SPAIN

Investment rules of the world

About

At DLA Piper, we have one of the largest finance and projects teams in the world with more than 600 dedicated lawyers and an established local law firm network. We share knowledge and skills in debt instruments, debt securities, funds, derivatives and portfolios, as well as energy, infrastructure and other projects, across Europe, the Middle East, Africa, Asia Pacific and the Americas.

When and wherever we work for you on finance and investment deals and projects, you can rely on our international platform; we are backed by the network and resources of one the largest and most-connected business law firms in the world.

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Investment Rules of the World

With input from across our global network, this guide covers key legal topics for different financial activities and projects and gives you an overview of the points you may consider when initially looking at financing or investing in particular jurisdictions. Please contact us if you would like to discuss any legal issues or solutions for your business. We also welcome your feedback about this guide via investmentrules@dlapiper.com.

Spain

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Capital markets and structured investments

Issuing and investing in debt securities

Are there any restrictions on issuing debt securities?

There are restrictions on offering and selling debt securities under both Spanish and EU law.

Unless certain exclusions or exemptions apply, it is unlawful to offer debt securities to the public in Spain or to request that they are admitted to trading on a regulated market operating in Spain unless an approved prospectus has been made available to the public.

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What are common issuing methods and types of debt securities?

The most common types of debt securities issued in Spain are bonds or notes issued on a stand-alone basis or under a program.

Many different types of debt securities are offered in Spain. Some common forms include:

- debt securities characterized by the type of interest or payment such as fixed-rate securities, floating-rate securities, variable-rate securities, zero-coupon securities and high-yield bonds;
- guaranteed securities, subordinated securities, perpetual debt securities (i.e. debt securities that have no specified redemption date);
- asset-backed securities;
- derivative securities such as securities linked to the value of one or more reference asset including shares, commodities, interest rate, currency rate or index, and credit-linked notes;
- hybrid securities (securities with both debt and equity features);
- equity-linked securities such as convertible bonds (debt securities convertible into the equity of the issuer);
- exchangeable bonds (debt securities convertible into the equity of a third party);
- depositary receipts (a security issued by a depositary conferring on the holders beneficial ownership of certain underlying assets held by the depositary for the holders); and
- warrants (securities giving the holders the option to purchase the equity of the issuer or a related company).

In Spain, the *Real Decreto Legislativo 4/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Mercado de Valores* (Securities Market Law) considers as financial instruments all transferrable securities of public or private persons or entities and grouped in issues (an issuance of such securities is required). A transferable security is defined as any *in rem* right, regardless of its nature, which, due to its legal configuration and rights of transfer, is capable of being traded on a financial market.

In general, debt securities which are also considered transferable securities include (but are not limited to):

- internationally issued bonds (*bonos de internacionalización*);
- bonds, debentures and similar securities representing part of a debt claim, including those which are convertible or exchangeable;
- mortgage covered bonds, mortgage bonds and mortgage participations;
- asset-backed securities;
- money market instruments (which means all categories of instruments which are normally traded on the money market, such as treasury bills, certificates of deposit and commercial paper, except those issued on a unique basis and excluding instruments of payment deriving from preceding commercial transactions that do not involve the capture of repayable funds);
- preference shares;
- territorial covered bonds; and
- warrants and any other derivative transferable security giving the right to acquire or sell any other transferable security or giving the right to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities, credit risk or other indices or measures.

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What are the differences between offering debt securities to institutional / professional or other investors?

The legal regime on public offerings of securities in Spain is governed by the Regulation (EU) 2017/1129 of 14 June 2017 on the prospectus to be published when securities are offered to the public and admitted to trading on a regulated market (Prospectus Regulation), the Securities Market Law and *Real Decreto 1310/2005, de 4 de noviembre, por el que se desarrolla parcialmente la Ley 24/1988, de 28 de julio, del Mercado de Valores, en materia de admisión a negociación de valores en mercados secundarios oficiales, de ofertas públicas de venta o suscripción y del folleto exigible a tales efectos* (Royal Decree 1310/2005).

Definition of public offering

According to the provisions of Article 35 of the Securities Market Law and Article 38 of Royal Decree 1310/2005, an 'offer of securities to the public' or 'public offering' means a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe for those securities.

Any offer of securities in Spain which is deemed to be considered as 'public' under the terms of the above referred definition, would entail the obligation for the issuer to have approved by and filed with the *Comisión Nacional del Mercado de Valores* (Spanish Securities and Exchange Commission, CNMV), an informative prospectus (*folleto informativo*), comprising:

- a registration document (*documento de registro*) disclosing information about the issuer;
- a securities note (*nota de valores*) describing the main terms and conditions of the offering; and
- a summary note (*resumen*) thereto (the Prospectus) (the Prospectus should be published through the CNMV's website).

Exceptions to the definition of public offering

Notwithstanding the above, according to the provisions of Article 35 of the Securities Market Law and Article 38 of Royal Decree 1310 /2005, the obligation to publish a prospectus would not apply to the following types of offerings (which, therefore, will not be considered as public offerings):

- an offer of securities exclusively addressed to qualified investors (as defined below);
- an offer of securities addressed to less than 150 natural or legal persons per EU member state, without including the qualified investors;
- an offer of securities addressed to investors who acquire securities for a minimum amount of €100,000 per investor, for each separate offer;
- an offer of securities the unit par value of which is not less than €100,000; and
- an offer of securities where the total consideration of the offer is less than €5 million within the EU, which limit shall be calculated over a period of 12 months.

Private placement

As opposed to a public offering, a private placement entails an offer to a relatively small number of selected investors as a way of raising capital. Every offer that does not qualify as a public offering will be considered a private placement. Thus, when any of the exceptions described above apply, the offer will not qualify as a public offering in Spain and, therefore, the issuer will not be required to complete any registration or filing or obtain any approval or consent from the CNMV, as Spanish competent authority, or from the relevant market, for making the offer available to investors in Spain.

Qualified investors

For the purposes of the exceptions referred to above, the principal categories of 'qualified investors' under Spanish law include:

- financial institutions and other entities which are required to be authorized or regulated to operate in the financial markets by a state, irrespective of whether it is a member state or a non-member state, including credit institutions, investment firms, insurance and reinsurance companies, collective investment schemes and their management companies, private equity funds, closed-ended investment schemes and their management companies, pension funds and their management companies, securitization funds and their management companies, commodity and commodity derivatives dealers and other institutional investors;
- national and regional governments, public bodies that manage public debt, central banks, international and supranational institutions such as the World Bank, the International Monetary Fund, the European Central Bank, the European Investment Bank and other institutions of a similar nature;
- companies meeting at least two of the following capacity requirements on an individual basis:
  - total balance sheet total equal to or above €20 million;
  - annual net turnover equal to or above €40 million; and
  - own funds equal to or above €2 million;
- institutional investors, beyond those specified in the bullet point above, whose main activity is to invest in securities and other financial instruments; and
- individuals and small- and medium-sized companies which request in advance to be treated as qualified investors and expressly waive their treatment as retail customers, and which are registered as such in the relevant client registries of the relevant entities providing investment services.

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When is it necessary to prepare a prospectus?

Under the Prospectus Regulation, unless an exemption applies, it is necessary to publish a prospectus where there is an offer of securities to the public or an application for the securities to be admitted to trading on a regulated market.

For more information, see Issuing and investing in debt securities – investor considerations.

If the offer is deemed not to be made to the public, a Prospectus Regulation compliant prospectus may still be required if an application is made for the securities to be admitted to trading on a regulated market. An exemption from both the offer to the public and the admission to trading on a regulated market is needed to avoid having to publish a prospectus.

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What are the main exchanges available?

The main exchanges on which debt securities are traded in Spain are:

- the *AIAF Mercado de Renta Fija, S.A.U.* (AIAF); and
- the *Mercado Alternativo de Renta Fija'* (MARF).

AIAF

AIAF is the Spanish regulated market for corporate debt and private bonds integrated in *Bolsas y Mercados Españoles* (BME is the holding company of the Spanish regulated exchanges), the Spanish securities markets operator. AIAF is a regulated market and is under the control and supervision of the public authorities in respect of its operation, admission to trading and disclosure of information.

MARF

MARF is the Spanish alternative bond market and considered as an alternative funding resource where different solvent companies may raise funds through the issuance of bonds. MARF adopts the legal structure of a multilateral trading facility (MTF), hence, it is considered as non-official market, similar to those that may be found in other European countries. Thus, the access requirements of MARF are more flexible than the requirements for regulated markets and, as a consequence, MARF has a greater flexibility and lower costs throughout the issuance process.

Securities which may be admitted to trade in the MARF are those exclusively targeted to qualified investors and whose nominal value is of a minimum amount of €100,000 (i.e. they do not fall under the requirement to publish a prospectus).

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Is there a private placement market?

There is no private placement market in Spain.

However, every offer that does not qualify as a public offering is considered a private placement (as stated in Issuing and investing in debt securities – investor considerations).

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Are there any other notable risks or issues around issuing or investing in debt securities?

Issuing debt securities

Issuers are responsible for the information contained in the prospectus, and they may face both civil and criminal liability in respect of the inaccuracy of such information.

With respect to civil liability, the civil liability of the Issuer relates to the content of the prospectus and is contained in article 38 of the Securities Markets Law and articles 32 to 37 of the Royal Decree 1310/2005. However, this liability is only applicable when Spain is the home member state (i.e., when the *Comisión Nacional del Mercado de Valores* (Spanish Securities and Exchange Commission, CNMV) is the competent authority approving the prospectus).

In relation to criminal liability, the Spanish Organic Act 10/1995, dated 23 November, on the Criminal Code (the Criminal Code) includes a specific criminal offence which may affect issuers if the relevant securities are admitted to trading in a Spanish regulated market or multilateral trading facility. Article 282 bis of the Criminal Code provides that:

> '[T]hose who, as de facto or de jure managers of a company that issues securities admitted to trading on securities markets, falsify the economic-financial information contained in a prospectus used to issue any financial instruments or information that the company must publish and make known pursuant to securities market legislation, concerning its resources, activities and present and future business, in order to attract investor or depositors to place any kind of financial asset, or to obtain financing by any means, shall be punished with a sentence of imprisonment of one to four years. Should the investment, deposit, placement of asset or financing be eventually obtained, causing damage to the investor, depositor, acquirer of the financial assets or creditor, the punishment shall be imposed in its upper half. Should the damage caused be sufficiently serious, the punishment to be imposed shall be one to six years imprisonment and a fine to be paid within six to twelve months.'

Investing in debt securities

Issuance of debt securities will qualify as a public offer, if:

- their terms and conditions are governed by Spanish law or by a non-EU or non-OECD country; and
- they are offered in Spain or admitted to trading in a Spanish regulated market or multilateral trading facility requiring a bondholder's syndicate and the appointment of a commissioner, who will be the legal representative of the bondholders' syndicate (there is also a requirement to convene investor meetings at the request of bondholders which represent, at least, 5%. of bonds issued and not repaid).

The directors of the issuer and the commissioner may convene investors meetings. The investors meetings have to approve any modification to the terms and conditions of the bonds by majority. A reinforced majority is required to the amendment to the term redemption conditions of the bonds, and conversion or exchange of the bonds.

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Establishing and investing in debt / hedge funds

Are there any restrictions on establishing a fund?

Generally

Establishing a fund, offering fund securities and operating a fund, among other things, are regulated activities under the Collective Investment Schemes Law (CIS) Law and the Close-ended Collective Investment Law and are therefore subject to regulation by the *Comisión Nacional del Mercado de Valores* (Spanish Securities and Exchange Commission, CNMV).

