INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

Finance for your clients: Harmonisation of Capital Markets

Commission(s) in charge of the Session/Workshop:

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National Report of Spain

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1. **Briefly describe the level of integration of the capital markets at the infra-national, national and supra-national levels.**

Capital markets integration is one of Europe's priority in the challenge to unlock investment in European companies and infrastructure. In this context, numerous Regulations and Directives, duly incorporated when applicable into Spanish law, have been designing a regulatory framework to harmonise member states' approach to their capital markets and, therefore, level of integration is significant amongst European countries.

Notwithstanding the above, Europe's objective aims at strengthening investment for the long term, as a way of complementing banks as a source of financing, and, for such purposes, the ultimate goal is to build a true single market for capital; as established in its last published Green Paper on building a Capital Markets Union (issued in February 2015) (the "**Green Paper**"), to build a "Capital Markets Union for all 28 Member States". Consequently, we shall see how integration in Europe is further fostered in the future.

2. **Which measures have been adopted (or are foreseen) in your jurisdiction to support access to finance by small and medium sized enterprises ("SMEs")? Measures might include (i) supporting venture capital and equity financing; (ii) lowering information barriers; (iii) enhancing access to public markets; (iv) supporting equity financing; (v) facilitating infrastructure investment; and/or (vi) promoting innovative forms of corporate financing.**

As regards supporting access to finance by small and medium sized enterprises ("**SMEs**"), the main and most recent measures that have been adopted in Spain, with the objective of responding to the strong historic dependence of our SMEs on banking financing, have come into effect with the approval of Act 5/2015, of April 27, for the encouragement of corporate financing (*Ley 5/2015, de 27 de abril, de fomento de la financiación empresarial*) ("**Act 5/2015**").

Facing said historic financing constraint, Act 5/2015 purposes to support SMEs in accessing financing by introducing, among others, the following measures:

(i) The traditional regime applicable to corporate debt financing has been amended significantly, not only giving access to private limited companies (*sociedades de responsabilidad limitada*) to said source of financing, but also suppressing existing quantitative limitations for public limited companies (*sociedades anónimas*) and relaxing certain formalities for the approval and execution of debt issuance corporate resolutions (i.e. publicity of the issue and registration with the Commercial Registry of the issuance public deed are no longer required).

(ii) On the other hand, a new regime regulating participative financing platforms ("**PFP**") –colloquially known as crowdfunding platforms- has come into effect as an innovative alternative to banking and other traditional sources of financing. Consequently, PFPs have become regulated "entities" under the surveillance of the Spanish Securities and Exchange Commission (*Comisión Nacional del Mercado de Valores*) ("**CNMV**"), and in turn benefit from exercising a now-reserved and regulated activity, provided they fulfil certain regulatory requirements (including financial qualifications, risk disclosure obligations and eligibility criteria for projects to be financed), designed to protect investors.

(iii) As regards banking financing, Act 5/2015 aims at encouraging SMEs to resort to it, by compelling credit institutions to (i) give prior notice when having the intention of not extending, terminating or decreasing by 35% or more the financing flow previously granted to the SME; and (ii) send the affected SME a free report including all of its historic financial information.

(iv) As regards capital markets, relevant developments introduced by Act 5/2015 will be further analysed under Questions 3 and 8 below.

3. Has your jurisdiction adopted (or are there any trends indicating that may do so in the future) any measures to remove barriers to cross-border investment? Measures could include (i) improving market infrastructure; (ii) fostering convergence of insolvency proceedings; (iii) removing cross-border tax barriers; (iv) strengthening supervisory convergence.

In the context of removing barriers to cross-border investment, and as regards measures for the improvement of market infrastructure, the most relevant development in Spain comes into effect through the reform introduced into the Spanish post-trade systems by virtue of Directive 2013/50/EU[1], which our legislator has incorporated recently in order to have said reform implemented before the established deadline of February 2017. The reform seeks to harmonize the Spanish post-trade system with European practices and standards, increase its level of competitiveness and enable its integration with the T2S Project and other European relevant regulations.

The Target2Securities ("**TS2**") Project, the largest infrastructure project implemented until now at European level, constitutes a significant step towards achieving an integrated, single securities market for financial services. It is intended for central securities depositories, which are offered the possibility of using the European Central Bank's single settlement platform for cash securities transactions.

For this purposes, developments introduced by Directive 2013/50/EU include, among others, the introduction of a central counterparty, the movement of the finality of transaction form the time of trade to that of settlement, a new two-tier registry system and amendments in the settlement system and the reporting of corporate actions.

