

**THE FORMATION OF BANKS, CROSS-BORDER ACTIVITY AND
OTHER ISSUES RELATING TO THE LEGAL REGIME FOR CREDIT
INSTITUTIONS**

Royal Decree 1245/1995, of 14 July 1995
(Official State Gazette of 31 July)

Law 3/1994, of 14 April, to adapt Spanish law in relation to credit institutions to the Second Banking Co-ordination Directive and to make other amendments in relation to the financial system, introduced significant changes into banking law and, in particular, into Law 26/1988, of 29 July, on the Discipline and Administration of Credit Institutions.

The purpose of this Royal Decree is to provide the regulations required to implement the new legal framework.

First, the regulations on the formation of banks contained in Royal Decree 1144/1988, of 30 September, are replaced, with the incorporation and implementation of the new rules introduced by Law 3/1994. The importance attached to the suitability of shareholders with significant holdings and to the soundness of the administrative and accounting procedures of newly formed banks should be stressed. It has also been seen fit to introduce the odd new provision, not strictly required by the Community directive, but necessary in the light of supervisory experience since 1988, such as that which seeks to ensure that the Directors of banks are informed of all material facts relating to the performance of the institution, so that they are able to fulfil their obligations and assume their responsibilities.

Second, other provisions of the law are implemented that relate not only to banks but to all credit institutions. Thus, the rules governing the cross-border activity of both Spanish and foreign credit institutions, whether or not carried on through a branch, are specified. For European Union institutions, the so-called "Community passport" - a truly essential element of the Single Market for financial services - is regulated in detail. This allows a credit institution that is authorised to operate in one Community country to operate in all the other Community countries without needing the authorisation of the authorities of the latter. There are also rules implementing the arrangements for so-called "significant holdings", already extensively regulated in the new Title VI of Law 26/1988, and other aspects of banking activity are regulated, such as agents and representative offices.

Now therefore, upon a proposal from the Minister of Economy and Finance, in accordance with the State Council and following the deliberation of the Council of Ministers at its meeting of 14 July 1995,

I HEREBY ORDER:

TITLE I

Legal regime for the formation of banks

Article 1. *Authorisation and registration of banks*

1. The Minister of Economy and Finance (*Ministro de Economía y Hacienda*) shall be responsible, following a report from the Banco de España and the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences (*Servicio Ejecutivo de la Comisión de prevención del blanqueo de capitales e infracciones monetarias*) on aspects of their competence, for authorising the formation of banks^{1 1 bis}.

2. In accordance with the provisions of Article 3.6 of the First Council Directive of 12 December 1977 on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, a decision shall be taken on applications for authorisation within six months of their receipt by the Directorate General of the Treasury and Financial Policy (*Dirección General del Tesoro y Política Financiera*), or of the time at which the documentation required is complete and, in any case, within twelve months following its receipt. When no decision has been taken on an application within the aforementioned period, it shall be deemed refused. To establish the effectiveness of a presumed refusal, the certification of presumed acts referred to by Article 44 of Law 30/1992, of 26 November, on General Government and the Common Administrative Procedure² should be applied for.

3. In order to pursue their activities, after obtaining authorisation and being incorporated and registered at the Mercantile Registry, banks shall be entered in the Special Register of the Banco de España³.

4. Entries in the Special Register mentioned in paragraph 3 above, and the removal of entries, shall be published in the BOE and shall be notified to the European Commission.

Article 2. *Requirements for the pursuit of banking activity*

1. For an entity to be able to pursue banking activity the following requirements shall be fulfilled:

¹ Article 1.1 drafted by Royal Decree 54/2005, of 21 January.

^{1 bis} See Article 43.1 of Law 26/1988, of 29 July.

² See Annex 5 of Royal Decree 1778/1994, of 5 August.

³ See the Order of 12 March 1947 and Articles 30 and 43.1 of Law 26/1988, of 29 July.

a) It shall have the legal status of a public limited company (*sociedad anónima*) incorporated under the simultaneous formation procedure and have an indefinite duration⁴.

b) It shall have an initial share capital of not less than three billion pesetas, fully paid up in cash and represented by registered shares.

c) Its corporate objects shall be restricted to the specific activities of a credit institution⁵.

d) Those of its shareholders with significant holdings shall be considered suitable, in accordance with the terms of this article and of Article 4.

e) Its founders shall not be entitled to any special privilege or remuneration.

f) It shall have a Board of Directors with at least five members. All the members of the entity's Board of Directors, and of the Board of Directors of its controlling entity, if any, shall be persons of good business and professional repute, and the majority of each Board shall possess the appropriate knowledge and experience to perform their duties. Such repute and experience shall also apply to general managers or similar executives of the entity and of its controlling entity, if any, as well as the individuals representing any legal persons who are directors⁶.

