Spain

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Statutes and regulations

1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

Several statutes and regulations contemplate the regime applicable to the offering of securities either issued or offered to the public in the kingdom of Spain and/or the application for an admission to listing of the securities sought in a Spanish secondary market. The main piece of legislation is Act No.24/1988 on the securities market (SMA), which has, since its year of enactment, been amended on several occasions, substantially by Act No.44/2002 on the measures for reform of the financial markets and recently by Royal Decree Law 5/2005 of 11 March, on urgent reforms to encourage, among others, productivity and improve public procurement (RDL 5/2005), implementing Directive 2003/71/EC of the European Parliament and of the Council, of 4 November 2003, on the prospectus which must be published when securities are offered to the public or admitted to trading, and which amends Directive 2001/34/EC (the Prospectus Directive) and subsequently redrafting Title III (Securities Primary Market) of Title III of the SMA.

Regarding securities offerings, the SMA was developed by, among others:

- Royal Decree 291/1992, on issues and public offerings of securities (RD 291/1992);
- the Ministerial Order dated 12 July 1993, regulating prospectuses and other developments of the Royal Decree; and
- Circular No. 2/1999 of the National Commission Securities Market (the 'Comisión Nacional del Mercado de Valores', the CNMV), approving forms of prospectuses to be used for specific issues or public sale of offerings of securities.

Regarding transactions performed in the Spanish stock exchanges, the old provisions of the 1967 Stock Exchange Regulation are, for the time being, still applicable.

Some other important secondary legislation to the offering of securities in Spain includes:

- Royal Decree 726/1989 on the managing of companies and members of the Spanish stock exchanges and collateral requirements;
- Royal Decree 1416/1991 on special stock exchange transactions, off-exchange transactions and weighted average quotations;
- Royal Decree 116/1992 on the representation of securities in book-entry form and the settlement of transactions in the stock exchanges;
- Royal Decree 629/1993 on the rules of conduct in the securities markets; and
- Royal Decree 867/2001, on the regulatory framework of investment services firms.

Finally, other specific legislation may be applicable to certain specific products (ie collective investment schemes, futures, options, etc).

As a consequence of RDL 5/2005 some of the above pieces of legislation will be amended or replaced in the near future by secondary regulations implementing the new provisions set forth in RDL 5/2005.

The Spanish regulatory authority for the supervision of the Spanish securities market in general is the CNMV. The CNMV is a public law entity with its own legal personality capable of pursuing its activities in the public/administrative sector (supervisory and sanctioning powers) and in the private sector (contracting and transactions concerning its own properties).

Public offerings

2 What regulatory or stock exchange filings are required to be made in connection with a public offering of securities? What information is required to be included in such filings and/or made available to potential investors in connection with a public offering of securities?

The new RDL 5/2005 has defined the term public offering broadly, as "any communication made to persons by any means which provides sufficient information about the terms and conditions of the offer and the securities offered that allow an investor to decide on the acquisition or subscription of these securities", and establishes similar requirements for both admissions to trading and public offerings.

Pursuant to the recently amended Article 25 of the SMA, the general eligibility requirements for admissions to trading in an official secondary market are as follows:

- the issuer must be validly incorporated under the laws of the country in which it has its registered office and must be operating in accordance with its memorandum of incorporation and its articles of association or equivalent documentation;
- the securities must conform to the legal system to which they are subject; and
- the securities must be freely transferable.

Also, according to the recently amended Article 26 of the SMA, the admission to trading of securities in an official secondary market is subject to the fulfilment of the following requirements:

- To submit and file with the CNMV the documents evidencing that the issuer and the securities comply with their applicable governing laws
- To submit and file with the CNMV the financial statements

of the issuer prepared and audited in accordance with the law which applies to the issuer
- To submit, approve and register a prospectus with the CNMV, and to publish it.

The requirements set out above do not apply to non-equity securities issued by the Spanish state, the autonomous regions and local authorities. Equity securities refers to shares and other transferable securities which are equivalent to shares, as well as to any other type of transferable securities which entitle its holders to acquire any of the these securities through conversion or by exercising the rights conferred by the relevant securities, with the condition that the securities are issued by the issuer of the underlying shares or by an entity belonging to the group of the said issuer. In turn, non-equity securities refer to all securities other than the mentioned securities.

