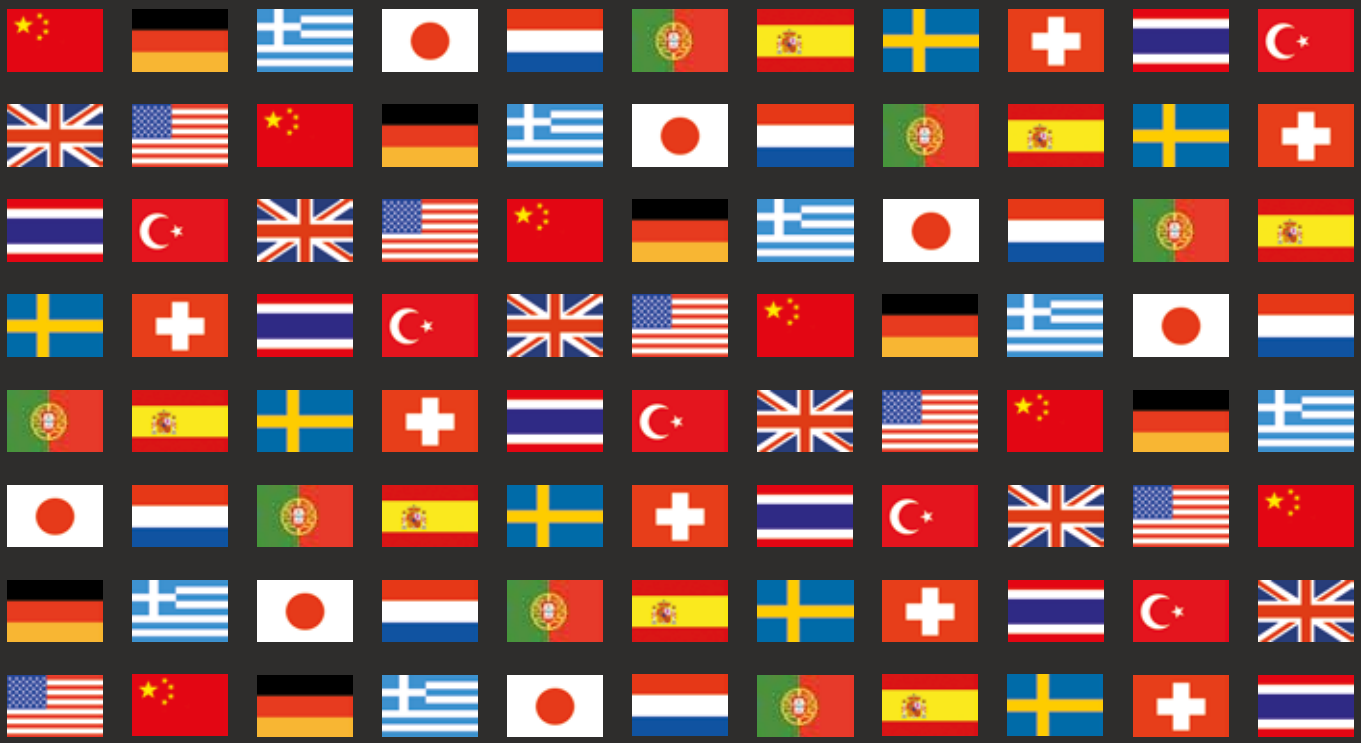
Debt Capital Markets

Contributing editors
David Lopez, Adam E Fleisher and Julian Cardona



2019

GETTING THE DEAL THROUGH

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Debt Capital Markets 2019

Contributing editors

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Cleary Gottlieb Steen & Hamilton LLP

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Sixth edition

Getting the Deal Through is delighted to publish the sixth edition of *Debt Capital Markets*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Thailand and the Netherlands.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, David Lopez, Adam E Fleisher and Julian Cardona of Cleary Gottlieb Steen & Hamilton LLP, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
February 2019

Spain

Antonio Herrera, Javier Redonet and Josep Moreno
Uría Menéndez

1 What types of debt securities offerings are typical, and how active is the market?

With a well-developed and agile banking sector and a widespread perception until recently that access to debt capital markets was generally inefficient from a cost perspective for non-listed potential issuers, Spanish companies have traditionally relied on bank loans as their principal source of financing. One of the lessons of the 2007–2012 credit crunch, however, was that access by Spanish companies to debt capital markets must be promoted to diversify their sources of financing, reduce their dependence on bank loans and ultimately help them withstand future banking crises.

