

CONVERTIBLE BONDS: KEY CONSIDERATIONS AND DIFFERENCES IN PRACTICE ACROSS EUROPE

Introduction

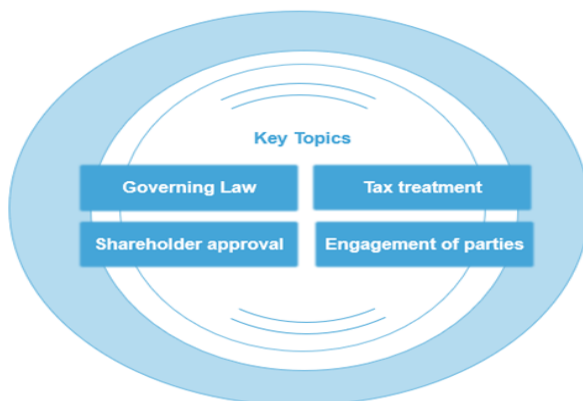
The hybrid nature of convertible bonds combines aspects of both debt and equity and can provide companies with alternative or additional sources of funding. Typically, convertible bonds will pay investors a set amount of interest for a given period of time but allow conversion into shares of the company at a prescribed conversion price and time. As such, and depending on the terms of a particular issuance, convertible bonds can allow investors the possibility to capitalize on the future growth of a company while at the same time maintaining certain protections by combining features of both debt and equity instruments into one product. For issuers, convertible bonds provide a way to raise additional capital at what can be relatively advantageous rates in circumstances when an equity raise from investors may not otherwise be possible.

While convertible bonds have a long history across different jurisdictions, the market practice surrounding this instrument has developed in different ways over the years and is continuing to evolve in different European countries. Key areas to note when looking at the differences in practice across jurisdictions include the governing law for the underlying documentation, shareholder approval requirements and confirmation of tax treatment.

Due to the complex nature of the documentation, other practical considerations such as the early engagement of a conversion agent and tax specialists should be taken into account when structuring a potential transaction.

Key issues

- Varying practices across jurisdictions
- Necessary requirements to be observed include shareholder approval in some jurisdictions
- Confirmation of tax treatment is often a key element
- Other practical considerations are important to keep in mind, including the early engagement of specialist advisors and other parties



Country-specific issues for equity-linked transactions

In certain countries, there are specific issues that should be kept in mind which can have a significant impact on a given transaction in terms of timing and execution. While there are similarities between jurisdictions across Europe, there are also notable differences in terms of required corporate approvals, choice of governing law for deal documentation and other themes that can have an impact on the structuring of a given transaction. In addition, this client briefing concentrates on large convertible bond transactions of companies which are publicly traded on a stock exchange. Market practice for pre-IPO convertible bond issuances can significantly differ from the overview presented in this client briefing.

The below provides a high-level overview of some typical practices and recent developments that characterize equity-linked transactions in the jurisdictions indicated:

Germany

In Germany, the usual practice in connection with equity-linked issuances is for the transaction documentation, in particular the terms and conditions as well as subscription agreements and ancillary agreements, to be governed by German law.

Convertible bond issuances are typically conducted excluding subscription rights by shareholders without a specific shareholder meeting for the issuance and are instead based on authorized capital. In order to exclude subscription rights, under German corporate law the offering size must be limited to 10% of the existing share capital of a German company.

Additionally, for the issuance of convertible bonds without subscription rights, German corporate law requires that the issuance price of the bond not result in a "material discount" to the hypothetical market price of equivalent shares at the time. In recent years, many German issuers outline within their corporate resolutions a requirement for the conversion price per share applicable at the time of issue to not be below 80% of the share price, calculated based on the previous 10 trading days.

For mandatory convertible bonds, a key consideration for the timetable of a transaction should be the amount of time required for a binding tax ruling in Germany, especially for first time issuers.

France

In France, documentation is typically governed by French law. Shareholder authorizations for the issuance of equity and equity-linked instruments are required and need to be specific to either a public offering or private placement, with or without pre-emptive rights. In addition, French equity-linked instruments include a legally required set of adjustment provisions with limited additional provision options.

French convertibles are also typically structured with an option for the issuer to remit existing or new shares; as such, appropriate share buyback authorizations are required.

Spain

In Spain, the documentation is typically governed by English law. In addition to required corporate approvals (shareholders' approval / board reports),

independent expert reports may also be needed. There are also corporate formalities to keep in mind, such as the need for a public deed and registration with the Mercantile Registry before or after closing.

