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KEY ISSUES ARISING FROM THE NEW DRAFT LAW ON STOCK MARKETS AND INVESTMENT SERVICES

The Council of Ministers approved the new draft law on Stock Markets and Investment Services (the "**Draft Bill**"), whose text was published on 12 September 2022. Once approved by the Spanish Parliament (*Cortes Generales*), the new regulation will replace the Consolidated Text of the Law on Stock Markets, approved by Royal Legislative Decree 4/2015, of 23 October, in addition to amending other essential regulations of our legal system regarding company law, such as Royal Legislative Decree 1/2010, of 2 July, approving the consolidated text of the Law on Capital Companies.

Among other matters, the Draft Bill covers new regulations affecting: (i) Financial instruments, the registration of securities and infrastructures, (ii) Investment service entities, and (iii) The regime and powers of the Spanish National Securities Market Commission (the *Comisión Nacional del Mercado de Valores* or "**CNMV**").

The aims pursued by the Draft Bill are mainly to:

1. Enable the development of the Spanish stock markets in a competitive environment.

2. Improve the regulatory and systematic approach of the stock markets sector.

3. Adapt national regulations to the new European Union Law and put in place alternatives to protect the interests of the Spanish stock markets, financial stability and investors' rights.

This article is not intended to be a detailed summary of all the Draft Bill's amendments affecting current regulations, which may still vary subject to deliberations while going through parliament, but rather to highlight the most significant issues:

Securities issuers

The Bill proposes changes to the procedures for admitting stocks for trading on regulated markets to simplify the process and improve transparency:

It establishes that verifying admittance requirements to trade in non-equity securities will be the responsibility of the **body overseeing the regulated market**, rather than the National Securities Market Commission ("**CNMV**"), thus speeding up the procedure and reducing emission rates by avoiding duplicate checks. Furthermore,

regulated markets are required to set clear and transparent rules for admitting financial instruments.

Meanwhile, the regulations establish that a **transferable security admitted to a regulated market in another Member State may be accepted** for trading on a Spanish regulated market **without requiring the issuer's consent**. In this situation, the issuer is not obliged to directly provide the Spanish regulated market with the information necessary for admitting securities for trading.

Likewise, the extension of the deadline for submitting the half-yearly financial report, corresponding to the second half of the financial year, to the CNMV from **two to three months** for securities issuers obliged to provide it, is widely known.

Furthermore, it introduces requirements supplementary to those already imposed by the regulations for trading additional tier 1 and 2 capital instruments and other debt securities, being liabilities eligible or susceptible to be used for recapitalising financial institutions, to retailers.

Investment services

The Draft Bill, regarding investment service firms, aims to adapt Spanish legislation as a result of the transposition of Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019, on the prudential requirements of investment firms.

Among the most notable novelties, it includes the new legal concept of an investment services firm, called a "National financial advisory firm", or an "**EAFN**" (in accordance with the Spanish acronym, *Empresa de asesoramiento financiero nacional*). The most significant characteristics of this legal model are: (i) they can be **individuals or legal persons**, (ii) they will be able to provide those investment services typical of financial advice firms and, (iii) they will not be considered an investment service business, even though they are subject to the same rules, requirements, and sanctioning regime, except for capital requirements and their action being limited to the territory of Spain.

Additionally, in accordance with the Draft Bill's Sixth Transitional Provision, within three months from the date on which the Project is approved, an EAFN must join the investment guarantee fund (**FOGAIN**).

Non-domestic financial advisory firms will be considered investment service firms, but they may only be legal persons.

On the other hand, regarding the "Central Counterparty Entities" (*Entidades de Contrapartida Central*) or "**ECCs**", in accordance with their Spanish acronym, these also include innovations, among which we would highlight: a) Their internal regulations must contain a recovery plan setting out the measures to be taken in the event their financial situation deteriorates or there is a possibility of non-compliance with the requirements of Regulation (EU) 648/2021; and, b) settlements may be carried out using Distributed Ledger Technology, or **DLT**.