The regulations do not clarify whether hybrid securities such as, for example, preferred capital securities regulated by the Second Additional Provision of Law 13/1985 of 25 May, or share quotas in saving banks, should be classified as equity or non-equity securities. This question will need to be clarified in the future by the regulatory authorities when applying the law.

Moreover, the government is authorised to allow for total or partial exemptions with regard to the fulfilment of the above-mentioned requirements for the admission to trading of certain securities according to: (i) the nature of the issuer or the securities; (ii) the amount of the admission; or (iii) the nature or the number of investors to which the referred securities are addressed. When the exemptions are based on the nature of the investor, additional requirements may be demanded to guarantee its correct identification.

When commercial publicity is used in connection with an issue or public offer, it is necessary to elaborate a summary (*tríptico*) with the main characteristics and risks of the public offer and of the issuer, based on information contained in the prospectus. In any case, the *tríptico* must contain a reference to the existence of the prospectus registered with the CNMV and to the ways of obtaining a copy of the prospectus. The CNMV shall verify that the content of the *tríptico* is consistent with the information contained in the prospectus.

Documents need to be filed in Spanish and, where the issuer or offeror is resident abroad, must be legalised by a notary public and authenticated by affixing the apostille pursuant to The Hague Convention of 5 October 1961 or other legalisation proceedings through a Spanish consulate.

In addition, it should be noted that, pursuant to Article 6 of RD 291/1992, still applicable, securities issued by the European Central Bank and the national central banks that comprise the European System of Central Banks are not subject to the filing requirements set out above.

3 What are the steps of the registration/filing process? Can an offering commence while review of the offering by the applicable regulatory authority is still in progress? How long does it typically take for the review process to be completed?

For the time being, the CNMV has up to 30 calendar days from the filing of an issue, offering or listing prospectus and the corresponding ancillary documentation to verify whether it complies with applicable requirements and to record it in the public registry. In practice, however, in advance of any transaction, the issuer or offeror and its advisors often approach the CNMV on a confidential basis in order to obtain informal prior approval of the prospectus, such that when the prospectus is officially filed and duly signed in final form, it is usually registered one or two days following the official filing.

In the case of issues and offerings of securities, the subscription or purchase period must begin within one month from the registration of the prospectus with the CNMV (unless the CNMV requests further information), and shall not remain open in excess of one year.

The issuer or offeror must publish the prospectus and the summary leaflet prior to the opening of the subscription/purchase period, and copies must be made available to investors free of charge at the registered address of the issuer or offeror, the CNMV and the financial institutions participating in the distribution of the securities. Finally, whenever admission to listing of the securities will be sought following the offering on the Spanish stock exchanges or the AIAF Market, copies of the prospectus and summary leaflet shall be also available at the offices of the relevant secondary market.

In addition, the CNMV customarily posts the registered prospectus on its official website, www.cnmv.es. The issuer or offeror may also voluntarily post the prospectus and the summary leaflet on its website, subject to appropriate access restrictions to comply with foreign securities law requirements.

If, following publication of the prospectus and prior to the end of the subscription period, any material inaccuracy or omission of information is discovered in the prospectus or there are new developments which may significantly affect the price of the securities being offered, such information shall be the subject of a supplement to the prospectus which must likewise be registered with the CNMV and published under the same terms as the prospectus.

Once the subscription/purchase period has closed, the issuer or offeror shall provide to the CNMV certain aggregate statistical information regarding the distribution of the securities classified by categories of investors and geographical allocation by filing a duly completed diffusion chart in the prescribed official form.

4 What, if any, are the publicity restrictions applicable to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

The prospectus and tríptico registered with the CNMV are the principal marketing material for a registered issue or offering of securities in Spain. Notwithstanding this, issuers and offerors may prepare publicity materials (including advertisements in newspapers, radio and television spots, mailings) in relation to the offering. Publicity materials, which must be approved by the CNMV before their release, must provide a clear and accurate picture of the main characteristics of the offering and may not include messages which are not extracted from the prospectus or which convey an overall understanding of the issue or offer different from the one deriving from the prospectus as a whole.