The CIS Law regulates open-ended collective investment schemes. The Close-ended Collective Investment Law regulates close-ended collective investment entities.

Open-ended collective investment schemes

The CIS Law defines CIS as entities whose corporate purpose is raising funds, assets or rights from the public in order to manage and invest in assets, rights, securities or other instruments, financial or otherwise, provided that the investor's yield is established in accordance with the collective results.

Close-ended collective investment entities

The Close-ended Collective Investment Law defines close-ended collective investment as the investment carried out by venture capital entities and other collective investment entities whose divestment policy fulfils the following requirements:

- such divestments are made simultaneously for all investors; and
- the yield obtained by each investor is in accordance with the rights which correspond to each investor, according to the terms set forth in the by-laws or regulations of the entity for each class of shares or units.

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What are common fund structures?

Open-ended collective investment schemes (open-ended CIS)

Open-ended CIS can have the form of investment company or investment fund (separated pool of assets with no legal personality, belonging to a number of investors, whose management and representation is carried out by a management company).

Open-ended CIS can also be of a financial nature or not, depending on the investments made. Open-ended CIS of a non-financial nature are those which invest in real estate assets.

Open-ended CIS may have restrictions in their investments. Therefore, open-ended CIS can qualify as UCITS or as non-UCITS, for the purposes of the Undertakings for Collective Investment in Transferable Securities Directive (2009/65/EC). Non-UCITS open-ended CIS are also called hedge funds. Hedge funds can be pure hedge funds or funds of hedge funds.

Close-ended collective investment entities

Close-ended collective investment entities can also take the form of an investment company or an investment fund. Close-ended collective investment entities can take two forms, depending on the nature of their investments:

- **venture capital entities** – which have as their corporate purpose the investment in non-listed companies different from financial or real estate companies; and
- **other close-ended collective investment entities** – which can invest in all kind of assets, in accordance with a defined investment policy.

All close-ended collective investment entities qualify as alternative investment funds, as per the definition of the Alternative Investment Fund Managers Directive (2011/61/EU).

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What are the differences between offering fund securities to professional / institutional or other investors?

Definition of marketing and reverse solicitation

Under the Collective Investment Schemes (CIS) Law and the Close-ended Collective Investment Law, offering/marketing of funds means attracting clients through an advertising campaign, by the CIS/close-ended collective investment entity or any other entity acting on its behalf or on the marketing entity's behalf, in order to raise funds, assets or rights to the CIS/close-ended collective investment entity.

For these purposes, marketing of funds shall be understood as any form of communication addressed to potential investors in order to promote, either directly or through third parties acting on behalf of the CIS/close-ended collective investment entity or on behalf of the management company of the CIS/close-ended collective investment entity, the subscription or acquisition of units or shares of the CIS /close-ended collective investment entities. In any case, there is marketing of funds when the CIS/close-ended collective investment entities or their management company approaches the investors through phone calls, home visits, personalised letters, emails or any other electronic means, which are part of a marketing and promotional campaign.

A marketing of promotional campaign in Spain means any campaign addressed to investors resident in Spain. In case of email or any other electronic means, the offer is deemed to be addressed to investors resident in Spain when the CIS/close-ended collective investment entity or their management company, or any person acting on their behalf through the electronic means:

- proposes the purchase or subscription of the shares or units; or

- furnishes to residents in Spain all the necessary information regarding the characteristics of the offer and how they can subscribe to the offer.

In light of the above, in the event that Spanish resident investors are contacted for the purposes of offering units or shares in a fund, this will be considered as marketing. If, on the contrary, a Spanish resident investor has requested the investment upon his/her own initiative, this would not be deemed as an offer (ie this would be a reverse solicitation).

Offering of funds to retail and professional investors

Open-ended CIS qualifying as UCITS can be offered/marketed to retail investors without limitation. However, non-UCITS open-ended CIS and close-ended collective investment entities can only be offered/marketed to professional investors with the following exceptions:

- funds of hedge funds can be offered to retail investors;
- hedge funds and close-ended collective investment entities can be offered/marketed to retail investors if:
  - such investors undertake to invest at least €100,000; and
  - such investors make an statement in writing declaring they are aware of the risks inherent with such investment (this exception is not applicable to hedge funds which invest in invoices, loans, or hedge funds which grant loans (these can only be offered /marketed to professional investors);
- venture capital entities can also be offered/marketed to retail investors if:
  - the investors are managers, directors or employees of the manager of the venture capital entity;
  - the investors ordinarily invest in listed venture capital entities; and
  - the investors have experience in these types of investments, i.e., management or advisory experience regarding a similar venture capital entity to that in which they want to invest in.

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Are there any other notable risks or issues around establishing and investing in funds?

Establishing funds

Managing funds is a regulated activity under the Collective Investment Schemes (CIS) Law and Close-ended Collective Investment Law and therefore subject to authorization. For more information, see Managing and marketing debt and hedge funds – marketing restrictions.

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Managing and marketing debt / hedge funds

Are there any restrictions on marketing a fund?

For more information, see Establishing and investing in debt and hedge funds – investor considerations.

Generally in Spain, the marketing of funds is regulated under the Undertakings for Collective Investment in Transferable Securities Directive regime or under the Alternative Investment Fund Managers Directive regime.

Undertakings for Collective Investments in Transferable Securities (UCITS)

UCITS, including those established in Spain, have an EU passport which enables fund promoters to create a single product for marketing in all EU member states and on the completion of the appropriate notification procedure, a UCITS established in one member state can be sold in any other.

A UCITS intending to market in another member state must complete and submit to its home regulator a notification including certain specified information, including copies of key investor documents. The home regulator then completes a notification file which is sent in a regulator-to-regulator transmission, following which the UCITS can be sold in the other member state.

Alternative Investment Funds (AIFs)

Under the Alternative Investment Fund Managers Directive, marketing is defined as: a direct or indirect offering or placement at the initiative of the Alternative Investment Fund Manager (AIFM) or on behalf of the AIFM of units or shares in an AIF it manages to or with investors domiciled or with a registered office in the European Union.

An AIFM may only market an AIF to EU investors if it is authorized by a relevant EU regulator – registration with one EU regulator opens access, subject to certain further limited conditions, to marketing to professional investors across the EU under a EU passport or if it complies with national private placement regimes (where available).

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Are there any restrictions on managing a fund?

Fund management in Spain is regulated under the Collective Investment Scheme (CIS) Law and Close-ended Collective Investment Law, their developing regulation and the *Comisión Nacional del Mercado de Valores* (Spanish Securities and Exchange Commission, CNMV) Rules. The CNMV is responsible for regulating funds, fund managers and those marketing funds and any legal or natural person is prohibited from carrying on regulated activities, such as fund management, without authorization.

Various restrictions arise on manager structuring/compensation and profit-sharing arrangements as a result of the regulations and any manager that is subject to the remuneration rules must apply those rules proportionate to its size, internal organization and scope and complexity of its activities. The rules impact on, among other things, reporting, equity remuneration, deferred compensation arrangements and clawback.

Alternative Investment Fund Managers (AIFMs) are also subject to regulation under the Alternative Investment Fund Managers Directive (as implemented in Spain by the Close-ended Collective Investment Law) and managers of Undertakings for Collective Investments in Transferable Securities (UCITS) are subject to certain requirements under the Undertakings for Collective Investment in Transferable Securities Directive (as implemented in Spain by the CIS Law). Full CNMV registration involves a significant authorization process – three-to-six months from completion of the application which must include:

- for the manager, information on senior personnel (must be suitable persons etc), organizational structure, policies and procedures, remuneration practices; and
- for each fund, investment strategy, constitutional documents, depositary information and disclosure requirements.

However, AIFMs based in Spain may be exempted from full regulation on certain grounds, including managing assets under €500 million where assets are not leveraged and investors have no redemption rights for five years, and managing assets under €100 million including assets acquired through leverage. Exempted managers must still register with the regulator, are subject to limited reporting and it should be noted that they do not benefit from the general passporting for marketing purposes.

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Entering into derivatives contracts

Are there any restrictions on entering into derivatives contracts?

Unless an exemption or exclusion applies, a person entering into a derivatives contract by way of business in Spain (such as a dealer) will ordinarily have to be authorized under the Securities Market Law, as such activity would be deemed as dealing on own account on financial instruments.

One of the key exclusions to the requirements above applies to persons who only deal in derivatives for risk management purposes.

The European Market Infrastructure Regulation applies to all derivative transactions and requires transactions to be reported to regulators, for transactions between dealers to be cleared or subject to other risk mitigation techniques such as initial margin and variation margin requirements.

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What are common types of derivatives?

Derivative contracts are entered into in Spain for a range of reasons including hedging, trading and speculation.

Derivatives may be traded over-the-counter or on an organized exchange.

All of the main types of derivative contract are widely used in Spain:

- forwards;
- futures;
- swaps (such as interest rate or currency swaps); and
- options (call options and put options).

The value of the derivative contracts is based on the value of the underlying assets. The main classes of underlying asset seen in Spain are:

- interest rates;
- equity;
- fixed income instruments;
- commodities;
- foreign currency; and
- credit events.

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Are there any other notable risks or issues around entering into derivatives contracts?

Since the global financial crisis in 2007-to-2008, derivatives and particularly over-the-counter derivatives have attracted significant regulatory attention. The European Commission has sought in particular, to:

- enhance transparency by requiring the provision of comprehensive information on over-the-counter derivative position;
- reduce counterparty risk by increasing the use of central counterparty clearing; and
- improve the management of operational risk by increasing the standardization of derivatives contracts.

As a result, the derivatives market has seen and continues to see the introduction of a significant amount of new regulation and this has led to substantial compliance costs for market participants.

There has been a number of national courts decisions (even from the Spanish Supreme Court confirming the jurisprudence) within the last years in relation to derivatives entered into with non-institutional/professional borrowers (mainly, consumers) in which the hedge provider has been sentenced to pay large sums given that, pursuant to the decisions, there was an error of understanding and a lack of information on the side of the borrower and, therefore, it executed the derivative not being duly aware of its possible consequences and costs (the courts understand that the providers, *inter alia*, breached any information requirements, ignored the financial knowledge of the customer and/or made available complex documentation and contracts without the due explanation of the underlying products). As a result, the institutions offering derivatives are nowadays really keen on their duties of information and clear documentation (including several pre-signing processes) and have ceased to offer certain kinds of products which were contentious.

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Debt finance

Lending and borrowing

Are there any restrictions on lending and borrowing?

Lending

Lending is only a regulated activity in relation to mortgages and consumer lending. In these circumstances, a lender that is not a credit institution or other entity registered with the Bank of Spain is required to register on a special administrative public registry before its commencing such lending activity (for foreign entities, the relevant registry is the State Registry created for this purposes within the Consumer General Directorate, or *Dirección General de Consumo*). There is no prior licensing requirement so this is a simple registration process.

Mortgage and consumer financing agreements are subject to a range of regulatory requirements that do not apply to unregulated loans. For example, for regulated mortgage contracts, there are particular restrictions around how:

- the loans are marketed, originated and sold;
- lenders administer the loans on an ongoing basis; and
- to deal with borrowers who fall behind with their payments.

Furthermore, regulated financing agreements have specific requirements around the information that shall be provided to the borrowers before the execution of the loan and during its life, how the agreement is drafted and formatted and what information must be included. In addition, borrowers under mortgage and consumer loans enjoy certain rights that they do not enjoy in case of non-regulated loans.

As far as exchange control regulations are concerned, there will be reporting requirements to the Bank of Spain on a Spanish resident who receives funds from a non-Spanish resident. The Spanish resident must comply with such reporting requirements (for statistical and information purposes only), if any, on a periodic basis. The timing of the reporting obligations depend on certain thresholds.