[1] Directive 2013/50/EU of the European Parliament and of the Council, of 22 October 2013, amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC ("**Directive 2013/50/EU**").

Finally, at the supervisory level, the reform of the regulation of market abuse that will be further explained under Question 8 below, constitutes an element of convergence towards strengthening and harmonising the regulatory framework under which European authorities perform their duties of supervision of the capital markets.

4. Have specific measures been adopted (or are foreseen) to increase choice and competition in cross-border retail financial services and/or insurance?

Enhancing cross-border competition in retail financial services has been identified by the European Commission, in the Green Paper, as one of the measures needed for the development and integration if capital markets, focusing on financial services provided by electronic and mobile tools due to these having potential to contribute in this regard. Thus, the European Commission is to begin preparatory work aimed at achieving this objective, including (i) addressing concerns over guarding against fraud, hacking and money laundering, as regards electronic and mobile tools; (ii) in more general terms, strengthening financial literacy to enable consumers to choose and compare financial products more effectively and easily; and (iii) clarifying and, where necessary, enhancing mandates in the area of consumer/investor protection given to regulatory and supervisory authorities.

In Spain, the referred financial literacy objective has been addressed by CNMV and the Bank of Spain through a Financial Education Plan, issued in 2008 and later updated in 2013, to enhance the population's financial literacy levels, in order to enable citizens to face the new financial environment confidently, including education for retirement and on insurance issues.

5. Capital markets harmonisation aims to facilitate companies' access to finance, particularly for SMEs by promoting more diversified funding channels that are complementary to bank financing. Is non-bank financing significant in your country? Please consider the role of private equity, venture capital, alternative finance, loan-originating funds, etc.

Typically, in Spain, as it tends to occur with the rest of European countries compared to other parts of the world, businesses are heavily reliant on banks for funding and relatively less on capital markets.

Notwithstanding the above, and although results from the analysis of 2015 tendencies have not yet been published, the last CNMV published annual report on securities markets in Spain revealed that venture capital activity recovered significantly in 2014, an improvement that was reflected in the CNMV register, where the number of new firms registered was the highest since 2008, and in the increase of funds raised from investors. Consequently, even if Spanish business remain mainly reliant on banks, we could conclude that the outlook for the coming years for the role of non-banking financing is very favourable, including as regards alternative finance such as PFPs, now to become a regulated activity as explained in Question 2(ii) above.

In terms of regulatory harmonisation, venture capital regulation in Spain was provided with a new framework for operations with the entry into force on 14 November, 2014 of Act 22/2014, of 12 November, regulating venture capital entities, other closed-ended collective investment schemes and their management companies (*Ley 22/2014, de 12 de noviembre, por la que se regulan las entidades de capital-riesgo, otras entidades de inversión colectiva de tipo cerrado y las sociedades gestoras de entidades de inversión colectiva de tipo cerrado*) ("**Act 22/2014**").

Act 22/2014 reformed the current venture capital regulatory framework in several significant aspects, for example, by simplifying the rules on administrative intervention or through the creation of new types of entities and increased flexibility in mandatory investment coefficients. In addition, it incorporated into Spanish law Directive 2011/61/EU[2], with the aim of implementing harmonisation of the conditions for authorisation, marketing, conduct of business rules and organisation of these entities in Europe.

6. While loans traditionally represent the bulk of the banking assets, most financial entities also invest in capital markets. Do financial institutions in your jurisdiction invest highly in the capital markets? Are bonds and equity investments a significant proportion of the assets of financial institutions in your jurisdiction?

In Spain, banks do not tend to invest in capital markets, especially in the private equity sector, where the main investors other than venture capital

[2] Directive 2011/61/EU, of the European Parliament and of the Council, of 8 June 2011, on alternative investment fund managers ("**Directive 2011/61/EU**").

entities are incubators/accelerators, business angels (irrespective if individually or syndicated) and public institutions specialized in the granting of participative loans. Thus, the answer is that bond and equity investments do not make a significant proportion of the assets of the Spanish traditional financial entities.

7. Harmonisation requires standardisation, particularly in terms of credit information. Is SME credit information easily available in your jurisdiction? Is your jurisdiction adopting any measures to boost availability and standardisation of SME credit information at the national and supra-national levels?

Information on SMEs has been typically limited and usually held by banks, a circumstance that causes SMEs to struggle to reach the non-bank investor base to satisfy their funding needs. Consequently, the European Commission, as it stated in the Green Paper, plans to work on improving credit information, by developing a common minimum set of comparable information for credit reporting and assessment and standardised credit quality information and by promoting credit scoring.