Entities acting as placing and underwriting entities of a particular issue or offer of securities must abstain from publishing reports on the issuer as from the date of verification by the CNMV of the prospectus until the end of the placement term, except for specific periodical reports to be published in accordance with a pre-established schedule (the modification of the periodicity of such reports and of the list of addressees is not permitted).

Roadshows would constitute a means of publicity, as defined by Article 3 of RD 291/1992. Therefore, no roadshows addressed

to Spanish investors could be carried out in Spain (or inviting Spanish investors to attend a roadshow carried out abroad) until the relevant prior communication and any other relevant documentation of the offering, as applicable, has been duly filed and registered with the CNMV.

Press releases on the securities offered prior to the registration of the offering should be limited to mentioning the fact that the prior communication has been filed and to the information contained in it. Therefore, any press release taking place in the meantime must not provide any information that goes beyond what is set out in the prior communication or any other information which is available to the public through other means.

5 Are there any special rules (for example relating to the issuance of new securities or the preferential subscription rights of existing security holders) that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

There are no specific rules that differentiate between primary and secondary offerings. Likewise, no special liability issues arise for the seller of securities in a secondary offering, other than the general rules described under questions 18 and 19 below.

6 What is the typical settlement process for sales of securities in a public offering?

Transactions carried out on the Spanish Automated Quotation System are cleared and settled through Iberclear. Only participating entities of the system are entitled to use it, and access to becoming a participating entity is restricted to authorised members of the Spanish Automated Quotation System, the Bank of Spain (when an agreement, approved by the Spanish Ministry of Economy, is reached with Iberclear), and, with the approval of the CNMV, other brokers that are not members of the Spanish stock exchanges, banks, savings banks and foreign settlement and clearing systems.

The clearance and settlement system and its members are responsible for maintaining records of purchases and sales under the book-entry system. Shares of listed Spanish companies are held in book-entry form. Iberclear maintains a registry reflecting the number of shares held by each of its member entities on its own behalf, as well as the number of shares held on behalf of third parties. Each entity member of Iberclear, in turn, maintains a registry of the owners of such shares. Spanish law considers the legal owner of the shares to be:

- the member entity appearing in the records of Iberclear as holding the relevant shares in its own name; and
- the investor appearing in the records of the member entity as holding the shares.

Iberclear has approved regulations introducing the 'T+3' settlement system, by which the settlement of any transaction must be made within three business days following the date on which the transaction was carried out.

Obtaining legal title to shares of a company listed on a Spanish stock exchange requires the participation of a Spanish official stockbroker, broker-dealer or other entity authorised under Spanish law to record the transfer of shares. To evidence title to the shares, at the owner's request the relevant member entity must issue a certificate of ownership. If the owner is a member entity, Iberclear is responsible for the issuance of the certificate with respect to the shares held in the member entity's name. Act No.37/1998, which implements an EU directive, allows, in specified circumstances, for the transfer of the ownership of shares of a company listed on a Spanish stock exchange without the need to comply with one or more of the requirements described above. However, secondary legislation required to implement this law in Spain has not been enacted to date.

Private placements

7 Are there specific rules for the private placement of securities? What procedures must be implemented to effect a valid private placement?

Finally, Spain has introduced specific full private placement of securities with the implementation of the Prospectus Directive. Since the amendments of SMA by RDL 5/2005, the obligation to publish a prospectus will not apply to the following types of offers, which will therefore not be considered as public offers for the purposes of Spanish law:

- Offers of securities addressed solely to qualified investors (although this term has not been defined)
- Offers of securities addressed to less than 100 natural or legal persons, other than qualified investors, per member state
- Offers of securities addressed to investors who acquire securities for a total consideration of at least €50,000 per investor, for each separate offer
- Offers of securities which denomination per unit is at least €50,000
- Offers of securities with a total consideration of less than €2,500,000, which limit shall be calculated over a period of 12 months

In addition, the SMA provides that further exemptions from the obligation to publish a prospectus will be set forth in secondary implementing regulations, depending on (i) the nature of the issuer or the securities, (ii) the amount of the offering or (iii) the nature or the number of investors to which the referred securities are addressed.