There are no additional restrictions that apply to foreign lenders making loans available to Spanish borrowers.

Borrowing

While borrowers are generally not regulated, it is advisable for borrowers to consider whether either the mortgage or consumer lending regimes apply to their activities, in which case they will benefit from the protections mentioned above.

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What are common lending structures?

Lending in Spain can be structured in a number of different ways to include a variety of features depending on the commercial needs of the parties.

A financing can either be provided on a bilateral basis (a single lender providing the entire facility) or syndicated basis (multiple lenders each providing parts of the overall facility).

Syndicated facilities by their nature involve more parties (such as agents which fulfil certain roles for the finance parties), are more highly structured and involve more complex documentation. Larger financings will typically be done on a syndicated basis with one of the syndicate taking the lead in coordinating and arranging the financing.

Facilities will be structured to achieve specific objectives, e.g. term loans, revolving credit facilities,working capital loans, equity bridge facilities, project facilities and letter of credit facilities.

Within the last years, it has become increasingly popular to finance certain transactions (usually LBOs) through private placements issued by the borrower, which are subscribed by Alternative Capital Providers (instead of usual credit institutions). For more information, see Private placement.

Facility durations

The duration of a facility can also vary between:

- a term loan or credit facility, provided for an agreed period of time but with a short availability period;
- a revolving credit facility, provided for an agreed period of time with an availability period that extends nearer to maturity of the loan and which may be redrawn if repaid;
- an overdraft, provided on a short-term basis to solve short-term cash flow issues; or
- a standby or a bridging loan, intended to be used in exceptional circumstances when other forms of finance are unavailable and often attracting a higher margin.

Facility security

A facility can either be secured, unsecured or guaranteed. For more information, see Giving and taking guarantees and security.

Facility repayment

A facility can also be repayable on demand, on an amortizing basis (in instalments over the life of the facility) or scheduled (usually meaning the facility is repayable in full at maturity).

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What are the differences between lending to institutional / professional or other borrowers?

Lending to institutional/professional borrowers is subject to less regulatory oversight and so less burdensome from a compliance perspective.

By contrast, lending in the context of mortgages and to consumers is a regulated activity and so additional protection will be afforded to borrowers. For more information, see Lending and borrowing – restrictions.

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Do the laws recognize the principles of agency and trusts?

No, the concept of a trust or a split between legal ownership and beneficial ownership is not generally recognized under Spanish law. Therefore, for instance, if security is granted in favor of a security agent or security trustee instead of each of the creditors, there is a risk that the Spanish courts may consider that the security agent or security trustee may only enforce the security in respect of the amounts owed individually to such security agent or security trustee under the secured obligations, but not in respect of the amounts owed to the other secured creditors. Therefore, it is highly advisable that, if possible, the security is granted in favor of all the relevant creditors.

Regarding the agency role, it is possible to appoint an agent to act on behalf of other lenders. This appointment will be principally for administrative purposes however, for example for the purposes of receipt of notices on behalf of each of the lenders.

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Are there any other notable risks or issues around lending?

Generally

Facility agreements and other finance documents are subject to general contractual principles and laws. For example, the Spanish courts have, in relation to payment obligations, the discretion to grant cure periods and to moderate the enforcement of any event of default having consideration to the debt and economic circumstances.

In relation to defaults, Spanish courts are reluctant to accept the early termination of a loan or the enforcement of security for reasons apart from non-payment of the financing or, in some cases, material defaults (e.g. financial covenants).

Specific types of lending

MORTGAGE LOANS

Specific to the area of mortgage lending is the issue of the Mortgage Credit Directive, which has been implemented in Spain through Law 5/2019, dated 15 March. This directive aims to prevent the irresponsible lending and borrowing practices that were exposed during the global financial crisis. The Law 5/2019 applies to mortgage loans granted for the purpose of acquiring or renovating a residential dwelling, or acquiring property rights over land plots or buildings. It imposes a number of requirements on real estate lenders, including the need to:

- conduct affordability tests before lending;
- provide standard information about the mortgage to enable borrowers to compare products; and
- ensure that staff are suitably trained.

A lender is only entitled to declare the early termination of the loan on the grounds of non-payment of monies due in the event that this has been provided for in the loan agreement and duly recorded at the Land Registry. In the absence of an early termination clause duly recorded at the Land Registry, the lender is only entitled to claim the principal and interest overdue but not the whole amount of the loan. If the mortgaged property is transferred before the payment of any overdue instalment and there are other instalments not yet due, the property will be transferred subject to the mortgage corresponding to that part of the loan pending payment.

Early termination of the loan cannot be declared (and therefore security may not be enforced) unless the default in payment extends to (i) 3% of the total amount of the loan or 12 monthly instalments, if default occurs in the first half of the term of the loan; or (ii) 7% of the total amount of the loan or 15 monthly instalments, if default occurs in the second half of the term of the loan.

Law 5/2019 also applies to real estate credit intermediaries who are defined as any natural or legal persons that, not acting as a lender nor a notary public, engage in a commercial or professional activity, in return for remuneration, whether pecuniary or in any other form of agreed economic benefit, consisting in bringing a natural person into direct or indirect contact with a real estate lender. Real estate credit intermediaries are subject to registration and supervision requirements.

This law also regulates the advisory service provided by the real estate lender or credit intermediary. The advisory service in relation to the real estate loan is a separate activity from the granting and intermediation of real estate loans.

Consequently, real estate advice is configured as an ancillary activity to the real estate loan or intermediation, so that it can only be provided by those who are registered as lenders or intermediaries.

Regarding the registration regime, depending on the geographical scope of action of the real estate credit intermediary or lender, lenders and real estate credit intermediaries must be registered with the Bank of Spain or with the competent body of each Autonomous Community.

The Bank of Spain shall be responsible for the management of the registration of:

- real estate credit intermediaries and lenders that operate or are going to operate with borrowers with domiciles located throughout Spain or in the territorial area of more than one Autonomous Community, provided that they have their head office in Spain, regardless of whether they additionally operate or are going to operate through a branch or under the freedom to provide services in other EU States, and
- real estate credit intermediaries and lenders who are going to operate in Spain through a branch or under the freedom to provide services, whatever the geographical area in which they are going to carry out their activity.

The management of the registration of real estate credit intermediaries and lenders that operate or are going to operate exclusively with borrowers domiciled within the territorial scope of a single Autonomous Community shall correspond to the competent body of said Autonomous Community, provided that the headquarters of its central administration is located in the same.

Credit institutions and Spanish branches of foreign credit institutions providing services subject to Law 5/2019 are exempted from the obligation to register, as they are already authorized and registered in their condition of credit institutions.

LEVERAGED LENDING

In case of leverage lending, it is important to bear in mind the issue of any potential financial assistance. For more information, see Giving and taking guarantees and security.

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Are there any other notable risks or issues around borrowing?

Borrowers should be aware of the potential implications of the EU's Bank Recovery and Resolution Directive (BRRD) which outlines certain measures for dealing with failing financial institutions, and which was implemented in Spain by Law 11/2015, of 18 June, on the Restructuring and Resolution of Credit Institutions and Investment Firms.

The BRRD applies to financial institutions incorporated in the European Economic Area (EEA), but does not apply to EEA branches of non-EEA incorporated entities.

Article 55 of the BRRD gives authorities the power to 'bail in' obligations of failed EEA financial institutions and also postpone the enforcement of early termination rights against the affected institution. 'Bail in' describes a variety of write down and conversion powers, such as the power to convert certain liabilities into shares or cancel debt instruments. In the case of Spanish or other EEA law contracts, such powers override what the contracts says. In the case of non-EEA law contracts, there are requirements to incorporate such provisions into the contract.

There are some reporting requirements when a Spanish resident receives funds from a non-Spanish entity. All Spanish residents shall report to the Bank of Spain:

- own-account transactions with non-residents, however structured and/or settled (i.e. through accounts of residents in Spain or abroad, or through cash delivery); and
- the relevant balance of their total foreign assets and liabilities.

There is no requirement for Spanish residents to report to the Bank of Spain when the total aggregate amount of such transactions with foreign entities is less than €1,000,000 in any year, unless the Bank of Spain has specifically requested a report to be submitted.

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Giving and taking guarantees and security

Are there any restrictions on giving and taking guarantees and security?

Some of the key areas affecting the giving of guarantees and security are as follows.

Capacity

It is important to check the constitutional documents of a company giving a guarantee or security to ensure it has an express or ancillary power to do so and there are no restrictions on the directors' powers that would be preventative. The safe approach is often to have the directors of the company approve the giving of the guarantee or security by resolution. Likewise, if the guarantee or the security is going to encumber an asset which is considered as 'essential' for the relevant company (an asset shall be considered as essential if its value exceeds 25% of the total value of the assets of the company according to the latest approved balance sheet), the approval of the shareholders' must be also obtained by resolution.

Fiduciary duties

Although Spanish law does not recognize a legal concept of 'corporate benefit', there might be a breach of fiduciary duties by the directors of a Spanish company giving a guarantee or security to the extent that the transaction pursuant to which the guarantee or security is given is not found to result in the ultimate corporate benefit of the company (the referenced directors must act diligently and loyally in the best interest of the company (i.e., judgement business rule and risk/benefit approach) and, in any case, in accordance with any applicable laws and the company's by-laws).

Insolvency

Pursuant to the Spanish Insolvency Law, any agreement entered into by a Spanish company within the two-year period preceding the adjudication of bankruptcy may be set aside by the relevant insolvency court if the insolvency officials can prove that it was detrimental to the insolvent estate

Upstream restrictions

Spanish private limited liability companies (*sociedades de responsabilidad limitada*) cannot grant loans, issue guarantees or provide financial assistance in favor of shareholders or directors, unless such transactions have been authorized on a case-by-case basis at the shareholders' meeting.

Financial assistance

Under Spanish law, the scope of the financial assistance prohibition varies depending on the corporate nature of the relevant company:

- a public limited liability company (*sociedad anónima*) may not advance funds, grant loans, grant guarantees/security or provide any kind of financial assistance whatsoever for the acquisition of its shares or of the shares of its parent companies (*sociedades dominantes*).
- a private limited liability company (*sociedades de responsabilidad limitada*) may not advance funds, grant loans, grant guarantees /security or provide any kind of financial assistance whatsoever for the acquisition of its shares or of the shares of any of its group companies.

Breach of financial assistance regulations may result in fines for the directors of the company granting the guarantee or security, and may also result in the guarantee or security or the relevant underlying transaction being deemed void. Any objection to the financial assistance must be invoked by the shareholders (usually minority shareholders) or the company's creditors.

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What are common types of guarantees and security?

Common forms of guarantees

There are two common forms of guarantees used in Spain.

GUARANTEE (*FIANZA*)

A guarantor undertakes to pay the guarantee obligation if the borrower fails to pay. The guarantor's liability with respect to the borrower can be either:

- **subsidiary (*subsidiaria*)** – the guarantor is only required to pay if the borrower fails to do so; or
- **joint and several (*solidaria*)** – the creditor may claim against the debtor or the guarantor at the same time.

As to each guarantor's liability with respect to other guarantors, it can be can be either:

- **several (*mancomunada*)** – each guarantor would only be required to pay up to the obligations expressly guaranteed by such guarantor); or
- **joint and several (*solidaria*)** – each guarantor would be liable for the total amount of the guaranteed obligations.

Usually, the guarantor's liability is joint and several (both with respect to the borrower and the remaining guarantors).