In pursuit of that objective, significant steps have been taken in the past few years such as the creation in May 2013 of MARF, a new specialised multilateral trading facility for debt securities issued by small and medium-sized companies, in line with other European examples such as EuroMTF in Luxembourg, and, more significantly, the enactment of Act 5/2015 that aimed to set up a more modern and flexible legal framework for debt issuances.

Spanish companies issue a broad range of debt securities that include principally:

- bonds: debt securities paying fixed or floating interest rates under a variety of forms (ranging from zero coupon to high-yield), secured or unsecured, senior or subordinated, guaranteed or not, including project bonds;
- structured bonds;
- convertible or exchangeable bonds: debt securities that can be converted into equity;
- asset-backed securities: mainly Spanish covered bonds and mortgage bonds (issued only by financial institutions);
- hybrid securities qualifying for regulatory capital purposes such additional tier 1, tier 2 and senior non-preferred securities (issued only by financial institutions); and
- commercial paper: mainly short-term debt securities generally issued in the form of zero coupon and at a discount.

2 Describe the general regime for debt securities offerings.

The Companies Act contains the rules governing the issuance of debt securities by Spanish companies. In the past, certain issuers other than companies (including cooperatives, public sector business enterprises and public corporate bodies, among others) were subject to specific rules but that duality of legal regimes came to an end with Act 5/2015 so that their debt issuances are currently also subject to the general framework contained in the Companies Act.

The Securities Market Act (which was also partially amended by Act 5/2015) contains the principles governing both the primary and secondary markets for all sorts of securities in Spain, and is the law implementing most of the EU directives on securities. As such, capital markets regulations in Spain are substantially in line with those of the other EU countries.

The Spanish National Securities Market Commission (CNMV) is the agency in charge of supervising and inspecting the Spanish capital markets and the activities of all the participants in those markets.

Finally, Act 10/2014 sets out the tax regime applicable to virtually all issuances of debt securities by private issuers.

3 Give details of any filing requirements for public offerings of debt securities. Outline any requirements for debt securities that are not applicable to offerings of other securities.

The Companies Act provides as a general principle that a Spanish company issuing debt securities must grant a public deed that shall contain specific information about the debt issuance (including a description of the terms and conditions of the securities). The public deed must be granted by the issuer and a representative of the bondholders (that Spanish law refers to as a commissioner) before a Spanish notary public and be filed with the Spanish tax authorities and registered with the competent commercial registry. Moreover, pursuant to the Commercial Code, such public deed must be filed and registered with the Commercial Registry. There are certain exemptions, however, to these obligations, as further described below.

This connects with another feature of the Spanish legal regime on debt issuances, which is the obligation to form a syndicate of bondholders and appoint a commissioner. Following the entry into force of Act 5/2015, the appointment of a commissioner and the formation of a syndicate of bondholders is only necessary in debt issuances that comply with the following three requirements (cumulatively):

- when they qualify as public offerings for subscription;
- when 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
- when 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 facility established in Spain.

Thus it is not necessary to set up a syndicate of bondholders and appoint a commissioner, among others, in debt issuances by Spanish companies when they do not qualify as public offerings or are governed by the law of a country of the OECD (typically English or New York law). Naturally, the above does not imply that Spanish issuers qualifying for the exception cannot voluntarily opt to set up a syndicate of bondholders and appoint a commissioner.