In connection with the preceding paragraph, although it is not expressly indicated from the wording of section third of Article 30 bis, it must be understood that public offerings of securities exempted from the obligation to publish a prospectus are also exempt from any other obligation to notify or file documentation with the CNMV. There is uncertainty, until the secondary legislation is implemented, as to how this exemption will work.

The new list of exceptions to the obligations to register documentation with the CNMV, provided by RDL 5/2005, provides a great deal more flexibility than the former regime as it will allow the conclusion of many transactions, which used to be subject to filing with the CNMV, without complying with any requirement. Some examples include issuances and offers of securities addressed exclusively to qualified investors, including block trades and accelerated book-built offers of shares, regardless of the percentage of the share capital of the issuer which they represent.

However, the transitory regime of RDL 5/2005 does not clarify whether the full or partial exemptions from the obligation to publish a prospectus and to file further documentation with the CNMV, according to RD 291/1992 and which are not in contradiction with the new exemptions (eg offers of securities to current and former directors and employees of the issuer and its group) are still in force. This will be clarified when the secondary implementing regulations of the SMA are approved. In the absence of specific regulations in this regard, it seems that the referred exemptions will continue being applicable in their terms and with their current scope until the secondary implementing

provisions of the SMA are enacted, which is expected to occur before summer 2005. Therefore, employee offers which cannot rely on an exception to the duty to register documentation, according to the new set of exceptions (because they target more than one hundred persons, have a nominal amount of less than €50,000 or are for a total consideration of more than €2,500,000), will only be subject to the obligation to file the supporting documentation regarding the issuer and the securities offered with the CNMV.

8 What information is required to be made available to potential investors in connection with a private placement of securities?

As mentioned in question 7 above, should a full private placement exemption be applicable, it shall be understood that the issuer or offeror would be exempted from any obligation to notify or file documentation with the CNMV. Non-specific required information for potential investors in a private placement is established by Spanish regulations.

9 Do any restrictions apply to the transferability of securities acquired in a private placement? Are there any mechanisms used to enhance the liquidity of securities sold in a private placement?

Under Spanish Law, there are no restrictions to the transferability of securities acquired in a private placement. However, it should be noted that the Prospectus Directive states that any subsequent resale of securities which were exempted from the obligation to publish a prospectus (which are the exemptions described in question 7 above) shall be regarded as a separate offer and the definition of offer of securities to the public given in the Prospectus Directive shall apply for the purpose of deciding whether that resale is an offer of securities to the public. This provision has not been already implemented by the new regime established by RDL 5/2005.

Offshore offerings

10 What specific rules, if any, apply to offerings of securities outside the home jurisdiction in relation to an issuer in your jurisdiction?

From the point of view of securities markets, no specific rules and requirements exist in regard to offerings outside Spain in relation to a Spanish entity. Only if such securities issued abroad were to be offered to residents in Spain, would the rules and requirements mentioned above be applicable.

In this regard, it should be noted that Article 29 of the SMA contains the principle of mutual recognition of EU prospectuses enshrine by its reciprocal nature. Thus, it is stated that the prospectus approved by the CNMV and any supplements thereto will be valid in any host member state, as long as the CNMV notifies the competent authority of each host member state in accordance with the secondary implementing regulations. In turn, the prospectus approved by the competent authority of the host member state and any supplements thereto, will be valid in Spain, provided that this competent authority notifies the CNMV. In such a case, the CNMV will refrain from approving or conducting any administrative procedures relating to the prospectus.

Particular financings

11 What special considerations, if any, apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

Other than certain corporate limitations and requirements that would be applicable to the issuance of exchangeable or convertible securities, warrants or rights offerings by a Spanish listed company, the general rules regarding public offering of securities and the preparation of a prospectus described in the preceding sections need to be taken into account if the securities (irrespective of whether there are exchangeable or convertible securities, warrants or rights offerings) are going to be offered on the Spanish market.

Underwriting arrangements

12 What types of underwriting arrangements are commonly used?

The CNMV normally requests copies of the placement or underwriting contracts with the relevant entities. Lead managers and global coordinators (whether Spanish or not) will also be required to sign a declaration stating that:

- they have made all proper investigations in order to check the reliability, accuracy and integrity of the information contained in the prospectus; and
- after carrying out such investigations, nothing has been found that contradicts or differs from the information contained in the prospectus, and no fact or data has been omitted which could be material for any investor.