FIRST DEMAND GUARANTEE (*GARANTÍA A PRIMER REQUERIMIENTO*)

A guarantor undertakes to pay the guarantee obligation at any time, upon first demand from the relevant creditor, if the relevant conditions set out in the guarantee clause or agreement are met, without any further requirements or exceptions (other than willful misconduct of the creditor). The guarantee is autonomous and independent from the guaranteed obligation.

First demand guarantees are the most common form of guarantee used in Spanish wholesale financing transactions.

Common forms of security

There are two main types of security *in rem* available for creditors: mortgages (*hipotecas*) and pledges (*prendas*).

MORTGAGE

A mortgage may be sub-categorized as:

- a mortgage over real estate assets (*hipoteca inmobiliaria*); and
- a mortgage over movable assets (*hipoteca mobiliaria*).

PLEDGE

A pledge may be sub-categorized as:

- a pledge without delivery of possession (*prenda sin desplazamiento*); and
- a pledge with delivery of possession (*prenda con desplazamiento*).

The nature of the security taken will depend on the asset expressed to be subject to such security.

In this regard:

- Movable assets which may be subject to a mortgage include intellectual and industrial property rights, industrial machinery, commercial establishments, motor vehicles, tramways, train carriages and aircrafts.
- Movables assets which may be subject to a pledge without delivery of possession include machinery, stored merchandise, raw materials, agricultural machinery, works of art, credit rights arising from permits, licenses and authorizations, subsidies or from other agreements with governmental authorities, and other credit rights not represented by securities and not qualifying as financial instruments for the purposes of Royal Decree-Law 5/2005 of 11 March 2005, implementing Directive 2002/47/EC of the European Parliament and the Council of 6 June 2002 on financial collateral arrangements.
- Movable assets which may be subject to a pledge with delivery of possession include shares, quotas, credit rights, receivables and bank accounts.

When the creation of security triggers a significant amount of stamp duty tax and the relevant assets are not significant in the context of the transaction, it is standard market practice to grant a promissory security over the such relevant assets.

The promissory security does not grant to the beneficiary any *in rem* right over the asset expressed to be subject thereto, until:

- the relevant security is effectively granted; and
- each of the actions required for the perfection of the security is fully performed.

Finally, it is relevant to note that Spanish law permits the creation of guarantees and security interests in favor of future obligations (such as, those arising under the hedging agreements if not signed at closing of a transaction), provided that the main features defining the relevant future obligation are duly determined at the date of creation of the guarantee or security interest.

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Are there any other notable risks or issues around giving and taking guarantees and security?

General considerations

In general terms, under Spanish law, any guarantee, pledge or mortgage must guarantee or secure another obligation to which they are ancillary and which must be clearly identified in the relevant guarantee or security agreement. Therefore, the guarantee or security will follow the underlying obligation in such a way that the invalidity of the underlying obligation entails the invalidity of the guarantee or security, and termination of the underlying obligation will entail cancellation of the guarantee or security.

Giving or taking security

FORMALITIES AND REQUIREMENTS

As a general rule, pledges with delivery of possession (*prendas con desplazamiento*) over shares, quotas, credit rights, receivables and/or bank accounts must comply with the following requirements in order to be perfected:

- Notarization (by means of a deed (*póliza*) or a public deed (*escritura pública*) is required.
- In relation to share pledges, the pledgor should deliver the share certificates (*títulos multiples*) to the secured creditor or to a third party acting as custodian (usually, the agent or security agent) and it is particularly advisable to record the creation of the pledge on the share certificates. Those share certificates shall be kept by the secured creditor or the custodian until the cancellation of the pledge, when they shall be returned to the shareholder.
- In relation to quotas' pledges, quotas are not physically represented (there are not quotas certificates) so they cannot physically be delivered to the secured creditor or to a third party custodian so, in order to render the pledge effective, notice to the company shall be given and the pledge recorded in the (physical or electronic) book registry of quota holders (*socios*), kept by the company, and it is advisable to record the creation of the pledge on the public document evidencing the ownership of the quotas.
- Notification to the relevant company, relevant counterpart and/or depository bank is not required for perfection purposes but advisable in order to ensure that, upon enforcement, payments are made to the account designated by the beneficiary).
- In relation to bank accounts, although the pledgor may be allowed to deal with the account in the course of its business (unless otherwise agreed, usually until a default takes place), it is compulsory to keep a positive balance in the bank account during the life of the pledge and some sort of control over the account (it is usually opened with the secured creditor or such secured creditor is able to control certain actions of the depository bank) to justify the delivery of possession.
- In relation to shares and/or quotas, the pledgor will retain voting rights and the rights to receive payment of dividends until enforcement, unless otherwise agreed in the pledge agreement.

Likewise, as a general rule, mortgages over real estate assets (*hipotecas inmobiliaria*), mortgages over movable assets (*hipotecas mobiliaria*) and pledges without delivery of possession (*prendas sin desplazamiento*) must comply with the following requirements in order to be perfected:

- The mortgages must be documented in a public deed (*escritura pública*) while the pledges may be documented in a deed (*póliza*) or a public deed (*escritura pública*), as the case may be.
- The assets must be adequately described and identified, as necessary, in the security documents.
- There must be due registration within the relevant Land and/or Moveable Assets Registry, as applicable (until the public document is duly registered, the relevant security will not be perfected).
- As regards floating mortgages (i.e., real estate mortgages securing multiple obligations), beneficiaries of such floating mortgages must always be 'credit entities' (i.e., those set out in article 2 of Law 2/1981 of 25 March, regulating the mortgage market), regardless of whether they are Spanish of foreign credit entities (such requirement would also apply to any assignee of a loan secured by a floating mortgage).

In relation to all the above, if the security is documented in a public deed (*escritura pública*), notarial and registration fees (as appropriate), along with stamp duty, shall apply. However, if the security is documented in a deed (*póliza*), no stamp duty will be levied.

With regard to registrar and notary fees, these are set by the government and are based on a sliding scale, although notary's fees can be negotiated down if the value of the transaction exceeds €6 million.

With regard to stamp duty rates, this will depend on the region where the asset is located (rates vary from 0.5% to 1.5%). The stamp duty rate is calculated over the relevant secured amount.

ENFORCEMENT

Spanish law provides for specific enforcement proceedings in respect of each type of security referred to in sub-question above. However, as a general rule, enforcement proceedings will usually be based on a sale at public auction of the relevant asset, conducted either by a Court or by a Spanish Notary (or, in certain cases, a specialized entity), while the proceeds obtained out of the auction process shall be used to repay the secured liabilities.

In this regard, in order to be able to proceed to the enforcement of any security governed by Spanish law through summary enforcement proceedings, a so called 'liquidity clause', which complies with the formal requirements set out in Spanish Procedural Law, shall be included in the relevant secured financing agreement (whether it is governed by Spanish law or otherwise). Additionally, notarization of the underlying financing agreement (and sworn translation into Spanish if drafted in a different language) is also a pre-requisite in order to benefit from summary enforcement proceedings.

INSOLVENCY CONSIDERATIONS

Upon declaration of insolvency of a Spanish company, no security interests over assets of such insolvent company which are 'necessary for the continuity of its business or professional activity' can be enforced (this will also apply to enforcement proceedings commenced before the declaration of the bankruptcy will also be held up) until the earlier of:

- the date on which an agreement (*convenio*) which does not prevent the enforcement of the relevant security interest has been reached between the insolvent company and its creditors; and
- the date on which one year has elapsed after the declaration of insolvency.

Although the Spanish Insolvency Law does not include a definition of assets which are 'necessary for the continuity of its business or professional activity', shares or quotas of project finance SPVs will not fall into that category. There are no clear rules followed by the Spanish Courts in relation to the assessment of when an asset shall fall into such category, so an analysis on a case by case basis will be required.

Receivers of the insolvent company may prevent any security interest being enforced after the end of the above referred 'stay period' by immediately paying the relevant secured amounts, including an undertaking to pay amounts which become due in the future under the relevant agreement as 'claims against the insolvency estate' (*créditos contra la masa*) (provided that, should a receiver fail to pay future claims as they become due, the secured creditor will be entitled to enforce the relevant security interest).

Any claims owed by an insolvent company to a 'related party' will be regarded as subordinated claims. Moreover, any security interest granted by the insolvent in favor of the 'related party' will be set aside by the court.

Any transaction entered into by the insolvent company within the two years immediately preceding the declaration of insolvency which are deemed as 'detrimental to the insolvency estate of the debtor' may be set aside by a receiver.

The Spanish Insolvency Law does not provide for a definition of 'detrimental to the insolvency estate of the debtor', however, it presumes that the following transactions will be detrimental:

- transactions involving donations or prepayments in respect of obligations which otherwise would be due after the adjudication of bankruptcy (this presumption does not permit the submission of evidence to the contrary);
- transactions between the insolvent and related parties (this presumption allows for the submission of evidence to the contrary); and
- granting by the insolvent of *in rem* security in relation to pre-existing non-secured obligations (this presumption allows for the submission of evidence to the contrary).

In any other case, the burden of proof will be on the person or entity arguing that the transaction is detrimental to the insolvency estate of the debtor.

Notwithstanding the above, new security granted in the context of a refinancing process shall not be subject to rescission (save in the case of fraud), so long as the refinancing process/agreement complies with the following requirements:

- the refinancing agreement creates a 'significant increase' of the funds available to the borrower, or a modification of the terms by extending the maturity date or by entering into new obligations that replace existing obligations;
- the refinancing agreement must have been reached as a result of a viability plan ensuring the solvency of the debtor in the short and medium term;
- the refinancing agreement is approved by creditors representing at least the 60% of the total value of the liabilities (certified by the company´s auditor) at the time the refinancing agreement is executed; and
- the refinancing agreement and any other ancillary documents must be set out in a public document.

These rules apply to the validity of the refinancing agreement itself, as well as to any other obligation and/or payment deriving from or connected with such refinancing. It is also worth mentioning that the exception to the general rule of rescission shall also apply to other transactions where the above-mentioned requirements have been fulfilled prior to the application for insolvency proceedings.

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Financial regulation

Law and regulation

What are the main laws and regulations that apply to entities that are involved in finance and investments generally?

