Possible effects of Brexit on debt issues by Spanish undertakings

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Many are the uncertainties concerning the implications of Brexit for the financial sector as a whole, and for capital markets in particular. Most will be made clear as the path treaded by the United Kingdom (UK) in its withdrawal from the European Union (EU) unfolds; a journey that can last for years.

However, the simple anticipation of some of Brexit's most potentially severe effects could begin to have immediate consequences for capital market players and the manner transactions are structured.

In principle, with respect to debt issues and beyond specific economic or market considerations, Brexit should not significantly affect the structuring of strictly local issues, i.e. those where the issuer, the governing law, the target investors, the financial intermediaries involved and, as the case may be, the market on which the bonds are traded, are Spanish.

For these types of issues, Spanish legislation on the issuance of bonds by Spanish companies has recently been amended, setting aside or clarifying some of the aspects that represented barriers or hurdles for the structuring of transactions from Spain.

This could help increase the volume of debt issues of a more local nature as international capital markets stabilize or redirect their central focus on Europe – rather than London as has heretofore been the case - and the uncertainty regarding the possible effects of Brexit – some of which we address below - is resolved or expelled.

And this increase in transactions could help develop Spanish regulated markets or multilateral trading facilities (MTFs) and provide them with greater liquidity. This is the case of the alternative fixed income market (MARF), which is already gaining some importance in mid-market transactions and attracting the attention of institutional investors, both Spanish and foreign, and even from some non-Spanish issuers (like the Portuguese Sugal Group, one of the largest tomato paste and fruit purées producers worldwide).

In addition, Brexit could have significant effects on the way debt issues are structured when an international element is present. Since a very significant part of European financial activity has concentrated in the UK, it is common for international Spanish debt issues to have some connection with the UK (English law and jurisdiction, placing among British institutional investors, admission to trading on the London Stock Exchange, etc.).

The following are some of the specific effects Brexit could have on the structuring of international debt issues by Spanish undertakings:

1. *Location of financial intermediaries involved in an issue and placing*

   Many of the financial intermediaries that advise Spanish issuers on the structuring, placing or underwriting of an international debt issue are British investment banks that provide investment services in Spain and other EU jurisdictions pursuant to the freedom to provide services or the freedom of establishment ('passporting').

   It is still unclear what will be the UK's status in respect of the EU once Brexit has been implemented. In any event, financial intermediaries operating from the UK are likely to lose the European passport.

   There are alternative or intermediate formulas that could mitigate some of the effects of the loss of the European passport (for instance, with the UK becoming a part of the European Economic Area or receiving the treatment of an equivalent third country). Nevertheless, all these formulas have certain limitations that the undertakings that operate in the financial markets might not want to assume.

   Hence, undertakings now established in the UK might very well relocate some of their European business to another European jurisdiction in order to continue operating from there as they have been doing so far from the UK.

2. *Other players in debt issues*

   In addition to financial intermediaries, we may find other players taking part and performing different functions in international debt issues, such as paying agents, depositories, central counterparty clearing houses, credit rating agencies, etc.

   All of the foregoing may have to consider relocating to another European jurisdiction if they wish to continue providing the same services, on similar terms, within the EU.

3. *Governing law and jurisdiction*

   It is very common for international debt issues targeting the European market, and sometimes the US market, to be governed by English law and to be referred to the jurisdiction of the courts of England in the event of any dispute.

There is some uncertainty as to what English law will be like post Brexit, since it currently includes and thrives on EU rules and case law that will no longer necessarily apply in the UK after Brexit.

Similarly, with the UK's withdrawal from the EU, the Brussels I Bis Regulation will cease to apply to English court proceedings and judgments, whereby 'lis pendens' rules (time-based priority of the court first seized and choice of exclusive jurisdiction agreements) will have no effect and judgments will no longer be directly enforceable in EU jurisdictions.

All this could mean fewer choices of English law and jurisdiction, submitting international debt issues instead to the law and courts of another jurisdiction that is affected by Brussels I Bis Regulation, thereby providing greater legal certainty with regards to the law governing such issues and the enforceability of judgments.

4. *Admission to trading*

It is common for international debt issues by Spanish companies to be admitted to trading on a foreign regulated market. Sometimes (although less often in recent years) the foreign market chosen has been the London Stock Exchange's fixed income market and by reason of the European passport the prospectus used for its admission to trading on that market could be used to make public offerings in other European jurisdictions and to request the admission of securities to trading on other European markets.

Once the UK leaves the EU, it is very likely that the number of international debt issues traded on regulated markets in London will be significantly reduced, since a specific prospectus would have to be drawn up for that market without the benefit of a European passport for use in other EU jurisdictions and markets.

5. *Other terms and conditions of issues*

Some debt issues include material adverse change or market disruption clauses that, in some cases, may trigger early maturity.

It is still unclear how Brexit can affect international debt issues whose terms and conditions include any of these clauses whilst having connecting factors to the UK. The question is whether bondholders in some instances could invoke Brexit as an early maturity event.

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