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MAIN INNOVATIONS IN THE LAW ON PROMOTING BUSINESS
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INTRODUCTION

On April 16, 2015, the *Congreso de los diputados* (the lower house of the Spanish parliament) passed the Law 5/2015, of April 27th, on Promoting Business Financing ("**LFFE**"), which was published in the Spanish Official Gazette ("**BOE**") on April 28th, 2015.

The LFFE aims to respond to Spanish companies' traditional dependence on bank financing, which is particularly critical among small and medium sized companies ("**SMEs**"). The preamble to the law states that this "strong bancarization" has exacerbated the financial crisis in Spain, characterized by a marked drop in lending and a parallel increase in its cost. The law proposes a series of measures to increase and facilitate SMEs' access to bank credit. It also introduces new developments to promote alternative sources of financing and corporate financing mechanisms.

The LFFE took effect on the day following its publication in the BOE, which is on April 29, 2015.¹ It includes a detailed transition regime enabling mutual guarantee companies, special finance companies and securitization funds to adapt to the legislation's new provisions.

Here is a summary of the most significant changes introduced in the new LFFE.

BASIC ASPECTS OF THE LAW

New developments in **securitization**:

- The law combines mortgage securitization funds (*fondos de titulización hipotecarios*, or FTH) and asset securitization funds (*fondos de titulización de activos*, or FTA) in a single category.
- The securitization funds' deed of incorporation allows assets to be split into independent compartments against which different kinds of securities can be issued.
- The LFFE eliminates the requirement that credit rights assigned to the fund's assets must be uniform, enabling several risks to be grouped in one fund.

¹ Exceptionally, Title I of the LFFE on the rights of SMEs regarding the reduction or cancellation of the flow of financing will come into force three months after the Bank of Spain publishes specific regulatory provisions.

- Assets can be acquired through assignment, acquisition, primary market subscription or any other way allowed by law. The assignment to fund is no longer required to be made fully, unconditionally and for all the period left until maturity.
- Fund liabilities may consist on loans granted by financial institutions and by any third party. It is no longer required that 50% of fund liabilities must be fixed-income securities.
- Securities issued by funds do not have to be rated by a credit rating agency.
- Funds can guarantee third party liabilities (structured covered bonds).
- Assets can be assigned to close funds during the four month period following the incorporation.
- Active asset management is allowed for open funds.
- The LFFE clears up the requirement for the assignor not to grant guarantees or assure the success of the transaction.
- The incorporation deed can establish the constitution of a creditors' committee to protect the creditors' interests. It will be governed by the terms in the instrument itself, with the supplementary application of provisions relating to the bondholder syndicates in Companies Act.
- The corporate purpose of the fund managers can include the management of bank asset funds, (*fondos de activos bancarios*, or FABs) and similar funds and other vehicles established abroad.

Important changes to the **bond issuance mechanism**:

- Limited liability companies are allowed to issue and guarantee bonds and other securities that create or recognize debt, except for convertible instruments.
- The LFFE eliminates most limits on the issue of bonds by public limited companies and limited partnerships by shares.
- Unless the articles of association specify otherwise, the governing body has the authority to issue bonds. The issue of convertible bonds remains under the authority of the shareholders' meeting.

- The LFFE clears up the requirement to publish an announcement with details of the issue in the Official Bulletin of the Commercial Registry (*Boletín Oficial del Registro Mercantil*). It can be interpreted that the LFFE may not require the registration of the deed of issue to be registered with the Commercial Registered. The issue guarantor, if any, must appear before the Notary public when the deed of the issue is granted.
- The LFFE establishes the statutory auditor's responsibility for damage caused when the auditor carries out its duties without the required diligence.
- It also introduces a conflict rule establishing the law applicable to the issue of bonds abroad by Spanish companies. The regulation on the bondholders' syndicate and the commissioner (*comisario*)—regardless of whether the issuing company is Spanish— applies to issues that are subscription public offerings, and (i) are subject to Spanish law or the law of a state that is not a member of the EU or the OECD, and (ii) for which the offering takes place in Spain or the securities are admitted to trading on a regulated market or a multilateral trading facility ("**MTF**") in Spain.
- Securities admitted to trading on a Spanish MTF are also exempt from granting a public deed and publishing debt issues.

The law also provides a regulation for crowdfunding and crowdlending investment through **collective financing platforms** (*plataformas de financiación participativa*, or "**PFPP**"):

- The LFFE establishes an activity reservation in favor of those PFPPs that meets the incorporation and activity requirements set forth by the law.
- The LFFE forbids PFPPs from carrying out activities reserved for investment services companies, credit institutions, payment institutions, electronic money institutions.
- PFPPs must be previously authorized by the CNMV and registered with a special CNMV register.
- PFPPs must meet specific requirements, including financial requirements, when carrying out their activity.
- PFPPs must keep their websites up to date on the specific risks associated with the investment and conflicts of interest that might affect them.
- Projects published by PFPPs can only be of a business, educational or consumer nature. They cannot involve fundraising for professional

financing, or subscribing or acquiring (i) listed financial instruments, or (ii) shares or participations in collective investment undertakings, closed-end collective investment undertakings or their management companies.

- The projects must fulfill suitability requirements and the platforms must provide the minimum specified information (including basic information on promoters).
- The LFFE establishes that investment in PFPs is risky and classifies investors as professionals (“*acreditados*”) or non-professionals (“*no acreditados*”).
- The CNMV supervises PFPs.

To conclude, we highlight these new developments:

- To encourage bank lending to SMEs, financial institutions must give prior notice when they intend not to renew, suspend or reduce by more than 35% the flow of financing granted. After they have given this notice, they must also send out free of charge a report with full historical financial information on the SME.
- For two years following admission to an official secondary market from a MTF, companies previously listed on a MTF are not required to publish the second half-year financial report or the interim management accounts.
- Companies listed on a MTF with a market capitalization exceeding €500 million must apply to be admitted to trading on a regulated market within nine months.
- The LFFE modifies the Securities Market Act by extending the responsibility of MTF supervisory entities. It also recognizes the responsibility of the registered advisor and the issuers of the securities admitted to trading on an MTF.
- The CNMV’s powers have been increased, strengthening its supervision and sanctioning role. It has been granted the power to impose penalties for very serious breaches, which had previously been reserved for the Ministry of Economy.
- The LFFE regulates requirements for setting up and developing business by special credit entities (*establecimientos financieros de crédito*), which are no longer considered credit institutions.

- The system for guarantees granted by mutual guarantee companies has been improved, and the suitability requirements for administrators and managers of credit institutions have been extended to these companies.

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