Generally

Law 10/2014, dated 26 June, on the management, supervision and solvency of credit entities (*Ley 10/2014, de 26 de junio, de ordenación, supervisión y solvencia de entidades de crédito*) (banking regulation)

Royal Legislative Decree 4/2015, dated 23 October, which enacts the consolidated text of the Securities Market Law (*Real Decreto Legislativo 4/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Mercado de Valores*) (securities markets)

Royal Decree-Law 21/2017, dated 29 December, on urgent measures for the adaptation of the Spanish legislation to the EU legislation on securities market (*Real Decreto-ley 21/2017, de 29 de diciembre, de medidas urgentes para la adaptación del derecho español a la normativa de la Unión Europea en materia del mercado de valores*) (securities markets)

Law 11/2015, dated 18 June, on the recovery and resolution of credit entities and investment services companies (*Ley 11/2015, de 18 de junio, de recuperación y resolución de entidades de crédito y empresas de servicios de inversión*) (recovery and resolution)

Royal Decree-Law, dated 11 March, on the urgent measures to encourage productivity and improve public sector procurement (*Real Decreto-ley 5/2005, de 11 de marzo, de reformas urgentes para el impulso a la productividad y para la mejora de la contratación pública*) (collateral and close-out netting)

Consumer credit

Law 16/2011, dated 24 June, on credit agreements for consumers (*Ley 16/2011, de 24 de junio, de contratos de crédito al consumo*) (credit agreements for consumers)

Mortgages

Law 2/1981, dated 25 March, on the regulation of mortgage market (*Ley 2/1981, de 25 de marzo, de regulación del mercado hipotecario*) (mortgage market)

Law 2/2009, dated 31 March, which regulates contracting with consumers of mortgage loans or mortgage-backed facilities and brokering services for loan or credit facility agreements (*Ley 2/2009, de 31 de marzo, por la que se regula la contratación con los consumidores de préstamos o créditos hipotecarios y de servicios de intermediación para la celebración de contratos de préstamo o crédito*) (mortgages with consumers)

Law 5/2019, dated 15 March, on real estate credit agreements (*Ley 5/2019, de 15 de marzo, reguladora de los contratos de crédito inmobiliario*) (mortgages with consumers)

Corporations

Royal Legislative Decree, dated 2 July, by virtue of which it is enacted the consolidated text of Companies Law (*Real Decreto Legislativo 1 /2010, de 2 de julio, por el que se aprueba el texto refundido de la Ley de Sociedades de Capital*) (companies law)

Funds and platforms

Alternative Investment Fund Managers Directive (2011/61/EU) (*Directiva 2011/61/ue del parlamento europeo y del consejo de 8 de junio de 2011 relativa a los gestores de fondos de inversión alternativos*) (alternative investment fund managers)

Undertakings for Collective Investment in Transferable Securities Directive (2009/65/EC) (*Directiva 2009/65/ce del parlamento europeo y del consejo de 13 de julio de 2009 por la que se coordinan las disposiciones legales, reglamentarias y administrativas sobre determinados organismos de inversión colectiva en valores mobiliarios*) (UCITS funds)

Law 35/2003, dated 4 November, on the Collective Investment Schemes (*Ley 35/2003, de 4 de noviembre, de Instituciones de Inversión Colectiva*) (collective investment schemes)

Law 22/2014, dated 12 November, which regulates venture capital companies, close-ended collective investment entities and management companies of close-ended collective investment entities, and which amends Law 35/2003, dated 4 November, on Collective Investment Schemes (*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, y por la que se modifica la Ley 35/2003, de 4 de noviembre, de Instituciones de Inversión Colectiva*) (closed-ended collective investment entities)

Other key market legislation

Bank Recovery and Resolution Directive (2014/59/EU) (*Directiva de Reestructuración y Resolución*) (recovery and resolution)

Capital Requirements Regulation (Regulation (EU) 575/2013) (*Reglamento de Requisitos de Capital*) (capital requirements)

European Market Infrastructure Regulation (*Regulation (EU) 648/2012) (Reglamento de Infraestructura Europea del Mercado*) (derivatives)

Market Abuse Regulation (Regulation (EU) 596/2014) (*Reglamento de Abuso de Mercado*) (market abuse)

Markets in Financial Instruments Directive (2014/65/EU) (*Directiva de Mercados de Instrumentos Financieros*) (financial instruments)

Markets in Financial Instruments Regulation (Regulation (EU) 600/2014) (*Reglamento de Mercados de Instrumentos Financieros*) (financial instruments)

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Regulatory authorization

Who are the regulators?

The *Comisión Nacional del Mercado de Valores* (Spanish Securities and Exchange Commission, CNMV) is the conduct regulator for firms providing investment services and fund managers in both retail and wholesale markets, and also the prudential regulator for investment firms and fund managers. It is also responsible for enforcing the market abuse and listing regimes.

The Bank of Spain is responsible for the prudential regulation of credit institutions, payment and e-money service providers, financial credit establishments and real estate lenders and intermediaries. It is also the conduct regulator for firms providing banking, payment and e-money services, financial credit establishments and real estate lenders and intermediaries.

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What are the authorization requirements and process?

Depending on the type of firm, a firm must apply to the *Comisión Nacional del Mercado de Valores* (CNMV) or Bank of Spain for authorization or registration, as the case may be.

The regulators must assess whether the application meets the required threshold conditions within six to twelve months (depending on the kind of entity) of the submission of the complete application.

The application fee depends on the type of the application ranging from €2,500 to €10,000.

The regulators will also approve key individuals (e.g. senior management) in their roles.

Authorized firms are listed on the Bank of Spain's register and CNMV's register.

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What are the main ongoing compliance requirements?

Threshold conditions (such as having adequate financial resources and compliance arrangements in place) are an ongoing compliance requirement for authorized firms.

Failure to comply with the threshold conditions and more detailed regulatory rules can result in sanctions for firms and regulated individuals, and loss of regulated status.

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What are the penalties for failure to be authorized?

A person undertaking a regulated activity without being authorized or exempt may be subject to a fine and other penalties (e.g. suspension of management position).

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Regulated activities

What finance and investment activities require authorization?

Generally

A person must not carry on a regulated activity in Spain unless authorized, registered or exempt.

A financial activity requires regulatory authorization and/or registration when it is identified as a specified activity in relation to a specified investment, it is carried on by way of business in Spain and it does not fall within any of the available exemptions.

- Specified activities include activities such as accepting deposits, mortgage lending, dealing in, managing, arranging and advising on investments, and establishing collective investment schemes.
- Specified investments include deposits, shares, debt instruments, options, futures, units in a collective investment scheme and government and public securities.

Consumer credit

Consumer credit activities are not regulated activities. However, the granting of mortgage loans to individuals or consumers requires prior registration of the mortgage provider in a designated register in the event that such mortgage provider is not a credit institution.

In any event, the granting of consumer credit in Spain is subject to complying with the requirements under Law 16/2011, dated 24 June, on the credit agreements for consumers.

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Are there any possible exemptions?

Depending on the nature of the regulated activity, and how this is performed with Spanish resident investors, such regulated activity can be undertaken without authorization.

For example, for banking services generally, the criteria used is the 'characteristic performance test', which focuses on whether the characteristic performance is fulfilled in Spain. For investment services, the criteria used is the 'solicitation or initiative test' which focuses on which party has taken the initiative to contact the other.

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Do any exchange controls or other restrictions on payments apply?

Spain does not operate any foreign currency controls.

For cases of cash being transferred to Spain or outside Spain, cash transfers equal or exceeding €10,000 have to be declared, but there is no legal restriction on moving money in and out of the country.

Compliance with the EU rules on payments (EU Payments Regulation and the Transfer of Funds Regulations) must be ensured.

There are also anti-money laundering and tax considerations to take into account.

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What are the rules around financial promotions?

The promotion of investment services is deemed also as a restricted activity which can only be undertaken by authorized entities.

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Entity establishment

What types of legal entity are generally used to undertake financial or investment activity?

Generally

The most common types of legal entities are limited companies (*sociedad anónima*) and limited partnerships (*sociedad limitada*), both of which are body corporates with separate legal personality and limit the liability of their members.

Limited companies (*sociedades anónimas*) can either be private or public depending on whether their shares are offered to the public. Some activities require a particular type of entity to be used. For example, banks and investment firms need to be limited companies (*sociedades anónimas*).

Limited partnerships (*sociedades limitadas*) are similar to limited companies (*sociedades anónimas*) in many ways, the main difference being that the transferability of interests in limited partnerships has more restrictions than the transfer of shares in a limited company (which is generally unrestricted, unless otherwise stipulated in the articles of association of the limited company).

Funds

Investment funds can take the form of legal entities (*sociedades anónimas*) or separate pools of assets without legal personality (*fondos*).

Investment funds without legal personality shall always have a fund manager in charge of representing, administering and managing the fund.

Fund managers have to be set up as limited companies (*sociedades anónimas*).

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Is it possible to conduct lending or investment business through a branch or establishment?

Yes.

A company can conduct lending or investment business in Spain through an establishment (also known as a 'branch') but this does not create a separate legal entity.

Foreign companies having a Spanish branch need to be passported (if EU based) or authorized (if non-EU based) if they intend to conduct regulated activities. In addition, Spanish branches of foreign companies need to be registered with the Commercial Registry and with the Bank of Spain registry or the *Comisión Nacional del Mercado de Valores* (Spanish Securities and Exchange Commission, CNMV) registry. The Bank of Spain's registry is in charge of registering Spanish branches of foreign credit institutions and payment services and e-money firms. The CNMV's registry is in charge of registering Spanish branches of foreign investment firms and fund managers.

Foreign companies carrying on activities in Spain through a 'permanent establishment' will be subject to Spanish corporation tax.

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FinTech

FinTech products and uses

What are the most common technology products and FinTech applications used or being developed in the finance and investment marketplace?

Peer-to-peer funding platforms and marketplace lending

There is no strict definition for marketplace lending given the wide variety of entrants and financing techniques involved. The principal characteristics of new marketplace lenders, however, would include:

- operating from or through a non-bank lending platform established as a specialist corporate or special purpose vehicle (SPV) based structure;
- applying technology to leverage and optimize the lending platform and user experience; and
- connecting borrowers and lenders through the platform, rather than applying funding arising from a wider deposit-based relationship.

Marketplace lending is available to address most forms of traditional bank funding products. Recently, products have included:

- virtual credit cards;

- consumer loans;
- student lending products;
- small and medium-sized enterprises (SME) lending; and
- residential property and commercial property mortgage lending.

It is likely that the volume of lending in these product areas as well as further and additional product areas will significantly increase over the coming years, as financing becomes more readily available to support the marketplace lending sector.

HOW ARE MARKETPLACE LENDING PLATFORMS FUNDING THEMSELVES?

Marketplace lending includes peer-to-peer (P2P)-type structures often operated through an electronic platform provider as well as crowdfunding and also direct-to-retail financing mechanisms. The increase in demand for credit through these marketplace platforms has also been appealing to larger pools of available capital, such as private equity and venture capital funds as well as institutional sponsors. Funding platforms will now often be backed by institutional finance in addition to or rather than, individual investors on a traditional P2P basis.

ISSUES FOR STARTUP MARKETPLACE LENDERS

Following the initial incorporation and startup funding for a new marketplace lending business, there will be a need to establish funding lines which can accommodate growth of the ongoing lending activities of the platform. As the startup lender will not have an established track record, deposit base or asset pools, the funding structure will often follow the format of a warehouse securitization structure. Origination of new assets will be funded through drawings on a note issuance facility backed by security over the new assets. Each of the new assets will be subject to eligibility criteria determined by reference to the nature of the underlying asset. In order to provide an efficient financing structure, the assets will typically be held through a SPV with origination and servicing provided by the marketplace lender. In order to cover expected losses on the asset pool, the senior facility will be subject to the lending platform maintaining sufficient subordinated capital in the form of equity, or a combination of equity and subordinated debt.

While the funding may be structured through a revolving loan or note program, if there is tranching of the debt this will typically result in the platform being treated as a securitization for the purposes of the European Union Capital Requirements Regulation, with the attendant requirements to hold risk retention and provide appropriate reporting and disclosures.

Blockchain, smart contracts and cryptocurrencies

WHAT IS BLOCKCHAIN?

Blockchain provides a new approach to holding and authenticating data. It is a database operating through distributed ledger technology in which data is recorded on computers, by way of a P2P mechanism, based on pre-agreed consensus algorithms in the applicable participating network. It is a form of database where data is stored in the chain in either fixed structures called 'blocks' or algorithm functions called 'hashes'.

Each block includes unique features such as its unique block reference number, the time the block was created and a link back to the previous block. Each block is reviewed by a number of nodes and the block is only added to the database if the node reaches consensus that the block only contains valid transactions. Content includes digital assets and instructions which reflect the transactions and parties to those transactions. The ability to track previous blocks in the chain makes it possible to identify transactions back to the first ever transaction completed, enabling parties to verify and establish the authenticity of the assets in the latest block. This makes blockchain exceptionally accurate and secure.