Since May 2021 there is a more flexible regime for issuing convertible bonds for listed Spanish companies. For example, there is no need for an independent expert report for a public company that wishes to issue convertible bonds if the underlying shares represent less than 20% of such company's share capital.

Belgium

In Belgium, documentation is governed either by Belgian law or English law. Approval of conversion rights is required by an issuer's board (under the authorized capital if available) or by a general meeting of shareholders in the absence of (sufficient) authorized capital. It is also possible to have an issuance of instruments that are cash-settled initially (or unconvertible), which become convertible after approval by the general meeting of shareholders.

Further, a 2020 change to the Belgian Code of Companies and Associations relaxed some previous formalities. For example, approval from the Belgian securities regulator of the board report that is required to be prepared in relation to a convertible bond issuance is no longer needed. The Belgian Code of Companies and Associations still requires the approval of the usual change of control put option in the conditions of the convertible bonds by the shareholders of the issuer (which is typically asked within a certain period of the issue date), save to the extent it can be established that the put option would not have a significant impact on the issuer. Other recent changes also created the possibility for listed real estate investment companies to issue convertible bonds outside of the preferential subscription rights of existing shareholders, subject to certain conditions and limitations.

Italy

In Italy, documentation is often governed by English law and it is common for bonds to initially be issued as straight debt bonds which then become equity-linked upon shareholder approval of a capital increase to service the conversion rights within a certain time frame. The board resolution approving the bond issue will also need to be notarized (in the case of non-bank issuers).

A shareholders' meeting for listed companies is typically called after the bond is issued to approve the capital increase linked to the conversion rights by way of an extraordinary resolution, excluding pre-emption rights.

An issuer may be able to issue shares without the approval of a shareholders' meeting, including in connection with the issuance of equity-linked bonds, if the bylaws of the company allow.

For listed companies, the issuer's auditors will need to confirm the fairness of the price at which the shares will be issued in a report made available prior to the shareholders' meeting. Typically, the principal shareholders will provide an undertaking/commitment to vote in favor of the capital increase before the launch of an issuance.

Netherlands

In the Netherlands, the documentation is usually governed by either Dutch or English law. Bonds are typically issued upon resolution by the management board (as approved by the non-executives or supervisory board) on the back of an "up to 10%" issuance authority which is annually delegated by the general

meeting of shareholders. This means boards are allowed to grant rights to subscribe for shares (*i.e.*, the conversion option) and limit or exclude pre-emption rights up to 10% without having to request (further) shareholder approvals.

The 10% threshold granted by the shareholders' meeting represents the current market practice, but there is technically no legal limit. However, if the 10% limit that has been granted is exceeded, a separate shareholder approval is required. In theory this separate resolution could also be adopted after launch and pricing of the bonds, but in practice is obtained beforehand.

There are no specific Dutch law limitations as to pricing and discounts in connection with equity-linked instruments and boards must decide on these topics within the scope of their delegated authority.

United Kingdom

In the United Kingdom, documentation is governed by English law. Additional flexibility for convertible bond issuance has been afforded by recent changes to pre-emption group guidelines. Previous guidelines which capped ordinary-course authorities for non-pre-emptive offerings at 5% of the ordinary share capital have been increased to 10%, and the requirement to observe a 7.5% limit in any three year rolling period has been removed.

The further incremental flexibility to raise equity on a non-pre-emptive basis in connection with an acquisition or a specified capital investment which is announced contemporaneously with the issue, or which has taken place in the preceding 12 month period, has also been increased from 5% to 10%.

U.S. Securities Law Considerations

In addition to home country requirements and market practice, companies seeking to issue convertible bonds and their advisers should be mindful of any relevant U.S. securities law provisions that could apply to their offerings. While most equity-linked offerings in Europe are conducted only outside of the U.S. in accordance with Regulation S of the U.S. Securities Act of 1933, as amended (the "Securities Act"), this may still require certain representations and warranties to be made by the issuer and/or guarantor or other wording and restrictions to be outlined within the deal documentation. A U.S. no registration opinion may also be required from U.S. counsel, particularly for offerings involving a so-called "delta placement" conducted in accordance with Regulation S and Rule 144A under the Securities Act (*i.e.*, including sales to U.S. qualified institutional buyers). Issuances which include a Rule 144A component for the delta placement may require further analysis and the incorporation of bespoke language within the standard documentation.