13 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and over-allotment options?

Standard provisions in underwriting agreements in the international market are generally included in Spanish underwriting agreements. These agreements, particularly regarding the Spanish tranche, are drafted in Spanish and governed by Spanish law, regardless of the fact that certain securities are placed not only in Spain but also abroad.

Force majeure clauses subject to Spanish law, which have thus far been accepted by the CNMV (within the strict terms of Section 1,105 of the Spanish Civil Code), are narrower than the international markets' force majeure standard language. The latter comes from an Anglo-Saxon background, and is therefore subject to common law standards which, if our understanding is correct, are based on a case-by-case analysis of different scenarios, covering many different events (such as material adverse changes) that might exceed the protection under the terms of the Spanish Civil Code standard clause accepted by the CNMV for certain types of offerings (ie securitisations).

The standard of the Spanish Civil Code accepted by the CNMV only covers events that are not foreseeable, or that (even if they are foreseeable) could not be avoided. This is therefore a principle and not a precise regulation. The courts will decide on a case-by-case basis based on the interpretation of the law and the court precedents. However, there are no court rulings thus far on the application of this force majeure concept to transactions in the securities markets from which guidelines may be drawn. Accordingly, it is difficult to assess the likely reaction of a judge when faced with the need to uphold an underwriter's decision to call for a force majeure event.

Regarding indemnity clauses, it should be noted that the term 'indemnity' under Spanish law refers to compensation for those

losses and damages generally caused by a breach by the counterparty of its obligations under an agreement. We understand that the term 'indemnity' in a UK law context has a different and narrower meaning and refers specifically to the bearing by the indemnifying party of the cost of the defence and of any liability arising from any claim brought by third parties against the indemnified party.

Spanish issuers are typically only prepared to indemnify the underwriters on a strict reciprocal basis. This may clash with underwriters' internal policies and standards pursuant to which 'underwriters get indemnities but do not indemnify'. In addition, Spanish issuers tend to be reluctant to indemnify underwriters for 'alleged' breaches (even on a reciprocal basis), in particular for the legal defence of the underwriters in the event of groundless claims by third parties.

Certain conditions precedent to underwriting obligations, such as the delivery of a legal opinion by counsel or a comfort letter by the auditors, both in a satisfactory manner for the underwriters, are not standard in the Spanish market in certain offerings (ie securitisations). Others, such as securing a listing for the bonds prior to underwriting are simply impossible as they are not compatible with the listing rules that require the issue of notes to be closed and funded before the listing application can be considered by the authorities.

14 What additional regulations, if any, apply to underwriting arrangements?

Non-specific requirements are set out in the Spanish regulations regarding the content of the underwriting arrangements. However, it should be highlighted that, under Spanish law, the *entidades directoras* (lead managers) of a public offering of securities (among others) are required to file a letter with the CNMV stating that they have carried out the required due diligence in order to confirm the accuracy and completeness of the information contained in the prospectus (other than the audit report on the portfolio of credit rights). If the prospectus turns out to be inaccurate, not complete or misleading, civil, criminal and administrative liability could be attracted by the *directoras* in Spain based on this letter. The decision to participate in a Spanish transaction as lead manager or as a book-builder should therefore be carefully considered.

Ongoing reporting obligations

15 In what instances does an issuer of securities become subject to ongoing reporting obligations?

Only if the securities are listed in the Spanish stock exchanges or the AIAF Market will there be ongoing reporting obligations for an issuer of securities.

16 What information is a reporting company required to make available to the public?

Issuers of securities listed on the Spanish stock exchanges or the AIAF Market must comply with certain ongoing requirements established by the SMA, as amended, such as to periodically deliver financial information regarding the company, to promptly disclose any relevant information which may affect their quotation, to appoint an audit committee within its board of directors and to approve an internal code of conduct on matters relating to the securities markets. Failure by a company to comply with its ongoing obligations in relation to the listing of its securities on the secondary markets may result in the mandatory delisting of the relevant securities by the CNMV ex officio or at the request of the governing body of the relevant market.