The Securities Market Act, as amended by Act 5/2015, has also more clearly set out the circumstances in which the requirement to grant and register a public deed with respect to the debt issuance no longer has to be complied with, which are:

- when the securities are to be admitted to trading on Spanish official secondary markets (such as AIAF) or are subject to a public offering that requires a prospectus subject to approval and registration by the CNMV; or
- when the securities are to be admitted to trading on a Spanish multilateral trading facility (such as MARF).

In conclusion, although the requirement to grant and register a public deed of issuance remains in force, it only applies in practice to issuances carried out by Spanish companies on international markets, when the securities are not admitted to trading on official secondary markets or multilateral trading facilities established in Spain, and when they will not be subject to a public offering in Spain. In addition, issuances of bonds convertible or exchangeable into shares of the issuer or shares of a company of its group are not eligible for the exception to the requirement of granting the public deed.

4 In a public offering of debt securities, must the issuer produce a prospectus or similar documentation? What information must it contain?

A prospectus will be required in Spain in connection with the issue of debt securities if either of the following circumstances applies:

- the securities are the subject of a public offering in Spain. Certain offers of debt securities do not qualify as public offers, as described in question 10; or
- the securities are to be listed on a secondary official market (ie, a regulated market) in Spain.

In both cases, a prospectus must be approved by the CNMV (or alternatively, passported into Spain) and be published by the issuer at its expense. The listing prospectus can be the same as the offer prospectus.

A prospectus must contain all the information necessary for prospective investors to make an informed assessment of the issuer and securities offered, including sufficient information regarding the assets and liabilities, the financial situation, profits and losses and prospects of the issuer and, if applicable, the guarantors of the securities. The information must be drafted in such a way that it is easy to analyse and understand.

5 Describe the drafting process for the offering document.

In circumstances in which the drafting of a prospectus and its approval by the CNMV is dictated by the Securities Market Act, the prospectus will obviously comply with the standards on content and format imposed by the Prospectus Directive (and by Regulation (EU) No. 2017/1129 and its implementing and delegated regulations after 21 July 2019) and other applicable regulations. If a prospectus is not legally required, the issuer will in any event ensure that the offering document meets the relevant market standards.

In both cases and although there is no one-size-fits-all approach, the primary responsibility of drafting the offering document typically lies on the issuer and its counsel, with the involvement of the underwriters and their counsel where appropriate. In this regard, it is worth noting that, under Spanish law and where the prospectus is legally required, the issuer and its directors, at least, will be liable for its content (as more fully described in question 26).

6 Which key documents govern the terms and conditions of the debt securities? Who are the parties to such documents? How can such documents be accessed?

The terms and conditions of the debt securities will initially be reflected in the corporate resolution of the issuer pursuant to which the debt securities are issued. Such terms and conditions will then be reflected in the public deed, if it must be granted (see question 3), and in the prospectus or, in the case of a private placement, in the offering memorandum.

The information contained in the public deed, once registered, will be publicly available through the Commercial Registry. When legally required, the prospectus, once approved by the CNMV, must be made available to the investors by the issuer and will be published in the official website of the CNMV (www.cnmv.es). Similarly, listing documents in respect of notes admitted to trading on MARF can be found in its website (www.bmerf.es). There are no legal rules that govern the dissemination of the offering document in a private placement but the market standard is clearly for the offering memorandum to be delivered to each prospective purchaser of the relevant debt securities.

7 Does offering documentation require approval before publication? In what forms should it be available?

Following the enactment of Act 5/2015, from a corporate perspective and unless otherwise stated in the issuer's articles of association, the management body of a Spanish company is authorised to approve the issuance and admission to trading of standard debt securities that do not yield a share of the profits of the issuer, as well as to grant guarantees or security interests in favour of standard debt securities of other companies. The general shareholders' meeting retains the power, though, to issue bonds convertible into shares or securities that yield a share of the profits of the issuer.

From a regulatory perspective, if a prospectus is legally required, it will have to be approved by the CNMV before it is made available to the investors (if it is an offering prospectus) or before admission of the securities to listing (if it is a listing prospectus) as more fully described in question 8.