CC European Equity-Linked Experience

Clifford Chance has experience advising on numerous transactions, with strong teams available to support our clients across jurisdictions. Below are selected examples of our experience on key transactions:

- **Nordex SE:** HSBC, UniCredit and Crédit Agricole CIB as joint global coordinators and Commerzbank, Banco Bilbao and Intesa Sanpaolo as joint bookrunners on the EUR 333 million green convertible bond issuance by Nordex SE
- **Siemens Energy AG:** BofA, J.P. Morgan, BNP Paribas, DB, Santander and Credit Suisse in connection with a landmark EUR 960 million mandatory

convertible bond issuance by Siemens Energy in connection with the Siemens Games takeover bid

- **Software AG:** German publicly traded company Software AG on its EUR 344 million convertible bonds issuance to private equity company Silver Lake, with the bonds convertible into 10% of Software AG's shares
- **Basic Fit N.V.:** in relation to its EUR 300 million convertible bonds due 2028
- **Criteria Caixa:** the underwriters on the issuance by Criteria Caixa of EUR 200 million exchangeable bond exchangeable into Cellnex SA
- **DiaSorinS.p.A.:** the underwriters (Citi, BNP Paribas, Mediobanca, UniCredit) on the issuance by DiaSorinS.p.A. of EUR 500 million senior unsecured equity linked bonds due 2028
- **CellinkAB:** Citigroup, JP Morgan and Carnegie as joint bookrunners in relation to the issue by CellinkAB of SEK 1.5 billion senior unsecured convertible bonds
- **Prysmian SpA:** in relation to the issue by Prysmian SpA of EUR 750 million zero coupon convertible bonds
- **Pirelli:** the underwriters (Credit Suisse, Goldman Sachs, BNP Paribas, CICC Hong Kong, Intesa Sanpaolo, Mizuho International, UniCredit) in relation to the issuance by Pirelli of EUR 500 million convertible bonds due 2025
- **SAFRAN:** the underwriters in relation to the issuance by SAFRAN of EUR 200 million convertible bonds
- **Samhällsbyggnadsbolaget Norden AB:** on the issuance of SEK 2.75 bn mandatory convertible notes due 2023
- **Norwegian Air Shuttle:** the creditors on the Norwegian Air Shuttle zero coupon perpetual subordinated convertible bonds

Conclusion

While there are common themes across European jurisdictions when it comes to the structuring and execution of equity-linked issuances, variances in practice can result in different approaches and considerations. Issuers and advisors should be mindful of important steps that may need to be carried out or assessed further in connection with a transaction, including shareholder approvals and confirmation of tax treatment or other input from relevant experts and advisors.



CONTACTS

Amsterdam

Han Teerink
Partner

T +31 20 711 9132
E han.teerink
@cliffordchance.com

Jurgen van der Meer
Partner

T +31 20 711 9340
E jurgen.vandermeer
@cliffordchance.com

Frankfurt

George Hacket
Partner

T +49 69 7199 3103
E george.hacket
@cliffordchance.com

Sebastian Maerker
Partner

T +49 69 7199 1510
E sebastian.maerker
@cliffordchance.com

London

Paul Deakins
Partner

T +44 207006 2099
E paul.deakins
@cliffordchance.com

Simon Sinclair
Partner

T +44 207006 2977
E simon.sinclair
@cliffordchance.com

Paris

Aline Cardin
Partner

T +33 1 4405 5222
E aline.cardin
@cliffordchance.com

Alex Bafi
Partner

T +33 1 4405 5267
E alex.bafi
@cliffordchance.com

Madrid

Yolanda Azanza
Partner

T +34 91 590 7544
E yolanda.azanza
@cliffordchance.com

Antonio Henriquez
Partner

T +34 91 590 9426
E antonio.henriquez
@cliffordchance.com

Milan

Filippo Emanuele
Partner

T +39 02 8063 4251
E filippo.emanuele
@cliffordchance.com

Laura Scaglioni
Counsel

T +39 02 8063 4254
E laura.scaglioni
@cliffordchance.com

Belgium

Wim Aerts
Senior Counsel

T +32 2 533 5026
E wim.aerts
@cliffordchance.com

Axel Wittmann
Counsel

T +49 69 7199 1582
E axel.wittmann
@cliffordchance.com

Michael Dakin
Partner

T +44 207006 2856
E michael.dakin
@cliffordchance.com

Olivier Plessis
Counsel

T +33 1 4405 5487
E olivier.plessis
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street,
London, E14 5JJ

© Clifford Chance 2023

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street,
London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Delhi • Dubai • Düsseldorf • Frankfurt • Hong Kong • Houston • Istanbul • London • Luxembourg • Madrid • Milan • Munich • Newcastle • New York • Paris • Perth • Prague • Riyadh • Rome • São Paulo • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

AS&H Clifford Chance, a joint venture entered into by Clifford Chance LLP.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.