Aside from this, it is worth mentioning that the European Securities and Markets Agency (**ESMA**) will be responsible for the systems for authorising Consolidated Information Providers (**CIPs**), Authorised Information Services (**AISs**) and the Authorised Publishing Agents (**APAs**), except for the last two, where they are of little market relevance and the exemption provided by Regulation (EU) 600/2014 is met, in which case they would be the responsibility of the **CNMV**.

Finally, the conduct rules have also been amended by the transposition of Directive (EU) 2021/338, known as the "Quick Fix", amending the Markets in Financial Instruments Directive II.

SPACs

The Draft Bill includes in its Second Final Provision a new Chapter VIII *bis*, which will regulate what are called "Special Purpose Acquisition Companies" or "SPACs", thus amending Royal Legislative Decree 1/2010, of 2 July, approving the Law on Capital Companies ("**LCC**").

SPACs are special acquisition companies, created with the aim of raising financing from the markets for acquisitions or mergers with other companies. An acquisition, of one or more companies, whether listed or unlisted, may be total or partial, direct, or indirect, and carried out by way of a sale, merger, spin-off, non-monetary contribution, global transfer of assets and liabilities or similar transactions. The only prior activity of this type of company consists of carrying out an initial public offer of securities, requesting admission for trading its shares, and those General Meeting activities which are mandatory for the subsequent acquisition.

These companies must incorporate a reimbursement mechanism for shareholders for when acquisition is approved, which may consist of: (i) a **statutory right** of separation. This will be independent of the vote carried out, and the provisions of article 346.1 a) LCC will not apply; (ii) **Issuance of redeemable shares**, without the provisions established in articles 500 and 501 LCC being applied to them; or (iii) **a capital reduction** which is carried out through the acquisition of the company's own shares for subsequent amortisation. In the latter case, the Draft Bill includes a series of preconditions that must be met. Any reimbursement will comprise a minimum value equivalent to the aliquot part of the actual fixed amount in the suspense account in which the resources obtained from the initial public offer were deposited.

Regarding the above, and as a special case in relation to public acquisition operations ("**PAOs**"), it should be noted that, if the SPAC carries out the abovementioned capital reduction as a reimbursement mechanism, the price of the public takeover bid will be the amount equivalent to the aliquot part of the actual amount fixed in the suspense account in which the resources obtained from the offer were deposited.

Finally, the new regulation of the LCC sets out a series of provisions only applicable to SPACs:

i. The term for formalising the acquisition agreement will be 36 months, being extendable for a further 18 months if the Shareholders' Meeting so decides.

ii. The maximum treasury shares limit for listed companies will not be applicable to the SPAC system, provided that the acquisition of own shares involves instituting a shareholder reimbursement mechanism.

iii. The company name must contain the abbreviation "SPAC" or the title "A Company Listed for the Purpose of Acquisition".

iv. Depending on their complexity, except where a reverse merger is concerned, the CNMV may require the drafting of a prospectus for those merger operations which are initially exempt from publishing one under Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017.

Distributed Ledger Technologies (DLTs)

The Draft Bill amends the necessary preconditions for the correct application of the provisions of Regulation (EU) 2022/858, which consists of a pilot infrastructure regime based on Distributed Ledger Technologies (hereinafter, **"DLTs"**), leading to the amendment of the **Regulation on a pilot regime for market infrastructures based on DLT** and the **Regulation on Crypto-assets.**

The most significant innovations of this new regulation are the following:

Representation, registration, formation and transfer of securities registered or represented through DLT-based systems:

- The definition of a financial instrument is broadened to include those issued through the use of DLTs, without this fact altering their classification or legal nature.

- The provisions of the content of Chapter II (on transferable securities represented by book entries) will apply to transferable securities registered or represented through DLT-based systems, where this is provided for in the issue document. Even if there is no express mention in the issuance document, they will also be subject to the regulations when the issuer's registered address or that of the sole entity responsible for recording and registering securities in the system it designates is in Spain.