8 Are public offerings of debt securities subject to review and authorisation? What is the time frame for approval? What are the restrictions imposed, if any, on the issuer and the underwriters during the review process?

See question 10 for a description of the debt offerings that do not require a prospectus

In case of a public offering of debt securities which requires the prior approval and registration of a prospectus, the CNMV will assess whether the prospectus is complete, may be understood and contains consistent information. The assessment of the CNMV does not imply, however, an evaluation of the creditworthiness of the issuer or as to the quality of the securities.

Generally, and in accordance with the applicable regulations, the CNMV has a maximum period of 10 business days from the day the prospectus is submitted by the issuer to approve it. If the issuer does not have any other securities admitted to trading on a Spanish or EU regulated market and has not issued securities to the public before, such period will be extended to 20 business days.

However, if the CNMV considers that the prospectus or the information provided is incomplete, it will so notify the issuer identifying the additional information that has to be provided. In such case, the 10- or 20-day period will be suspended until the issuer files the requested information, which must be submitted within a maximum period of 10 business days. Given the amount and complexity of the information contained in a prospectus, the CNMV usually does require additional clarifications or changes to the document and, therefore, in practice, the process typically takes longer that the aforementioned 10- or 20-day period. Having said that, the CNMV announced on 1 December 2017 a number of measures designed to streamline its procedures for the registration of debt issuances targeting qualified investors only with an aim at matching the practices of regulators in the most popular EU markets for listing non-equity securities in an effort to make the domestic debt capital market more attractive to Spanish issuers. Among them, the CNMV has committed to reducing the timeline for providing comments to prospectuses to only three business days for the first turn and two business days for any subsequent turns; will not review the final terms of the offering prior to the placement if the issuance is conducted under a programme; following closing will approve the admission to listing of the securities in two business days; and will not request going forward statistical information from the issuer regarding the distribution of the securities.

Once the CNMV has approved the prospectus, it will have to be published and made available by the issuer to the public at its expense as soon as possible.

When a prospectus is legally required for the offering of the securities, the issuer and underwriters may not solicit investors for the debt securities or, further, accept purchase orders from investors before the prospectus has been so approved and published. It is possible, however, for the issuer and the underwriters to conduct advertising activities with respect to the debt securities in advance of registration of the prospectus provided that the information contained in any advertising materials is consistent with the information to be contained in the prospectus.

9 On what grounds may the regulators refuse to approve a public offering of securities?

In general, the Securities Market Act states that the issuance of securities is not subject to prior regulatory approval. However, this is provided that the issuer is validly incorporated in accordance with the laws of its jurisdiction of incorporation and is operating in accordance with its constitutional documents and that the securities issued comply with the legal requirements applicable pursuant to their legal nature and, to the extent that the offering requires the registration and approval of a prospectus, that the offering is conducted in accordance with the rules contained in the prospectus (suitability requirements). In addition to the suitability requirements, the CNMV will also assess the information requirements applicable to the offering, which will cover documentation evidencing compliance with the suitability requirements and, in certain cases, as mentioned before, a prospectus and audited financial statements of the issuer and, where applicable, its consolidated group for at least the last two fiscal years.

10 How do the rules differ for public and private offerings of debt securities? What types of exemptions from registration are available?

A public offering for the sale or subscription of securities consists of any communication to persons in any form and by any means that provides sufficient information on the terms of the offering and the securities offered to allow an investor to decide whether to acquire or subscribe to said securities. This notwithstanding, the following are not considered public offerings by the Securities Market Act and are therefore exempted from the obligation to register a prospectus with the CNMV:

- offerings of securities exclusively directed to qualified investors;
- offerings of securities directed to less than 150 natural or legal persons per member state, without including qualified investors;
- offerings of securities addressed to investors who acquire securities for a total consideration of at least €100,000 each, per offering;
- offerings of securities whose unit nominal value amounts to at least €100,000; and
- offerings of securities amounting to a total of less than €1 million, which limit will be calculated over a period of 12 months, unless the Securities Market Act is amended to increase it, which it may do up to €8 million, by virtue of the partial entry into force of Regulation (EU) No. 2017/1129 on 21 July 2018.