In addition, persons acquiring or transferring holdings in shares of listed companies crossing specified thresholds of the company's issued share capital must report said transactions to the market under the rules governing disclosure of significant shareholdings.

Anti-manipulation rules

17 What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

In general, issuers of securities listed on a secondary market must promptly disclose any information, knowledge of which may reasonably affect an investor in order to acquire or transfer the securities in question, and which, accordingly, may have a noticeable effect on the quotation of securities on any organised trading market or system. The information disclosed must be accurate, complete, reliable and, where appropriate, quantified, in order to avoid misleading or false news which could distort the quotation of the securities.

In addition, issuers and market participants must respect the rules prohibiting the use of inside information and have a duty to promptly disclose any material information which could affect the quotation of their securities, in order to avoid a market manipulation.

Pursuant to Article 83 of the SMA, any practice that may artificially alter the free setting of market prices is prohibited. The Act considers the following practices as price manipulation:

- Transactions or orders which provide or may give false or misleading signals regarding the offer, demand or price of negotiable securities and financial instruments; or which guarantee, through one or more individuals acting together, an unusual or artificial price of one or more financial instruments, except if the individual carrying out such transactions or orders proves his/her reasons are legitimate or in accordance with the market practices accepted in the relevant market
- Transactions or orders using fictitious devices or any other misleading form, scheme or plan
- Disclosure of information through the media (including the Internet) or by any other means that results in misleading or false signals regarding financial instruments, including rumours or misleading news when the individual disclosing the information knew or ought to have known that such information was untrue or misleading. The Act particularly refers to professional journalists.

In addition, the minister of economy is to provide a list of the practices that are considered as price manipulation, which are still pending. The new provision has been drafted in a very broad sense and it could include different methods of market manipulation. This new provision has not yet been interpreted by the CNMV or by any case law.

Liabilities and enforcement

18 What are the most common bases of liability for a securities transaction?

According to recently amended Article 28 of the SMA, liability for the information contained in the prospectus lies with: (i) the issuer; (ii) the offeror; (iii) the person requesting admission to trad-

ing in an official secondary market; (iv) the directors of all the aforementioned parties; (v) the guarantor, with respect to the information that this person prepares; (vi) the lead manager, with respect to any verifications it may carry out; and (vii) any other person who assumes liability for the content of the prospectus, as long as this acceptance is contained in the prospectus, and those persons who have authorised the content of the prospectus, all of which shall be carried out in accordance with the secondary implementing regulations. It should be noted that there is no mention of the joint global coordinators of public offers of securities, which were given the same treatment as lead managers for the purposes of prospectus liability by means of the amendment made in 1998 to the RD 291/1992.

The prospectus must identify the persons who are liable for the information contained therein with their name and post, or, in the case of legal persons, their corporate names and registered offices. These persons must declare that, to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission which could affect its import.

Due to its importance, special mention must be made of the fact that, in accordance with the Prospectus Directive, civil liability for the content of the prospectus has been established for the first time in Spain which, up to now, did not have a specific regulation and, in the opinion of scholars, stemmed from the general principles of tort. In this regard, the persons liable for the information of the prospectus will be liable for any damages caused to the holders of the securities acquired as a result of any misleading information or omissions in the prospectus, in accordance with the secondary implementing regulations. In connection with the summary, no civil liability can be attributed to any person solely on the basis of the summary, including any translation thereof, unless it is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus.

Claims for this type of liability expire within three years from the time the claimant could have been aware of the misleading information or omission in the prospectus.

19 What are the main mechanisms for seeking remedies and sanctions for improper securities activities (for example, civil litigation, administrative proceedings or criminal prosecution)?

Notwithstanding the answer provided in question 18 above, lead managers or coordinators may be subject to criminal or administrative sanctions or incur civil liability other than the abovementioned civil liability for the information contained in the prospectus.