- Where securities are represented by means of a DLT-based system, the issuer must (i) ensure that the systems guarantee the integrity and immutability of the issuance and allow the direct or indirect identification of the right holders in transferable securities, as well as their nature, characteristics, and the

number of securities. (ii) have a continuity and contingency plan to deal with any system failure; and (iii) designate, where appropriate, the entity responsible for registering the transferable securities represented through DLT-based systems, which may be the issuer itself or another issuer(s) designated by the latter.

- The change in the form of representation of negotiable securities through DLT-based systems will be carried out as provided for in the continuity or contingency plans, or with the prior authorisation of the CNMV.

  This change will be executed in accordance with the holders' consent.

  Responsibility for complying with the representation and registration requirements will lie with the market infrastructures authorised by the CNMV, in accordance with European regulations.

- As for the formation of these securities (based on DLT systems), this will be carried out through their first registration on said systems, and their transmission will be undertaken by registering the transfer in the distributed ledger, which will have the same effect as the handover of titles. The Draft Bill foresees the implementation of functions within these systems to provide guarantees regarding the legitimacy of the transmissions and allow the ownership of the corresponding rights to be indisputably proven.

- The CNMV will be responsible for the oversight, inspection and sanction regime to which the entities responsible for recording and registering these negotiable securities (DLT) are subject.

The introduction of these new negotiable securities (based on DLT systems) leads to numerous amendments to regulations such as the Law on Capital Companies (regarding the representation of shares or bonds), the Law on Credit Investment Institutions (regarding the representation of stakes and shares), and even to the Law on Civil Procedure (in matters of enforceable titles).

Sanctioning Regime

The Draft Bill introduces systematic improvements and considerably reduces the sanctioning regime, since it typifies in the same article all infractions and sanctions for all behaviours involving an infraction, together with all the corresponding degrees.

It is obvious that this, in addition to improving this regime, represents an update of the existing one, due to the introduction of new legal concepts, such as national financial advice firms, crypto-assets, or entities responsible for recording and registering transferable securities represented by DLT-based systems, regarding the

representation of the latter or compliance with the rules of clearing systems, and registering and liquidating securities, etc.

Institutional regime of the CNMV

Likewise, the Draft Bill affects the CNMV's basic working regime. The most significant innovations are:

i. The Draft Bill reinforces the CNMV's basic and working autonomy and bans State institutions or other public or private entities from attempting to put pressure on it or give instructions to the CNMV Board or its staff.

ii. Appeals to the Ministry of Economic Affairs and Digital Transformation against the CNMV's sanctions and on the latter's resolutions regarding the intervention and replacement of directors, as an additional measure highlighting its independence, have been abolished.

iii. The CNMV retains the power to approve circulars and can clarify that they are subject to prior public hearing and consultation procedures, as well as the opinions of the Council of State.

iv. The CNMV's Board retains its current composition, consisting of a chair, vice-chair and three directors appointed by the Government and the Ministry of Economic Affairs and Digital Transformation, as well as two current ex officio directors, the Secretary General of the Treasury and International Finance and the Deputy Governor of the Bank of Spain.

However, the term of office of the chair, vice-chair and non-ex officio directors of the CNMV is extended from four to six years, without the possibility of re-election. Renewal will be partially undertaken every two years.

v. The draft law establishes the principle of a balanced presence of men and women on CNMV's Board and its Advisory Committee, except where duly substantiated well-founded and objective reasons can be provided.

vi. Regarding the oversight, inspection and sanction regime, this also includes amendments and innovations as a result of the transposition of Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms, as well as the application of Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 (on investment products) and, where applicable, the EU Regulation (still pending) on crypto-asset markets and the digital operational resilience of the financial sector (known as MiCA, the vote on which has been delayed until April 2023, and DORA).