Particularly in Spain, and in the context of promoting access by SMEs to banking financing, Act 5/2015 has introduced a new measure which in turn contributes to SME credit information: the aforementioned financial report to be sent out free of charge by financial institutions, when they intend not to renew, suspend or reduce by more than 35% the flow of financing grated. This report shall contain all the historical financial information on the SME which the financial entity has been gathering and, among other information, the last four data declarations sent out to the Risk Information Central (*Central de Información de Riesgos*), the credit record or the risk rating of the company. Additionally, this report may be accessed at any moment if the SME wishes to obtain it, provided it pays for it.

8. Is there any recent or proposed legislation in your jurisdiction aimed to establish a framework for simple, transparent and standardised securitisation? Examples might include measures (i) to simplify prospectus requirements; (ii) to increase/decrease the information required to be provided to investors before making an investment decision; or (iii) to reduce barriers for smaller firms to access capital markets. If there have been no recent developments, please describe the current situation of securitisation in your jurisdiction.

Our legislator's most recent efforts to provide a framework for simple, transparent and standardised securitisation can be summarised by reference to the following developments, which we consider are the most relevant towards the promotion of said regulatory framework:

(i) As regards transparency in capital markets and investor information: Amendments in transparency regulations have their origin with the EU and the referred Directive 2013/50/EU, which Spain has duly incorporated recently, thus converging towards European standards as regards, mainly, transparency of major holdings in Spanish listed companies. The most important development in this regards lies with the new obligation to disclose ownership over certain types of financial instruments having a similar effect to that of holding shares, regardless of whether settlement is made through shares or cash (before that, only shares and financial instruments conferring an unconditional right or discretion to acquire issued shares were to be disclosed). Consequently, the legal framework as regards information available to investors on the structure of corporate ownership (of listed companies) has become a regulatory umbrella covering all EU member states.

(ii) As regards market abuse: Regulation of market abuse is also moving towards European harmonization through Regulation nº 596/2014[3], which shall apply from July 3, 2016, establishing a common regulation of the matter in all the EU member states, particularly as regards privileged information and its use, communication and diffusion to the market, as well as market manipulation and operations by managers and directors. In addition, and for the purposes of avoiding disparities among different

[3] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) ("**Regulation nº 596/2014**").

EU state members, the market abuse reform introduces minimum rules on administrative measures, sanctions and fines (including, for the first time, as regards whistle-blowers), without prejudice to each state's faculty to impose heavier ones.

(iii) As regards access to capital markets: Certainly, the most innovative development in this regard lays within the so-called "lift Act" ("*ley ascensor*") –which is part of the batch of amendments introduced by Act 5/2015 into the Spanish Securities Market Act-, aimed at facilitating admission to listing on official exchanges for companies currently listed on multilateral trading facilities ("**MTF**"). For such purposes, the "lift Act" enables these companies, during a two-year period after admission on the relevant MTF, to benefit from a more lenient reporting obligations regime (by relaxing certain information requirements).

Nevertheless, the most important provision of the "lift Act" is that those companies reaching a capitalisation worth 500 million Euros shall apply for listing on an official exchange within the nine-month period following the surpassing of such capitalisation level. For firms listed on MTFs, this provision serves precisely to the objective of tearing barriers down towards capital markets or, in other words, "lifting" smaller companies to upper floors.

9. In your experience as a banking/capital markets lawyer, have you detected in your jurisdiction any unnecessary regulatory burdens, interactions, inconsistencies and/or rules that have unintended consequences which threaten the ability of the companies to finance themselves?

As regards our clients' ability to finance themselves, we have not encountered grave regulatory burdens or inconsistencies that would pose a serious threat to their capacity. However, there would be room for a general commentary regarding corporate governance rules affecting companies listed on securities exchanges. In certain cases, specific characteristics of certain companies may cause certain corporate governance rules to be unsuitable for them, becoming an unnecessary burden to comply with. It is understood that corporate governance plays a crucial role for the protection of small investors and of the financial environment. However, financial history demonstrates that these measures have not always proven to be sufficient to avoid financial fraud. Therefore, while the tendency is for soft law to become hard law, we believe

that certain corporate governance recommendations should remain at the soft law level (or, at least, apply differently to different companies) if not serving as an essential measure of investor protection, which would in turn facilitate the access to securities markets by smaller companies, sometimes excessively burdened with compliance of the abovementioned rules.

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