In addition, the obligation to register a prospectus will not apply to the admission to trading on a secondary official market of, among others, the following:

- securities fungible with securities already admitted to trading on the same regulated market, provided that they represent, over a period of 12 months, less than 20 per cent of the securities already admitted to trading on the same regulated market, which may be helpful in the context of 'tap issues' (ie, issues of fixed-income securities fungible with other securities previously issued by the same issuer); or
- non-equity securities issued in a continuous manner by credit institutions involving total aggregated consideration of less than €75 million over a period of 12 months, provided that these securities are not subordinated, convertible or exchangeable and do not have the right to subscribe for or acquire other types of securities and are not linked to a derivate instrument.

As private offerings of securities not to be listed on a regulated market do not require the registration of a prospectus with the CNMV, they benefit from greater flexibility; a significant reduction of the time period required to implement the transaction; and lower costs.

11 Describe the public offering process for debt securities. How does the private offering process differ?

The process for an offering of debt securities depends very much on whether the transaction is a public offering or a private placement and also on whether it is a stand-alone transaction or the issuer has a base prospectus in place and is drawing down on a debt programme.

Public offerings of debt securities are relatively unusual and entail a longer process including the preparation, filing and approval of a prospectus by the CNMV, which can take from four to eight weeks before the transaction can be launched and marketed to investors. The prospectus typically contains the definitive pricing of the securities (issue price, coupon and maturity), so demand is filled on a first-come, first-served basis. Alternatively, if a base prospectus is available in respect of a debt programme, the issuer can take advantage of the programme by simply filing with the CNMV the final terms of the bonds at the time of launching the offering, which facilitates the process substantially.

In private placements, an offering memorandum is typically produced (except for certain types of deals such as, for example, equity-linked securities, which are frequently undocumented) which is submitted to the CNMV or MRF for informal approval before distribution to investors. In these deals, pricing of the securities is determined on the basis of a bookbuilding by the underwriters and, following pricing, the offering memorandum is turned into a listing prospectus containing final pricing information for admission to listing purposes. A base prospectus and final terms can also be used in this context.

12 What are the usual closing documents that the underwriters or the initial purchasers require in public and private offerings of debt securities from the issuer or third parties?

Statutes do not set out what document underwriters or initial purchasers may request from the issuer or third parties in the context of a debt issuance so that it is entirely up to the parties to contractually regulate this area. In any event, it is customary for underwriters to obtain legal opinions from legal advisers and comfort letters from auditors (without negative assurances in Regulation S offerings).

13 What are the typical fees for listing debt securities on the principal exchanges?

Both AIAF (the regulated market) and MARF (the multilateral trading facility) disclose complete information about the fees they charge for listing debt securities on their websites. In addition to such fees, in the context of an offering of debt securities, leaving aside the costs and expenses of advisers, advertising and so on, it has to be borne in mind that the issuer may be required to pay notarial and registration fees (to the extent the issuance has to be documented in a public deed, see question 3) and the fees charged by the CNMV, if a prospectus has to be approved by it. Fees charged by notaries, the Commercial Registry and the CNMV are set out by law.

14 How active is the market for special debt instruments, such as equity-linked notes, exchangeable or convertible debt, or other derivative products?

The market is currently particularly active around the design and issuance of equity-linked notes (including structured bonds, synthetic convertible bonds and covered bonds issued by financial institutions) as well as hybrid debt instruments by both financial institutions and industrial corporations.

15 What rules apply to the offering of such special debt securities? Are there any accounting implications that the issuer should be aware of?

The issuance of hybrid debt instruments by financial institutions in Spain is always structured through private offerings targeted to qualified investors (given that they are not suitable for retail distribution) and is thus subject, as explained before, to less strict regulations under the Securities Market Act. From a substantive point of view, the main concern in these offerings is that the securities meet the requirements of the capital adequacy regulations for them to qualify for regulatory capital purposes.

