

Amendments to Spanish Corporate Laws Add Flexibility to Bond Issuances by Spanish Companies

New rules relax certain structural and procedural legal restrictions, helping Spanish companies access debt capital markets.

On 27 April 2015, the Spanish parliament passed Law 5/2015, of 27 April, of corporate finance promotion (the Law) which introduces major amendments into certain Spanish laws (the Amendments). The Amendments take effect starting on 29 April 2015 and are aimed at improving Spanish companies' access to debt capital markets by developing and promoting non-bank related corporate finance sources.

The Amendments affect both *sociedades anónimas* (S.A.s) and *sociedades de responsabilidad limitada* (S.L.s), the two most common forms of Spanish limited liability companies.

The Amendments affect 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 Companies Act), and the Securities Market Act (Ley 24/1988, de 28 de julio, del Mercado de Valores or Securities Act), among others.

Maximum issuance limit for S.A.s removed

Until the entry into force of the Law, non-listed S.A.s were not allowed to issue notes in excess of the aggregate amount of their disbursed share capital and reserves booked in their last approved balance sheet combined with certain special reserves approved by the Ministry of Economy. Companies could avoid the limit if the bond issuance was secured with a mortgage, a pledge of securities, a public guarantee or a joint and several guarantee from a credit institution.

S.A.s can now issue secured and non-secured bonds without such limitation.

Listed S.A.s can still issue secured and non-secured bonds without limitation, as they could prior to the entry into force of the Law.

S.L.s now allowed to issue and guarantee notes

The traditional prohibition on S.L.s to issue and guarantee any kind of notes has been removed. S.L.s are now allowed to issue notes subject to the following restrictions:

- S.L.s can only issue bonds up to an aggregate maximum amount of twice its own equity (*recursos propios*), unless the issuance is secured by a mortgage, a pledge of securities, a public guarantee or a joint and several guarantee from a credit institution. If the issuance 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 the capacity of such company, at the time of issue, in accordance with the specific rules applicable to such entity.

The Law has not specifically addressed whether this restriction shall also apply to S.L.s when guaranteeing notes, so will remain an unresolved matter subject to interpretation until the legislator or settled case law shed light on the restriction.

- S.L.s are prohibited to issue or guarantee convertible notes.

The former prohibition on S.L.s issuing bonds left many companies with Spanish S.L. subsidiaries with increased legal and transactions costs for many bond structures and limited the ability of many companies with subsidiaries in the form of Spanish S.L.s to issue or guarantee bond issuances.

Issuer groups also experienced situations in which structures were imposed as a post-closing covenant or condition, which obliged the issuer group to convert Spanish S.L.s into S.A.s (which were the most common legal form of Spanish company allowed to issue and guarantee bonds).

Removing such prohibition will simplify structures and reduce costs and legal procedures of Spanish companies issuing bonds.

Issuance of notes by Spanish companies governed by foreign law clarified

The Law expressly recognizes that Spanish companies may issue notes (including convertible notes) or other debt instruments abroad. In this case, (i) Spanish law will govern the capacity, the competent body and the conditions for adopting the resolutions approving the issuance; and (ii) the law to which the issuance is subject will govern the rights of the noteholders vis-à-vis the issuer, their forms of collective organization and the regime for repaying and redeeming the notes.

This important Amendment clarifies for the first time in Spain that (i) Spanish issuers are allowed to govern the terms of their bonds (e.g., indenture, purchase agreement and other transaction documents) to non-Spanish jurisdictions, and that (ii) noteholders can organize and structure their collective organization through trustees or other similar structures not contemplated under Spanish law. These important clarifications shed light on certain legal academic risks in many common structures Spanish issuers have implemented in the past.

In case of convertible notes (i) Spanish law will govern the issue value of the notes, limitations on conversion and the system for excluding pre-emption rights; and (ii) the relevant foreign law will govern the content of the conversion right within the limits set out by Spanish law as the governing law of the issuer.

Commissioner and syndicate of noteholders appointments relaxed

The Law provides that creating a syndicate of noteholders and appointing a commissioner will only be required in those cases contemplated in the special legislation on issues of notes or other debt instruments. Thus, pursuant to such legislation (*i.e.*, the Spanish Securities Act), issuers are only obliged to create a syndicate of noteholders and appoint a commissioner when all three of the following conditions are met:

- The issue constitutes a public offering.