Specialist users on the system apply advanced computing software to identify time stamped blocks, verify the accuracy of the blocks using sophisticated algorithms and add the verified blocks to the chain. As the number of participants increases, the replication of the data over a wider base makes it harder for any person to alter the data in the chain. Any attempted addition or modification to the information on a block needs to be approved by all users in the network and verification of any block can only happen through a 'proof of work' process. This process requires vast amounts of computing power, making it practically impossible to insert fake transactions into a block.

As a result, the data is identified and authenticated in near real-time, providing a permanent and incorruptible database sufficiently robust to operate as a store of value (e.g., in the case of cryptocurrencies such as bitcoin) or providing an indisputable record, for example, relating to securities transfer.

Blockchain is a decentralized system, created and maintained by users of the network rather than being dependent on any central or third party intermediary. It may be public and open ('permissionless' or 'unpermissioned') or structured within a private group ('permissioned').

Permissionless blockchains include bitcoin and ethereum, in which anyone can set up a node that once authorized, can validate, observe and submit transactions. The identities of the participants are not known (other than the unique and random identities known as an 'address'). Permissioned ledgers restrict participation in the network and only the specific participants are given access and are known within the network. The network is private, and only organizations that have been authorized can participate and view transactions.

WHAT ARE SMART CONTRACTS AND DECENTRALIZED AUTONOMOUS ORGANIZATIONS (DAOS)?

Developments in blockchain are also providing an ability to transfer and rely on instructions verified within the electronic system in the form of so called 'smart contracts'. These contracts have been converted into code and are then executed and enforced by the blockchain network on the occurrence of an event. This reduces the need for intermediaries to collect, store and act on communicated information.

Smart contracts are essentially pre-written computer codes which are stored and replicated on distributed ledger platforms such as blockchain. Execution takes place over the network, eliminating the need for intermediary parties to confirm the transaction, leading to self-executing contractual provisions. These contracts can be as simple as moving a balance from one account to another or advanced more-complex interactions with the outside world using so called 'Oracles'. With Oracles, the contract code consults with a service outside of the blockchain network to make a decision. This may entail receiving a confirmation that an event has occurred, such as payment, which automatically executes a further step in the contract, such as the transfer of an asset, which might be in digital form or by delivering instructions to a person or warehouse to release the asset for delivery.

DAOs are essentially online, digital entities that operate through the implementation of pre-coded rules. These entities often need minimal to zero input into their operation and they are used to execute smart contracts, recording activity on the blockchain. DAOs can be particularly challenging to regulate, depending on their software engine, the nature of transactions they are completing or other unique features. Questions of ownership and responsibility for resulting acts of DAOs can also be brought to question if any technical issues arise with their operation.

WHAT IS A CRYPTOCURRENCY?

The European Central Bank definition of a cryptocurrency is that it is a digital representation of value that is neither issued by a central bank or public authority nor necessarily attached to a fiat currency, but is issued by natural or legal persons as a means of exchange and can be transferred, shared or traded economically. The oldest and best-known cryptocurrency is bitcoin (itself based on the bitcoin platform) although many other cryptocurrencies now exist. For example, the most widely-known alternatives to bitcoin include ether, based on the ethereum platform and litecoin (these cryptocurrencies are now actively traded with a large developing infrastructure for holding, pricing and exchanging currency).

Initial coin offerings and token-based products

WHAT IS AN INITIAL COIN OFFERING (ICO)?

ICOs are a form of digital currency or token using blockchain technology. ICOs are often a means by which funds are raised for a new blockchain or cryptocurrency venture (the market for ICOs is currently booming). ICOs come in a wide variety of forms and may be used for a wide range of purposes. Some forms of ICOs may be directed at customers or suppliers as a form of loyalty program or a form of access or purchasing power (preferential or otherwise) in respect of assets of the issuer's business. Other forms may be more focused on raising initial funding. It is essential to examine the legal and regulatory basis for any ICO as an unauthorized offering of securities is illegal and may result in criminal sanctions in a number of jurisdictions. Legal analysis of the underlying token will determine if it should be treated as a specified investment or form of regulated security or is more appropriately a form of asset that is not itself subject to the regulatory regime.

Typical attributes provided by tokens will include:

- access to the assets or features of a particular project;
- the ability to earn rewards for various forms of participation on the platform; and
- prospective return on the investment.

Key aspects to consider will include the:

- availability and limitations on the total amount of the tokens;
- decision-making process in relation to the rules or ability to change the rules of the scheme;
- nature of the project to which the tokens relate;
- technical milestones applicable to the project;
- basis and security of underlying technology;
- amount of coin or token that is reserved or available to the issuer and its sponsors and the basis of existing rights;
- quality and experience of management; and
- compliance with law and all regulatory requirements.

The nature of the business and the purpose and structure of the token offering will typically be set out in a white paper available to potential purchasers.

Artificial intelligence and robo advisory systems

Automated financial advice tools, also known as 'robo advisors' are software tools driven by artificial intelligence (AI) that provide a variety of investment advice services, from portfolio selection to personal finance planning. The systems are generally operated on a platform /personal dashboard basis; a user can input a set of personalized data to be processed by the AI algorithms, which produce optimized outcomes around specified parameters. Although generally of application in the asset management sector, AI and automated advice tools also impact in the banking and private wealth advisor sectors; the implications include decreased human involvement, although recent trends have included a growth in popularity of hybrid structures which combine AI and human inputs.

Data analysis and cloud computing

Cloud computing enables delivery of IT services through internet-based tools and applications, rather than direct connection to a physical server. Cloud-based storage makes it possible to save masses of data to remote servers, accessible through the internet rather than by way of a physical connection. With the vast data processing and storage capabilities offered by cloud computing technology and virtually no infrastructure barriers to entry, there are a number of applications in building and running FinTech businesses and the technology has had a significant impact in recent years.

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Are there any restrictions, specific laws, regulations or procedures that apply to FinTech products?

General financial regulatory regime

The Bank of Spain (*Banco de España*) and the *Comisión Nacional del Mercado de Valores* (CNMV) are the conduct regulators for firms providing financial products and services in both retail and wholesale markets.

The Bank of Spain is responsible for firms providing banking services, payment services and e-money services.

The CNMV is responsible for firms providing investment services and for regulated crowdfunding/crowdlending platforms.

GENERAL

A person must not carry on a regulated activity in Spain unless authorized or exempt. A financial activity requires regulatory authorization when: it is identified as a specified activity in relation to a specified investment, it is carried on by way of business in Spain and it does not fall within any of the available exemptions. Where FinTech products and/or applications involve financial activity which require regulatory authorization, the firms providing such products and/or applications must be authorized by the Bank of Spain or the CNMV, as applicable.

FINTECH/INNOVATION PORTAL AND REGULATORY SANDBOX

In December 2016, the CNMV launched the Fintech/Innovation Portal.

The CNMV has made available a space on its website (called the FinTech Portal) in order to receive information and requests of any kind related to the FinTech phenomenon. It provides an informal channel of communication for the CNMV to exchange information with promoters and financial institutions on their initiatives in this area.

The philosophy of this portal or FinTech space is to provide quality customer service and supervision, as the CNMV's aims with respect to Fintech are to be receptive, respond to queries and help where possible so that projects can be authorized.

In short, the aim is to enable the FinTech aspect of any project, to the extent that it conforms to the legal requirements, so that it does not hinder its success.

The CNMV has created a multidisciplinary internal group, made up of technicians from all of the CNMV departments that relate to Fintech, in order to assist the Portal, improve internal coordination and thus provide an agile response to the requests that are sent to the CNMV.

Of the enquiries received to date by the CNMV, most relate to crowdfunding and the digitization of financial services. There have also been a significant number of queries relating to automated advice or robo advisors and various enquiries about social trading, big data and Distributed Ledger Technology or blockchain.

The CNMV has issued Q&A documents on these FinTech topics.

The Ministry of Economy is currently working on the launch of a regulatory sandbox. This would be a 'testing space', governed by a set of rules previously determined by the regulator, which would allow companies to test new technology or innovative products and services in a secure environment.

A fundamental requirement of the sandbox is that tests would only be performed on a certain number of people, previously defined and agreed with a supervisor.

In addition, companies that participate in the sandbox will have the certainty that if they work during the tests as agreed with the regulator, they will not be sanctioned for carrying out a regulated activity without a license.

The role of the supervisor in a sandbox is to evaluate the legal framework of the products, services or innovative business models being tested.

REGULATORY DEVELOPMENTS ON CROWDFUNDING/CROWDLENDING PLATFORMS

Crowdfunding/crowdlending is regulated in Spain in Law 5/2015 on the Promotion of Business Financing.

Crowdfunding/crowdlending in Law 5/2015 is known as Participative Financing Platforms (PFP) and these are based on the principle of neutrality in the coming together of investors and promoters.

PFPs are companies authorized by CNMV, whose activity consists of contacting, through websites or other electronic means, natural or legal persons offering financing, with natural or legal persons who request funding in their own name, to use it for a project.

The projects financed are related to business, training or consumer affairs.

Up to November 2019, 29 PFPs have been authorized; many of them are generic (that is, they are set up for any type of project), other projects are focused on real estate, corporate social responsibility, technological sectors and training courses. The Ministry of Economy and CNMV are currently carrying out a review of Law 5/2015 to strengthen this industry and investor protection.

PFPs are intended to be an alternative channel to bank financing. It is also reasonable to expect that many of the companies financed through them will be able to move to the stock markets more easily, either directly or through venture capital, generating a larger capital market in Spain.

Electronic payments platforms and regulation of peer-to-peer lenders

ELECTRONIC PAYMENT PLATFORMS

A number of FinTech businesses are offering electronic payment platforms to rival traditional payment systems and the future implementation of the European Union Payment Services Directive II in Spain will recognize the rise in such business, with the aim of creating a more level playing field for payment services providers, while addressing the need for enhanced security and customer protection.

Spanish law also regulates the issuance of electronic money (e-money). E-money is defined as electronically (including magnetically) stored monetary value, represented by a claim on the issuer, which is issued on receipt of funds for the purpose of making payment transactions. E-money must be accepted by a person other than the electronic money issuer and includes pre-paid cards and electronic pre-paid accounts for use online. Generally, firms issuing e-money must be authorized and registered with the Bank of Spain.

PEER-TO-PEER LENDERS

Generally, lending in Spain is not a regulated activity which requires the authorization of the Bank of Spain. However, the granting of mortgage loans to consumers and individuals requires the prior registration of the mortgage loan provider in a designated register in the event that such mortgage provider is not a credit institution.

In addition, the granting of consumer credit in Spain is subject to complying with the requirements under Law 16/2011, dated 24 June, on credit agreements for consumers.

Therefore, unless caught by the above mentioned requirements or by the fact that the peer-to-peer (P2P) lender meets the requirements of PFPs (crowdlending platforms), there are no specific regulations for P2P lenders.

Regulation of payment services

Where a Spanish business provides payment services as a regular occupation or business activity in Spain, it will require authorization by the Bank of Spain to become an authorized payment institution under the Spanish Payment Services Royal Decree-Law 19/2018. Failure to obtain the required authorization is a very serious administrative breach. Please note that Spain has not yet implemented partially the European Union Payment Services Directive II.

In order to become authorized by the Bank of Spain, a payment services business will need to meet certain criteria, including, in relation to its business plan: initial capital, processes and procedures for safeguarding relevant funds, sensitive payment data and money laundering, along with other controls.