16 What determines whether securities are classed as debt or equity? What are the implications for instruments categorised as equity and not debt?

The Securities Market Act draws a very simple distinction and defines debt securities as those securities that create or recognise the prior existence of a debt. The Securities Market Act uses that definition to establish what offerings of debt securities have to be documented in a public deed (see question 3) or require the creation of a syndicate of bondholders and the appointment of a commissioner. For these purposes, securities that are convertible or exchangeable into shares of the issuer or shares of a company of its group are considered equity securities and, consequently, do not benefit from the exemptions of the obligation to grant the public deed or to create the syndicate of bondholders.

Accounting wise, securities will be classified as equity or debt depending on their inherent economic attributes pursuant to accounting rules, which follow a substance over form approach.

17 Are there any transfer restrictions or other limitations imposed on privately offered debt securities? What are the typical contractual arrangements or regulatory safe harbours that allow the investors to transfer privately offered debt securities?

No, there are no legally imposed transfer restrictions or limitations. However, a private offering of securities may not be followed by an offering by one of the purchasers of the debt securities that qualifies as a public offering under the Securities Market Act unless it is covered by a registered prospectus in accordance with the rules on cascade offerings contained in the Prospectus Directive.

Update and trends

Since 3 January 2018, MIFID II applies in the Spanish debt capital markets. This regulation contains provisions:

- to reinforce pre- and post-trade transparency requirements for equity and (extended to) non-equity instruments (eg, if a debt instrument is labelled as liquid, details of the transaction will be published to the wider market, although certain liquidity waivers may apply);
- to create a price discovery mechanism in fixed-income markets;
- to move fixed-income trading practices (ie, over-the-counter) onto trading venues (such as regulated markets, organised trading facilities and multilateral trading facilities);
- to allow non-discriminatory access to trading venues; and
- to enable best execution and transaction reporting requirements.

Therefore, the Spanish exchange operator (BME) has adapted its fixed-income electronic platform to enable brokers and intermediaries to trade comfortably in the regulated market (eg, real time data, automatic order execution, etc).

Corporate bond issues increased slightly in 2018 to take advantage of the good market conditions in advance of interest rate hikes (as the ECB announced the phase-out of its debt purchase programmes). In Spain, the main issuers of debt securities are leading banks such as Caixabank, Sabadell and Santander.

Further, BME's Circular 2/2018 dated 4 December 2018 streamlines the process for the listing and delisting of securities from the MARF. The process has been relaxed since, among others:

- corporate resolutions approving the issue do not need to be delivered;
- audit opinions in respect of annual accounts need not be unqualified;
- issuer's corporate documentation need not be delivered to MARF where the market can check it online; and
- a credit rating on the securities or a report on issuer's creditworthiness is no longer required to be filed except where the issuer has elected to seek such rating or report.

18 Are there special rules applicable to offering of debt securities by foreign issuers in your jurisdiction? Are there special rules for domestic issuers offering debt securities only outside your jurisdiction?

The Companies Act (after Act 5/2015) expressly establishes that Spanish companies can issue debt securities abroad (a possibility that anyway was fully accepted before Act 5/2015) and it regulates some aspects of these issuances.

In particular, the Companies Act determines which law applies to the different aspects of a debt issuance carried out 'abroad' (a concept which is fairly unclear) by a Spanish company as follows:

- Spanish law (lex societatis) will determine the power, the competent body and the conditions for approval of the resolution through which the securities are issued;
- the foreign law to which the issuance is subject (lex contractus) will determine the rights of the bondholders against the issuer (ie, the contractual matters of the issuance), the forms of collective organisation of noteholders and the securities' redemption and cancellation regime; and
- in the case of convertible bonds, the foreign law to which the issuance is subject will determine the content of the conversion right (within the limits set out by Spanish law) and Spanish law will determine the conversion value, the limits for the conversion and the disapplication of the shareholder pre-emption rights rules.