- 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 Organisation for Economic Co-operation and Development (OECD).
- 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.

If all such condition are not met, the law applicable to the issue will provide the terms and conditions of the collective organisation of noteholders. Again, this Amendment confirms that issues of securities subject to, for example, English or New York law do not require establishing a syndicate of noteholders in Spain or appointing a Spanish commissioner.

The Board of Directors now entitled to authorize bond issuances

Until the approval of the Law, any kind of bond issuances had to be approved by the general shareholders' meeting of the Spanish company (or such shareholders' meeting had to delegate such power to the management body), with obvious implications in terms of timing, legal formalities and costs of many bond issue structures, especially when the issuer was listed or had many shareholders.

Under the new Law, the issuer's director (either through the Board of Directors or other relevant governing body) shall be generally entitled to authorize the issuance and listing of notes as well as the granting of guarantees, except if (i) the issuer's bylaws provide otherwise; or (ii) the notes to be issued are notes convertible into shares or notes that grant holders a participation in the company's earnings. In such cases, the approval of the general shareholders' meeting will be required.

In those cases in which shareholders' approval is no longer statutorily required, issuers should check the bylaws of the issuer and guarantors at a preparatory stage to verify those parties do not require shareholder approval.

Ranking of the notes will follow general insolvency rules

Former article 410 of the Companies Act broadly set out that the first issuances would rank ahead of ulterior issuances with regard to a company's unsecured assets. This article has been removed by the Law.

In removing this article, the Law diffuses potential concerns about interpretations that could rank subsequent note issuance by the same company differently. The Law confirms the most common interpretation that, in case of an issuer's insolvency, the general rules on ranking of claims set out under the Spanish Insolvency Act will apply.

Certain formalities relaxed

The Law specifies the cases in which granting the public deed of issue and filing with the Commercial Registry shall no longer be required. Those cases include either of the following:

- Issue of notes to be listed on an secondary regulated market in Spain (e.g., Mercado AIAF de Renta Fija) or subject to an initial public offering that require the preparation of a prospectus to be approved by and filed with the Spanish securities regulator CNMV
- Issue of notes to be listed on a multilateral trading system established in Spain (e.g., Mercado Alternativo de Renta Fija or MARF).

The foregoing exception will not capture convertible notes.

Therefore, the obligation to grant a public deed of issue in Spain and file it with the Spanish Commercial Registry will still be applicable to Spanish issuers which list their bonds in non-Spanish exchange markets or multilateral trading systems.

In those cases in which granting the public deed of issue and filing with the Commercial Registry is still required, the Law removes the obligation to publish an announcement of the issuance in the Official Gazette of the Commercial Registry (BORME) before the notes can be released into circulation.

New formalities as for public deed of issue

As a notable exception to the general tone of the Law, which aims to facilitate capital market operations, the Law sets out additional required content or formalities in relation to the public deed of issue (whenever such public deed shall still be granted):

- If the issuer has notes in circulation, it must state which issues of notes are in circulation and the nominal amount of such notes.
- If the notes are secured (*in rem* guarantees), the public deed of issue shall identify the secured asset, including the details, on the public registry or depositary in which they are registered or deposited and certain details about the granting of the security.
- If the notes being issued have personal guarantees, the guarantors must attend the execution of the public deed of issuance (this is important for logistical purposes as it will require coordinating the relevant signatories, or granting powers of attorney).

Conclusion

The amendments to the regime of notes issue introduced by the Law are welcome as they were necessary in order to facilitate Spanish companies' access to debt capital markets.

From a structuring point of view, the Law has simplified bond issuances by allowing S.L.s to issue and guarantee notes without needing to convert into S.A.s first (which is a lengthy and costly process).

From a procedural point of view, the Law has shortened and eased up the issuance of bonds by:

- Entitling the Board of Directors, or other governing body, to authorize the issuance (saving the time, resources and risks of subjecting the issuance to the approval of the shareholders)
- Removing the obligation to grant a public deed of issue and register it with the Commercial Registry in certain cases
- Eliminating the general obligation to publish the public deed in the BORME prior to the release of the notes

Finally, from a legal certainty perspective, the Law has helped to clarify that the ranking of notes will follow general insolvency rules and that issuances subject to, for example, English or New York law shall not require establishing a syndicate of noteholders or appointing a commissioner.

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