Application of data protection and consumer laws

EU General Data Protection Regulation 2016/679 ("GDPR") and Spain's Data Protection and Digital Rights Guarantee Fundamental Act 3 /2018/1999 ("NLOPD") regulate the processing of personal data within Spain. The NLOPD develops and completes the GDPR, which is directly applicable all across the European Union. The new regulatory framework for privacy reinforces the information duties of data controllers (the entities or individuals deciding on how the personal data shall be processed). It also replaces the prior pre-eminence of consent by a more diverse scenario, in which compliance with contractual and legal obligations and even the legitimate interest of controllers may be preferable as legal basis for processing. Fines are much higher than before, reaching 20 million euros or the 4% of the global turnover of the controller in most serious cases.

Spanish Act 34/1988 on advertising, Spanish Unfair Competition Act 3/1991, Spanish Act on the General Defense of Consumers and Users RDL 1/2007 and Spanish Act 22/2007 on distance marketing of financial services to consumers, do contain some of the main provisions to be taken into account, from the perspective of consumer laws applicable in Spain.

Money laundering regulations

The Anti-Money Laundering and Terrorist Financing Law 10/2010 gives the Executive Service for Anti-Money Laundering (SEPBLAC) responsibility for supervising the anti-money laundering controls of businesses that offer certain services, such as lending, providing payment services and issuing and administering other means of payment. This law and its implementing regulations have partially implemented the European Union's Fourth Money Laundering Directive.

Generally, where a firm is authorized and supervised by the Bank of Spain or CNMV, it will also be authorized and supervised by the SEPBLAC for compliance with anti-money laundering requirements. Electronic currencies such as bitcoin and cryptocurrencies tend to represent a high money-laundering risk.

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What type of funding arrangements and incentives are available to FinTech businesses?

Early stage

SEED INVESTMENT

Initial investment in FinTech businesses may be provided by family and friends of the founders and other high-net-worth individuals (often known as business angels) in return for an equity stake. Such seed investment is often used to fund the establishment and early growth of the business before larger investment is available. The investing individuals may also provide know-how and expertise to assist in the company's development. The seed investors would typically not require the same controls over the business as, for example, venture capital providers.

CROWDFUNDING

The crowdfunding sector is being establishing progressively in Spain, and may be appropriate for a FinTech business in the early stages. It involves members of the public investing in a business by pooling their resources through an intermediary platform, such as Crowdcube, which is one of the 29 regulated crowdfunding/crowdlending platforms in Spain as of November 2019.

There are two main types of crowdfunding: equity and reward-based.

- Equity crowdfunding involves company shares being given in exchange for investment in the business.
- Reward-based crowdfunding provides investors with a tangible benefit, such as early access to a platform or an application that the business is developing. This type of crowdfunding is not regulated under Law 5/2015.

Crowdfunding offers a large number of private investors an opportunity to make small-scale investments in early-stage businesses, to which they may otherwise not have had access.

ACCELERATORS

There are various incubators or accelerators in the Spanish market which offer support, facilities and funding for startups, often in return for an equity stake.

Venture capital and debt

Venture capital funding is a type of equity investment usually targeted at early stage FinTech companies with an established business and some trading history. Venture capital provides a viable alternative to traditional lending, given that the business is unlikely to have the tangible asset base or long track record needed to attract traditional debt funding from financial institutions.

Corporate venture capital (CVC) is a type of venture capital and involves an equity investment by a corporate fund. The benefit of having a CVC as an investor for a FinTech startup is that the fund is able to share its knowledge and expertise of the FinTech sector with the company and act as an advisor.

An additional funding option is venture debt, which is typically structured as a three-year term loan (or series of loans), which is secured against a company's assets and includes an equity element allowing the debt provider to purchase shares in the company. However, venture debt providers will usually only invest into companies that have already received investment through venture capital.

Warehouse and platform funding

Warehouse financing may be suitable for FinTech companies which own a portfolio of assets. Funding is often provided by way of a loan from a small number of lenders to a special purpose vehicle (SPV). The loan is secured on the assets acquired by the SPV from the originator. The lenders will only fund a portion of the assets, with the remainder being financed by way of subordinated lending from the originator.

Some FinTech companies may see warehouse funding as a temporary form of financing to be followed by a larger capital markets transaction at a later date.

Another alternative form of funding is by way of crowdlending platforms (Participative Financing Platforms regulated under Law 5/2015), which bring individual borrowers and lenders together without the involvement of traditional banks. Crowdlending does not involve equity investments, and instead interest is paid on the money borrowed.

Senior bank debt and capital markets funding

SENIOR BANK DEBT

Once a FinTech company is established and has a track record, bank debt becomes a more viable source of funding, either on a secured or unsecured basis depending on the creditworthiness and asset base of the business. In contrast to capital markets funding which is often covenant-lite, bank funding will generally involve the imposition of financial covenants and controls that will apply over the life of the facility. Bank finance may be particularly important for working capital, overdraft, accounts management and general liquidity purposes.

CAPITAL MARKETS FUNDING

Spain has both debt and equity capital markets which are accessible to businesses (usually of a certain size).

Raising finance by way of an Initial Public Offering (IPO) could be a funding arrangement for FinTech companies that have grown to a certain size. An IPO is the initial sale of company shares on a public exchange, such as any of the four Spanish Stock Exchanges (*Bolsas de Valores*). The Alternative Stock Market (*Mercado Alternativo Bursátil* or MAB) in particular caters for small, growth-orientated companies.

FinTech companies may also start to access funding by issuing bonds as a way of raising more competitive funding.

CONVERTIBLE BONDS/LOAN NOTES

Another funding tool for fast-growing FinTech businesses is to issue convertible bonds or loan notes, which are essentially a hybrid between debt and equity. Convertible instruments begin as a loan accruing interest and are convertible into shares in the issuing company at prescribed prices in certain circumstances.

Incentives and reliefs

The 'business angel' regime is designed to encourage investment in small, early-stage companies by offering a 30% income tax deduction for individuals who acquire shares of qualifying startups. The deduction base is limited to €60,000 per year. In addition, capital gains derived from the sale of these shares are exempt from Personal Income Tax, provided the investor reinvests the amounts resulting from the sale in the acquisition of shares of another company of new or recent creation.

Research and development (R&D) deductions from CIT (Corporate Income Tax) are an incentive to increase investment in R&D. The deduction rates are 25% to 42% (R&D expenses) and 8% (acquisition of certain fixed assets used for R&D activities).

The Patent Box regime provides for a reduction on net income derived from the licensing of qualifying intellectual property, (patented inventions etc.) subject to compliance with certain requirements.

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Portfolio sales

Loan transfers and portfolio sales

What are common ways of buying and selling loans?

Buying and selling loans is very common.

A loan can be sold on an individual basis or packaged up with other loans and sold as a portfolio pursuant to overarching terms.

The most common ways of selling loans are:

- **Novation** – A novation is a full legal transfer of the party's rights and obligations. It is a tripartite arrangement between the existing parties and the transferee and results in a fresh contract being formed between the continuing party and the transferee and the transferor being released from its obligations.
- **Assignment** – An assignment is a transfer of rights only, not obligations. Subject to any contractual restrictions, assignment can be done without the consent of the debtor. An assignment can be effected as either an equitable assignment or legal assignment depending on whether certain statutory requirements have been satisfied.
- **Sub-participation** – A sub-participation is a transfer of the economic interest in a loan without changing the legal relationship between the existing parties. Sub-participations involve the buyer taking on double credit risk, both on the seller as well as the borrower.

Loan transfers are commonly documented using standard form contracts made available by the Loan Market Association. For more complex transactions, a more bespoke form of sale and purchase agreement would tend to be used. The form and content of the transfer documentation will depend on the nature of the loan assets being sold.

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What are the main considerations when transferring a loan and related security?

There are a number of issues to consider when transferring a loan or portfolio of loans. Some of the key considerations include:

- **nature of assignment** – whether if the assignment is for the contractual position or just the economic rights;
- **effective date** – determination of the moment when the economic rights are effectively assigned by the assignor;
- **security** – determination of the security under the relevant loan, in particular the ranking and registration of the security (a transferee creditor cannot enforce any registered security if the transfer is not registered too – however, the registration of any transfer triggers stamp duty);
- **court information** – if the loan has been challenged before the courts before its assignment, it will be important to obtain all the information regarding the judicial proceeding and the legal advisors involved in the ongoing claims;
- **data protection** – whether there is any personal data or other restricted information in the loan that should not be disclosed without the prior consent of the borrower;
- **lender eligibility** – whether there are any restrictions around the type of entity to which the loan can be transferred;
- **undrawn commitments** – whether there are any continuing obligations for further funding or other material obligations on the part of the lender that may fall on the transferee or reduce claims made by the transferee;
- **transfer mechanics** – whether there are any steps that need to be taken to transfer the loan in accordance with its terms;
- **consent** – whether a transfer requires the consent or notification of any other parties;
- **notification** – notification to the borrower is not mandatory (unless otherwise agreed under the loan), however, is essential in order for existing borrowers to effect payment to the assignee to know who should repay the credit to and to avoid potential set offs between assignor and assignee; and
- **registration** - even if it is not a requirement under the loan, the transfer agreement should be granted by means of a Spanish public document if the underlying agreement was also notarised before a Spanish public notary.

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Projects

Financing / investing in energy / infrastructure

To what extent are energy and infrastructure assets publicly or privately owned?

Generally

The ownership of energy and infrastructure assets in Spain varies according to the asset class. The main asset classes are usually considered to be:

- economic infrastructure (energy, aviation, rail, telecommunications, water, roads and waste); and
- social infrastructure (education, health and justice/prisons, housing.

Key sectors are considered below.

Energy

The gas and electricity industries in Spain are privatized, with the generation, transmission, distribution and supply services provided by a number of private sector companies. The relevant private sector companies own the generation, transmission and distribution assets. Notably, the private company *Red Eléctrica de España, S.A.* (REE) owns all the high voltage electricity grid. The private company *ENAGÁS, S.A.* is the main gas natural transport operator in Spain and it is certificated as a Transmission System Operator (TSO) by the Spanish public authorities and the European Commission.

The private sector finances and delivers most of the required infrastructure but there are a number of government policy mechanisms (adopted through legislation) which are used to incentivize investment in eligible energy generation technologies.

The principal body of the energy sector in Spain is the National Authority for Markets and Competition (CNMC), as the new independent authority in charge of both competition and regulatory matters in Spain in the fields of energy, electronic communications, audiovisual, postal and transport (railway and airport).

CNMC is fully independent from the Government, Public Administration and market players, has organizational and functional autonomy and is subject to judicial and parliamentary control.

Telecoms infrastructure

The telecommunications networks (fixed and mobile) in Spain are privately owned by a number of service providers. A good example is Telefonica which is responsible for most of the Spanish broadband infrastructure but whose work is heavily regulated by government.

Transport infrastructure

LIGHT RAIL

Typically, light rail assets (such as trams and associated track) are owned by local public sector promoting bodies, although certain elements of light rail projects may be outsourced to the private sector; for example, the private sector may provide new trams, run a concession or operate and maintain a light rail system on behalf of a local transport executive – the assets will continue, however, to be owned by the public sector.

HEAVY RAIL

The rail market in Spain is privatized but its composition (which is complex) involves both public and private entities.

ROADS, BRIDGES AND TUNNELS

The public sector may outsource the construction, operation and maintenance (sometimes on a project financed basis) of such assets to the private sector. In the case of tolled roads, the private sector has taken on roads/crossings on a full concession basis – namely, responsible for the design, build, financing, operation, maintenance and collection of tolls for a number of years with the main revenue

stream being the collection of toll revenues from users (rather than any service payments from the public sector) but these types of projects are no longer considered viable as the private sector is not willing to take 'demand risk' in order to service the upfront capital costs and associated bank debt.