In addition to the above, foreign issuers may offer debt securities in Spain provided they comply with the Securities Market Act and related regulations (including the rules on the obligation to create a syndicate of bondholders and appoint a commissioner in the cases outlined in question 3).

19 Are there any arrangements with other jurisdictions to help foreign issuers access debt capital markets in your jurisdiction?

The CNMV may approve a prospectus of an issuer incorporated in a third country, drafted in accordance with the legislation of such country, provided that it has been drawn up in accordance with international standards (for instance, those of the International Organization of Securities Commission) and that the information requirements laid down by such foreign legislation are equivalent to those of the Spanish legislation. The Spanish central securities depository, Iberclear, requires additional information for the trading of foreign securities (ie, securities issued pursuant to a law other than Spanish law and by a non-Spanish issuer), irrespective of whether they are denominated in euro or in any other currency.

In addition to the above, a prospectus approved by the competent authority of another EU member state will be valid in Spain (regardless that the issuer may be incorporated in a third country, not a member of the EU) benefiting from the European passport set forth by the Prospectus Directive.

20 What is the typical underwriting arrangement for public offerings of debt securities? How do the arrangements for private offerings of debt securities differ?

The underwriting for a public offering of debt securities is generally structured on a firm commitment basis involving the undertaking by the underwriters to subscribe a pre-agreed amount of debt securities at a fixed price set at the outset of the deal. The underwriting agreement is executed by the issuer and the underwriters of the public offer before the offer period starts.

Conversely, private offerings are generally underwritten only on a soft basis, meaning that the underwriters only enter into the underwriting agreement following a successful bookbuilding and pricing of the transaction whereby they only take on the settlement risk associated with final payment of the securities by the subscribers at closing.

21 How are underwriters regulated? Is approval required with respect to underwriting arrangements?

Underwriters that act in this capacity in Spain must be investment services companies or credit entities duly authorised or passported into Spain. Therefore, underwriters must comply with the Securities Markets Act as amended by both Royal Decrees-law 21/2017 of 29 December and 14/2018 of 28 September, which transpose MiFID II into the Spanish legal system.

22 What are the key transaction execution issues in a public debt offering? How is the transaction settled?

The Spanish clearance and settlement procedures went through a major process of adjustments that began in April 2016 and finished on 18 September 2017. The changes have aligned Spanish procedures with the practices and standards of most European markets and, furthermore, Iberclear, the Spanish central securities depository in charge of both the register of securities held in book-entry form and the clearing and settlement of all trades in AIAF and MARF, is now connected to the TARGET2 (T2S) technical platform. The settlement and registration of both equity and debt instruments is now carried out through a single platform named ARCO. ARCO operates under a T+2 settlement standard and it can be classified as a Model 1 delivery versus payment system, according to the classification of the Bank for International Settlements: that is, it is a 'transaction-to-transaction' cash and securities settlement system where finality is simultaneous.

The book-entry register structure of Iberclear and the Iberclear participants is divided as follows:

- the Spanish Central Registry, managed by Iberclear, that reflects the aggregate balance of the securities held by each of the Iberclear participants (segregated into the Iberclear participants' own account and accounts held on behalf of third parties), and
- an itemised individual register managed by each of the Iberclear participants, in which securities are listed under the security owner's name.

23 How are public debt securities typically held and traded after an offering?

Debt securities in Spain are fully dematerialised, meaning that global certificates are not used and, instead, securities are created by way of registration in book-entry form with Iberclear.

24 Describe how issuers manage their outstanding debt securities.

Issuers may manage their outstanding debt securities through any of the various liability management transactions available in the marketplace, including through open market purchases (to the extent permissible under the terms and conditions of the notes), consent solicitations, tender and exchange offers.

25 Are there any reporting obligations that are imposed after offering of debt securities? What information would be included in such reporting?

Yes. Issuers of debt securities listed in a regulated market domiciled in the EU having Spain as home member state should file with the CNMV and make available on the issuer's website the following:

- financial information, in particular, the annual audited financial statements and the semi-annual unaudited financial statements. The obligation to file such financial information does not apply to issuers of debt securities listed on a regulated market with a minimum denomination of €100,000; and
- any inside information relating to the issuer or the securities.

