through subscriptions in the primary market as well as by more traditional means, such as assignments.

- Security interests over assets which are part of a securitisation fund may need to be recorded with Spanish Public Registries.

- It is possible to create different sub-funds within a securitisation fund. Each sub-fund's assets and liabilities will be independent (i.e. ring-fenced) from the other sub-funds so that they can back different issuances and can be wound-up independently.

(b) Fund's Liabilities

- Comprised of: (i) fixed-income securities issued by the fund; and (ii) loans granted by any third party (not only by credit entities).

- Removal of the requirement that financing through fixed-income securities must exceed 50% of the funds' liabilities. The requirement for fund securities to obtain a rating is also removed.

- Removal of the reference to the contributions of institutional investors.

- The securities issued may be listed on a multi-lateral trading facility (not only on a regulated market).

- Securitisation funds are allowed to secure liabilities issued by third parties.

(c) Asset Transfer to a Securitisation Fund

- Certain restrictions provided in the former regulation are removed: (i) the assignment in favour of the securitisation fund of credit rights recorded as assets of the originator does not need to be in full, unconditional and up to the final maturity; (ii) the assignor (originator) is allowed to underwrite the transaction and grant security in favour of the fund; and (iii) the assignor (originator) is not required to maintain the servicing and administration of the assigned credit.

- At the time the securitisation fund is set up, the issuer and the originator must have audited its accounts, at least, in the 2 preceding years.

- It will not be mandatory to audit the accounts: (i) if the securities to be issued by the fund will not be listed on a multi-lateral trading facility and are only targeted at qualified investors; or (ii) the guarantor or the debtor of the securitised assets is the State of Spain, a Spanish Region (*Comunidad Autónoma*) or an international organisation to which Spain is a member.

(d) Synthetic Securitisation

- Synthetic securitisation may be carried out through credit derivatives and financial or bank guarantees granted in favour of the holders of credit rights.

(e) Closed-end securitisation funds

- The incorporation deed of a closed-end securitisation fund may include a maximum period of 4 months in which further assets or liabilities can be integrated into the fund (except to remedy hidden defects).

(f) Open-end securitisation funds

- The asset fund of the securitisation fund may be replaced and widened at any time the securitisation fund is set up.

- An actively management of the securitised portfolio by management companies is allowed: changes in the assets of the securitisation funds are permitted in order to maximise profitability, improve risk management or guarantee the quality of the assets. The actively management of the fund must be envisaged in the incorporation deed of the fund.

(g) Set-up Requirements

- Setting-up a securitisation fund will only require: (i) the authorisation of and registration with the Spanish Securities Market Commission (CNMV); and (ii) the provision to the CNMV of the incorporation deed of the fund provided that the securities to be issued by the securitisation fund are targeted exclusively at institutional investors and are not listed on a regulated market.

- If the securities to be issued by the fund are not targeted at qualified investors, the CNMV will need to approve the relevant prospectus of the securitisation fund.

- The incorporation deed of the securitisation fund may include a creditors meeting in its structure, which will be responsible for passing the relevant resolutions to preserve the interests of the securitisation fund's creditors. The incorporation deed will establish the authorities and rules of the creditors meeting which will also be subject to the provisions related to the syndicate of bondholders under the Spanish Companies Act for those matters not regulated in the incorporation deed.

(h) Termination of Securitisation Funds

- Under the circumstances and following the procedure set out in the incorporation deed.

- Upon full amortisation of the credit rights which comprise the fund and upon liquidation of the assets of the fund.

- Upon decision of a majority equivalent to 3/4 of the creditors meeting.

- Upon full payment of the fund's liabilities.

- Upon compulsory replacement of the Management Company of the securitisation fund.

(i) Amendment of the incorporation deed of the securitisation fund

In order to amend its incorporation deed, the Management Company needs to evidence:

- Unanimous consent of the holders of securities issued by the securitisation fund and the rest of its creditors (excluding non-financial creditors) or consent of the creditors meeting.

- The above consent will not be required: (i) for minor amendments; or (ii) for open-ended funds if the amendment only affects the rights and obligations of holders of securities issued before the granting of the incorporation deed or if the amendment improves the position of the securities issued before the granting of the incorporation deed.

(j) Management Companies

- Management companies can also be in charge of incorporating, managing and representing funds and special purpose vehicles similar to securitisation funds set up in foreign jurisdictions in accordance with the applicable legislation.

- The registered address and the effective management of the management company must be located in Spain.

- Management companies must have, as a minimum, an amount of €1.5m as total own resources and a minimum share capital of €1m. The total own resources of the management company must be increased by 0.02% of the sum of the book value of the assets under its management (if the asset funds managed by the management company exceed €250 m). Nonetheless, the amount of the own resources and this additional amount may not exceed €5m.

(k) Entities subject to supervision and sanctions by the CNMV

- The management companies and the securitisation funds; and

- The entities which assign assets to the securitisation funds, the issuers of the assets included in a securitisation fund and the managers of the assets assigned to the funds, among others.