AVIATION

Commercial aviation management in Spain is (for the most part) privatized. As regards airport infrastructure, there are a number of ownership structures in the Spanish market, including private ownership, local government ownership and various forms of public-private ownership. All models are heavily regulated by government and another public sector entities such as AENA, AESA and ENAIRE.

PORTS

The Spanish ports sector comprises a complex variety of public and private agents and operators. The current regulations distinguish between local ports and ports of general interest, being the latter monitored by the public bodies *Autoridades Portuarias*.

Other infrastructure

SOCIAL INFRASTRUCTURE (SCHOOLS, HOSPITALS, EMERGENCY SERVICES CENTERS/PRISONS)

Typically, these are owned by the public sector. The majority of social infrastructure assets in Spain are directly financed by the government.

Education

The ownership of a school's infrastructure depends upon which category of school it belongs to. For example, in the case of a local authority maintained school, the school and playing fields will be typically owned by the local authority; an academy school can receive funding directly from the government and may lease land from a local authority.

Hospitals

More than half of the hospitals in Spain are in some way involved in the public sector: they belong to the public health and hospitals system, operate through concerted public-private actions or by means of public funds/contracts.

Social housing

This is a diverse sector involving many different organizations and individuals including housing developers, building contractors, mortgage lenders, local authorities, housing associations, landlords, owner-occupiers, private renters and those in the social rented sector, which are constrained by public sector regulations.

DEFENSE

Typically, defense assets are owned by the public sector.

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Are there special rules for investing in energy and infrastructure?

Generally

There is no specific regime governing or restricting investment in energy or infrastructure projects in Spain over and above existing regulation for investors and funders more generally but a particular proposed investment may be subject to legislative or regulatory control (e.g., merger control rules). As regards the planning and implementation of the underlying energy or infrastructure project (in which the investment is to be made), the legal/regulatory position relevant to that project must be considered. For example, a project involving development on land will require planning permission or a development consent order; and a project may require environmental authorizations/permits and/or sector specific regulatory consents or licenses.

Whether an investor can invest will depend on the terms of the procurement of that project if it is a public sector project and, in respect of an existing/operational project, that will depend on whether there are any contractual restrictions on 'Change of Control'. This is less of

a concern on private sector infrastructure although investors would need to consider whether any licenses/consents/permits would be affected by their acquisition of an interest.

Energy

The energy markets Spain have a complex system of arrangements between suppliers, generators, transmission and distribution which are heavily regulated. In particular, there are complex arrangements in respect of licensing, subsidies and demand/charging mechanism with suppliers, customer and REE (operator of the Spanish electricity system) or ENAGAS (operator of the Spanish gas grid) and these are subject to change/regular updates meaning that investors will need to have a good understanding of the current framework and the potential directions in which the market may move. Investors need to understand how technology changes may impact on the overarching regulatory framework and vice-versa.

Investors should also consider whether the acquisition of any interests in the energy sector (at an entity or asset level) would cause any issues with any license conditions or the granting of specific subsidies. In particular, if a breach of those conditions could lead to the revocation of a license/subsidy that might make the potential target less attractive or viable.

Telecoms infrastructure

There is a complex regulatory environment for this sector including how access and interconnectors (between networks) are regulated under the General Telecommunications Law of 2003.

The industry is largely privatized, therefore investors should consider if any permits/consents/licenses will be affected by their interest.

Transport infrastructure

RAIL

There is an extensive and complex regulatory framework to consider in respect of a practical and operational involvement in this sector. Key areas include understanding the regulatory regime for certification for train use and acceptance and user fare regulation. Depending on how an investor wishes to invest in a project (specifically what type of entity or asset), there is a varying degree of difficulty for investors to enter into an existing project.

ROADS

In order for a private sector partner to carry out its duties on certain types of roads projects, the procuring public sector authority may delegate certain of its statutory duties to the private sector partner. This will be dependent on the project and the specific contractual requirements. Any investor will, therefore, need to understand those duties and whether it is able to subcontract those duties to an appropriate person.

Other infrastructure

On publicly procured infrastructure, it is quite common for long-term projects to have a 'change in control' clause which restricts change in ownership structures of the private sector. For example, in most sectors there is a restriction on change in control during the construction period. How strict these restrictions are will often depend on the sector. For example, the defense sector usually gives the Ministry of Defense a strong degree of discretion.

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What is the applicable procurement process?

Public procurement in Spain is, for the time being, in most instances governed by the Act 9/2017, dated 8 November, on Public Sector Contracts. There are some sector-specific regulations such as the Act 31/2007, dated 30 October, on Public Procurement in the Sectors of Water, Energy, Transports and Postal Services and the Act 24/2011, dated 1 August, on Public Sector Contracts on Defense and Security. All the regulations mentioned are based on EU Directives.

The key principles are that contract procured by the public sector are awarded fairly, transparently and without discrimination on the grounds of nationality and that all potential bidders are treated equally.

Investing in energy and infrastructure

Public procurement is relevant where Spanish public sector bodies or entities, seek to outsource delivery of a new project. On an infrastructure project, a potential investor would have to bid in its own capacity or as part of a consortium to deliver the overall deal which could include design, build, operation, maintenance and financing of the relevant energy or infrastructure asset. The relevant procurement legislation applies to all bodies and entities that make up the so-called 'public sector', conforming to the regulations of the European Directives, including all types of public administrations, autonomous agencies (*organismos autónomos*), state owned companies (*entidades públicas empresariales*), public universities and foundations, state agencies etc. A regulated procurement is required where certain financial thresholds are met and on most major infrastructure projects (where limited exclusions do not apply), it is likely that those thresholds will be met so a regulated procurement would need to be run.

In most cases, the public sector will need to publish a contract notice in the Office Journal of the European Union (OJEU) and typically run one of the following procedures:

- **Open procedure** – This is suitable for easy-to-evaluate projects and tenderers simply submit a tender in response to the OJEU notice. Change and negotiations to the tender are not permitted.
- **Restricted procedure** – There is a shortlisting of at least five tenderers following an expression of interest stage and tenderers submit a bid. Again, no negotiation is permitted other than clarification and finalization of the contract terms.
- **Competitive dialogue** – This is often the most common procedure for complex infrastructure projects and involves a shortlisting of at least three bidders who are invited to dialogue with the public sector to develop detailed solutions which are capable of being accepted by the public sector. Clarification and further negotiations are allowed following final tender but only on the basis of confirming the financial and other commitments in a tenderer's bid.
- **Competitive procedure with negotiation** – This is sometimes described as a hybrid procedure as it allows dialogue with bidders but also allows the public sector to award a contract on the basis of an initial tender (or further stages) but clarification and negotiation is not allowed following final tender.

An investor may choose, however, to seek to invest in a project (by acquiring an interest in a private sector partner) that has already been procured and is operational. Typically, such investments are controlled by contractual mechanisms (particularly on publicly procured projects) within the original awarded contract rather than procurement regulations themselves.

Depending on the structure of the deal, any acquisition of an interest or variation to the existing project may have procurement-related considerations that need to be borne in mind.

Financing energy and infrastructure

On a publicly procured contract, the public sector may have prescribed requirements on the funding arrangements. Following entry into the contract, the main tool for controlling the financing is that, typically, on project finance deals, a refinancing of the senior debt will require the consent of the public sector.

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What are the most common forms of funding / investing in energy and infrastructure?

The principal forms of private sector funding/investment in energy and infrastructure in Spain (including in relation to public-private partnerships) are as follows.

Funding

Common forms of funding in energy and infrastructure include:

- loans made on a corporate finance basis (balance sheet debt);
- loans made on a project-finance basis (to a special purpose project company) on medium to long-term bases – such loans may later be syndicated to other funders;
- bond finance; and

- asset financing (this is particularly relevant in the aviation and naval sectors).

Funding/funding products can also, sometimes, provided by the European Investment Bank and export credit agencies.

Investing

Common forms of investing in energy and infrastructure include:

- 'equity' investment in special purpose vehicles or entities that may have a portfolio of interests, i.e., share capital and subordinated sponsor loans; and
- secondary market investment in operational projects (acquisition of 'equity').

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Restructuring

Enforcement and sanctions

When can there be regulatory investigations?

When the *Comisión Nacional del Mercado de Valores* (Spanish Securities and Exchange Commission, CNMV) or the Bank of Spain considers that an authorized firm or regulated individual may have breached the ongoing compliance requirements, it will launch a formal investigation. They may also launch a formal investigation for alleged breach of any laws and regulations applicable to entities operating in the banking and securities sector, including investigations of entities providing regulated activities without authorization or license. This may result in regulatory sanctions.

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What regulatory penalties may apply?

When a rule breach has taken place, the *Comisión Nacional del Mercado de Valores* (Spanish Securities and Exchange Commission, CNMV) or the Bank of Spain may impose a financial penalty or censure, or withdraw regulated status against the firm and/or regulated individuals. The regulator will publicize these penalties.

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What criminal penalties may apply?

Following formal investigation, the regulators have powers to impose criminal penalties in certain cases, including:

- fraud;
- insider dealing; and
- breaches of the money laundering regulations.

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Tax

Tax issues

Are stamp, registration, transfer or other similar taxes applicable?

Are there stamp, registration, transfer or other similar taxes payable on the advance, transfer or assignment of a loan?

No stamp, registration, transfer or other similar taxes are payable on the advance, transfer or assignment of a loan.

Are there stamp, registration, transfer or other similar taxes payable on the taking, transfer or assignment of a mortgage, debenture or other security?

The taking, transfer or assignment of a mortgage, debenture or other security over real estate assets located in Spain is subject to stamp duty at the tax rate approved by the Spanish region where the real estate asset is located. The applicable tax rate ranges between 0.5% and 1.5% depending on the region where the real estate asset is located.

Are there stamp, registration, transfer or other similar taxes payable on the issue, transfer or assignment of a debt security (e.g., a bond)?

No stamp, registration, transfer or other similar taxes are payable on the issue, transfer or assignment of debt securities.

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Do tax authorities take priority on enforcement?

On the enforcement of security, do tax authorities take priority over secured lenders or secured debt security holders (e.g., secured bond holders)?

In case of real estate transactions, the Spanish Tax Authorities take priority for the collection of payments of Spanish Real Estate Tax (*Impuesto sobre Bienes Inmuebles*) corresponding to the year of the enforcement and the four previous years. Furthermore, the Spanish Tax Authorities take priority for the collection of transfer tax and stamp duty due on previous transfers or other taxable events related to the property itself in a period of four years.

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Is withholding tax on interest payments applicable?

Is there withholding tax on interest payments under a loan?

Withholding tax applies when a payment of interest with a Spanish source is paid under a loan.

If so:
What is the rate of withholding?

The current rate of Spanish withholding tax is 19%.

What are the key exemptions?

The most commonly relied on exemptions to ensure that interest payments made by Spanish companies can be made free of Spanish withholding tax include:

- the exemption for interest paid to a bank resident for tax purposes in Spain;
- reliance on a double tax treaty (such treaty may provide for a total or partial exemption); or
- reliance on the EU Interest and Royalties Directive, as implemented under Spanish domestic law, provided that certain conditions are met (the key conditions being that the lender is resident for tax purposes in a member state of the EU and is not acting through a permanent establishment in Spain nor through a territory considered as a tax haven).

Would the same analysis apply to interest payments under a debt security (e.g., a bond)?

Yes.

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Are foreign lenders and debt security holders subject to tax on interest payments?

Will the lender be taxed on interest payments under a loan in the jurisdiction of the borrower (other than by way of the application of withholding tax (if any)), assuming the lender is not otherwise resident in that jurisdiction for tax purposes (eg by virtue of incorporation, residence or local branch)?

No.

Would the same analysis apply to interest payments under a debt security (eg a bond)?

Yes.

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