Separately, Regulation (EU) No. 596/2014 requires persons discharging managerial responsibilities in an issuer of debt securities to report to the issuer and the CNMV any dealing on securities of the issuer.

26 Describe the liability regime related to debt securities offerings. What transaction participants, in addition to the issuer, are subject to liability? Is the liability analysis different for debt securities compared with securities of other types?

Liability for the information contained in the prospectus lies with: the issuer; the offeror; the person requesting admission to trading of the debt securities; the directors of all the referred parties; the guarantor, with respect to the information that this person prepares; and 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.

The prospectus must identify the individuals who are liable for the information contained therein with their name and position, or, in the case of entities, their corporate names and registered offices. These persons must represent that, to the best of their knowledge, the information contained in the prospectus is accurate and in accordance with reality and that the prospectus contains no omission that could affect its scope.

In this regard, the persons liable for the information contained in 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. However, no civil liability can be attributed to any person solely on the basis of the summary of the prospectus, including any translation thereof, unless it is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus.

The statutory limitation period applicable to claims on the above grounds is three years from the time when the claimant could have been aware of the misleading information or omission in the prospectus.

27 What types of remedies are available to the investors in debt securities?

Investors have a right to claim damages suffered against the persons that are liable for the content of the prospectus to the extent the securities were acquired in good faith and the damages are linked to any false information or omission in the prospectus and provided that the inaccuracy or omission is not corrected by means of a prospectus supplement that is disclosed to the market prior to the date on which the investor acquires the relevant securities.

Leaving aside the liability derived from inaccurate information or omissions in the prospectus, an investor will be entitled to claim liability from the issuer in cases where the issuer breaches any of its contractual obligations or warranties in the offering documents.

28 What sanctioning powers do the regulators have and on what grounds? What are the typical results of regulatory inquiry or investigation?

Pursuant to the Criminal Code, directors of a company that knowingly falsify the annual accounts of the company, or any document that must reflect fairly the legal position of the entity, with the aim of causing damage to the company, its shareholders or a third party, will be imprisoned for a period of between one and three years and sanctioned with fines ranging from six to 12 months (fines are calculated on the basis of a daily amount that ranges between €2 and €400 and is determined by the court on a case-by-case basis in view of the economic situation of the sanctioned individual). If damage is actually caused, the penalties will be imposed in the upper middle range.

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 Securities Market Act contains a detailed list of infringements of securities market regulations and their sanctions. In this regard, the Securities Market Act sets out as a serious offence illicit publicity in breach of legal requirements, the omission of relevant information or including inaccuracies, false or misleading data in the relevant prospectus. Further, MiFID II has recently introduced new (and higher) sanctions for infringement of, among others, obligations related to

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transparency standards, product governance and target market rules, clearing, settlement and registration of securities and obtaining mandatory authorisations.

In addition, if the infringement is committed by a legal entity, and its directors are responsible, they may also be subject to sanctions on a personal basis.

29 What are the main tax issues for issuers and bondholders?

Stamp duties

There are no stamp or other issuance, registration or transfer taxes on the issue or transfer of debt securities issued by a Spanish tax-resident issuer. No value added tax is triggered either.

Withholding tax

Provided that the requirements laid down in Additional Provision One of Act 10/2014 (which include that the securities be admitted to listing on a regulated market, multilateral trading facility or other organised market) are met and the formalities prescribed by Spanish tax regulations are complied with, payments under the bonds would not be subject to Spanish withholding tax. As regards income derived from the securities, it would be exempt from Spanish non-resident income tax for non-Spanish resident investors and fully subject to taxation in the case of Spanish residents.

Deductibility of interest payments by the issuer

Subject to the assumption referred to in the preceding paragraph, interest paid by the issuer on the securities will be fully deductible for Spanish income tax purposes without limitation and regardless of the accounting treatment of the instrument issued.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
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