According to the Spanish Criminal Code (Organic Law 10/1995), directors of a company that knowingly falsify the annual accounts of the company, or any document that must reflect the legal position of the entity, with the aim of causing damage to the company, its shareholders or a third party, will be imprisoned from one to three years and sanctioned for six to 12 months. If damage is actually caused, the penalties will be imposed in the upper middle range. Although the above liability must primarily affect the issuer and its directors, we understand that directors of the lead manager or coordinator may be held liable under similar terms (ie where they knowingly falsify the prospectus) since: (i) the lead manager or coordinator assumes responsibility for the contents of the prospectus and, in particular, its accuracy and completeness; and (ii) the lead manager or coordinator may be perceived as a necessary cooperator of the issuer since, without its approval of the contents of the prospectus, the CNMV will not proceed with its registration.

As a general principle, Spanish law does not allow dual sanctions (criminal and administrative) to be imposed on the same party as a result of the same conduct and with the same protective aim of the law. As an exception, the constitutional and supreme courts have upheld the possibility for a criminal penalty to be imposed alongside an administrative sanction in those situations in which the infringing party is subject to a special relationship of dependence towards the administration. Financial institutions subject to supervision have been rendered for these purposes as subject to that special relationship of dependence. The SMA contains a detailed list of infringements of securities market regulations and their sanctions. The exact terms of the infringements are relevant, as, under the principles of Spanish administrative law (and criminal law), a party may not be held liable for the commission of an administrative offence unless the action or conduct is clearly classed by law as such.

In addition, Section 100 of the SMA further considers as a serious offence illicit publicity in breach of legal requirements.

The sanctions applicable to the commission of any very serious offence may include one or more of the following:

- A fine of up to five times the benefit obtained and, in the event that the fine cannot be determined, the highest of 5 per cent of own resources of the entity, 5 per cent of the funds used to carry out the offence, or €300,506
- Suspension of, or restrictions to, the type of activities or volume of transactions carried out in the Spanish market for a period of time not exceeding five years
- Suspension for a maximum period of five years as member of a secondary market in Spain
- Withdrawal of the authorisation to act as a securities company or agency
- Public reprisal
- separation of the offender from the management or administration of the entity, including the inability to hold a management or administration post in the same entity for a period of five years
- Separation of the offender from the management or administration of the entity, including the inability to hold any management or administration post in any financial entity for a period of time not exceeding 10 years.

In addition, if the infringement is committed by a legal entity, and its directors are responsible, they may be subject to one of the following sanctions:

- A fine of the highest of 5 per cent of the total funds used in the infringement or €300,506
- Suspension in the appointment for a period not exceeding three years
- Separation of the offender from the post and inability to hold similar ones in the same entity for a period not exceeding five years
- Separation of the offender from the post and inability to hold similar ones in any financial, securities or credit entity for a period not exceeding 10 years.

The sanctions imposed for the commission of a serious offence may include one or more of the following:

- Public reprisal;
- A fine up to the benefit obtained and, in the event that it cannot be determined, the highest of the following: 2 per cent of its own resources; two per cent of the funds used in the committal of the offence; or €150,253;

- Suspension or limitation of operations for a period of up to one year
- Suspension for up to one year of membership of a market
- Suspension for up to one year in the management of the entity that has committed the offence

In addition, directors may also be held liable and sanctioned with one of the following

- Public reprisal
- A fine of the highest of 2 per cent of funds used in the offence or €150,253
- Suspension in the performance of any managerial function for a term not exceeding one year

Current proposals for change

20 Are there current proposals to change the regulatory or statutory framework governing securities transactions?

Without prejudice to the abovementioned RDL 5/2005, which has implemented most of the provisions of the Prospectus Directive, its full implementation should be completed with additional secondary implementing regulations. This should take place in the upcoming months, bearing in mind that the term for implementation expires on 30 June 2005.

Apart from that, the implementation of the various other directives which stem from the Financial Services Action Plan (financial instrument markets, market abuse, transparency, tender offers) will require a substantial review of the SMA and its developing legislation in the coming months or years. There were even rumours of the possibility of enacting a new Securities Market Act to restate and harmonise the several directives affecting the securities market.

In that regard, there are indications that a new Royal Decree may be approved which would override not only the existing Royal Decree but also the old Decree, dated 1967, governing the requirements for admission to listing on the Spanish stock exchanges. The new Royal Decree would regulate in a single body the requirements governing issues and offerings of securities, admission to listing of securities on regulated markets and the ongoing transparency obligations of issuers of listed securities.

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