5. Amendments to the legal regime of EFCs

Changes in the legal regime of EFCs are based on the approval of Law 10/2014, dated 26 July, on the organisation, supervision and solvency of credit entities (*Ley 10/2014, de 26 de junio, de ordenación supervisión y solvencia de entidades de crédito*). The main change is that EFCs no longer qualify as credit entities but are still subject to financial supervision and remain under financial regulation.

(a) Restrictions on the activity

- EFCs will be companies (which do not qualify as credit entities) that carry out: (i) lending activities; (ii) factoring with or without recourse and supplementary activities; (iii) financial leases; (iv) provision of collateral and guarantees; and/or (v) granting of reverse mortgages, with the authorisation of the Spanish Ministry of Economy (*Ministerio de Economía y Competitividad*).

- EFCs cannot take deposits but can securitise their assets.

(b) Authorisation and Registry

- The incorporation of an EFC requires the authorisation of, and registration with, the Spanish Ministry of Economy. This requires consultation with the Bank of Spain and

the executive service of the Commission of the Spain's Financial Intelligence Unit (*FIU*) and AML/CFT Supervisory Authority ("**SEPBLAC**").

- Hybrid entities (i.e., companies that seek to incorporate as both an EFC and a payment service institution) require a single authorisation of and registration with the Spanish Ministry of Economy. This also requires consultation with the Bank of Spain, the executive service of the Commission of the SEPBLAC.

(c) EFCs' reporting obligations

- Financial statements must be disclosed and submitted to the Bank of Spain.

- Annual accounts must be audited and the audit report must be submitted to the Bank of Spain.

6. Spanish Secondary Market, MAB.

The Law amends the Securities Market Law (*Ley del Mercado de Valores*, "**LMV**") in order to favour a transition from a multilateral trade system (like the MAB) to an official secondary market. The Law releases listed companies switching to an official market from the obligation to publish and disclose their second semester financial statement and the interim management statement for a transitional period of 2 years.

The above is supplemented by the obligation of companies with a capitalisation in a multilateral trade system above € 500 million for a continuous period of 6 months, to request admission to trading on a regulated market in a period up to 9 months. The Law enables the CNMV to release collective investment schemes, venture capital entities, collective investment schemes of closed-end type and certain particular kinds of public limited companies (*SOCIMIs*) from this request obligation.

The companies switching from a multilateral trade system to an official secondary market in the above scenario will not be obliged to "*carry out any measures to prevent the investors from suffering a potential loss of liquidity of the securities*". This ambiguous wording seems to provide that a public offering will not be necessary prior to the de-listing of securities in a multilateral trade system.

7. Crowdfunding Platforms

The Law regulates crowdfunding platforms for the first time, dedicating Title V to crowdfunding activities. According to the Law, crowdfunding can be performed through: (i) the issuance or underwriting of securities; (ii) the issuance of shares (*participaciones*); or (iii) the granting of loans. Therefore, crowdfunding activities without a financial component are outside the scope of the Law (i.e. crowdfunding activities where investors do not expect to receive a monetary consideration for their participation).

The Law establishes, among other matters, that crowdfunding platforms will be authorised by the CNMV and registered with a registry also reporting to the CNMV. Moreover, said platforms will be subject to requirements aimed at strengthening the protection of investors. The Law limits the investment ability of each investor according to their income and wealth, differentiating between qualified and non- qualified investors.

Thus, according to the Law, crowdfunding platforms will be considered as a type of financial intermediary, due to the registry requirement and the performance of regulated activities.

The Law, inspired by the client classification applicable to the carrying out of investment services, differentiates between qualified investors and non- qualified investors. Qualified investors include regulated entities and investors with a certain income and wealth minimums[1]. The investments of non-qualified investors (who assume greater risks related to this kind of investment) are limited to € 3,000 (by project) and € 10,000 (by total investment per year). The Law has not imposed limitations on investments by qualified investors (aside from the ones indicated in the paragraph below).

The platform must check the identity of the promoter, its partners and directors. In addition, the platform must ensure that the promoter, its partners and directors have not entered into insolvency proceedings or been convicted for social-economic crimes. Additionally, the raising of funds is limited by project and platform, and must not exceed €2 million (if targeted to non-qualified investors) or €5 million (if targeted to qualified investors). Hence, the security offered by a crowdfunding platform will not be considered "public" according to article 30 *bis* of the LMV.

Finally, it is important to highlight that the Law foresees the possibility of setting up crowdfunding platforms as "hybrid entities" (platforms which also carry out payment services). In the event that the platform raises funds from investors and promoters seeking to carry out payment services, the platforms must be registered as hybrid entities with the relevant registry of the Bank of Spain.

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[1] **The following investors will be considered as qualified investors: (i) people that can qualify as professional clients according to section 78 *bis* 3 (a) and (b) of the LMV; or (ii) entrepreneurs that individually meet, at least, two of the following conditions: (a) the value of their total assets amounts to at least €1 million; (b) their annual turnover amounts to at least €2 million; or (c) their own funds amount to at least €300,000; (iii) individuals who evidence revenues over €50,000 or a financial net worth over €100,000 and request to be treated as qualified investors; or (iv) individuals who mandate an authorised investment service company to provide them with financial advice on the funding instruments of the platform.**