g) It shall have sound administrative and accounting procedures, as well as adequate internal control procedures to ensure sound and prudent management of the entity. In particular, the Board of Directors shall establish adequate operating rules and procedures to enable all its members to be able to comply at all times with their obligations and to assume the responsibilities that are theirs according to the rules of supervision and discipline of credit institutions, the Public Limited Companies Law (*Ley de Sociedades Anónimas*) and any other provisions that may be applicable.

h) It shall have its registered office, and its actual administration and management within Spanish territory⁷.

i) It shall have adequate internal control and communication procedures and bodies to anticipate and prevent the performance of transactions relating to money laundering in the terms laid down in Articles 11 and 12 of the regulations of Law 19/1993, of 28 December, on measures to prevent money laundering, approved by

⁴ See Additional Provision Two, paragraph 1, of Law 26/1988, of 29 July .

⁵ See Article 1.1 of Royal Legislative Decree 1298/1986, of 28 June, and Article 28 of Law 26/1988, of 29 July.

⁶ Article 2.1.f) drafted by Royal Decree 1332/2005, of 11 November.

⁷ Article 2.1.h) drafted and incorporated by Royal Decree 692/1996, of 26 April.

Royal Decree 925/1995, of 9 June⁸.

2. Business and professional repute shall be deemed enjoyed by those persons who have respected the commercial and other laws that regulate the economic activity and life of businesses, as well as good commercial, financial and banking practices. The following persons shall be considered to lack such repute: persons who have a criminal record, in Spain or abroad, on account of wilful misconduct; persons disqualified from holding public office or positions of administration or management of financial institutions; and persons disqualified under Law 22/2003, of 9 July, on insolvency, until the disqualification period established in the judgment classifying the bankruptcy has ended and undischarged bankrupts in bankruptcy proceedings prior to the entry into force of the above-mentioned law⁹.

3. Persons who have performed, during a period of not less than five years, duties of senior administration, management, supervision or advice of financial institutions or similarly responsible duties in other public or private entities of at least a similar size to the entity it is sought to form, are deemed to possess adequate knowledge and experience to perform duties in banks.

4. Banks shall comply at all times with the requirements set out in paragraph 1 above and have own funds of not less than the amount of capital specified in its subparagraph b), with the elements mentioned in Article 20.1.g) and h) of Royal Decree 1343/1992 of 6 November 1992 being excluded from such own funds. Nonetheless:

a) Authorisation may only exceptionally be revoked on the basis of the lack of fitness of a shareholder, in accordance with the provisions of Article 62 of Law 26/1988.

b) In the event of lack of business or professional repute of Directors or managers, revocation shall only be appropriate if those concerned do not cease to hold office within one month from the receipt of a request that they should do so sent by the Banco de España. Supervening lack of repute shall not be deemed to arise merely by reason of the fact that, while holding office, a director or manager is charged or prosecuted for any of the offences mentioned in paragraph 2 above.

c) Revocation for insufficiency of own funds, in the terms mentioned, shall not be appropriate, so long as the amount thereof is at least four fifths of the minimum share capital and the insufficiency lasts no more than twelve months.

5. For their registration in the Register of Senior Officers created by Decree 702/1969, of 26 April, the Directors and general managers or similar executives of the entity shall expressly declare, in the document evidencing their acceptance of the position, that they fulfil the requirements for repute and, where applicable,

⁸ Article 2.1.i) incorporated by Royal Decree 54/2005, of 21 January.

⁹ Article 2.2 drafted by Royal Decree 1332/2005, of 11 November.

professionalism referred to by this article, and that they are not subject to any of the restrictions or conflicts of interest established in Law 31/1968 ,of 27 July., or in any other provision that may be applicable to them.

6. Besides managing the register of senior officers of banks, the Banco de España shall be responsible for setting up and managing a register of directors and general managers of entities controlling Spanish banks that are not credit institutions, investment firms or insurance or reinsurance undertakings, in which the directors, managers and similar executives of such entities shall be entered. In order to be entered in this register, such persons must notify their appointment within 15 days of taking up office, including the personal and professional data that the Banco de España may generally establish, and expressly declare, in the document evidencing their acceptance of the post, that they fulfil the requirements for repute and, where applicable, professionalism referred to by this article, and that they are not subject to any of the restrictions or conflicts of interest established in those provisions that may be applicable to them¹⁰.

Article 3. *The application*

Applications for authorisation to form a bank shall be submitted to the Directorate General of the Treasury and Financial Policy in duplicate, and shall be accompanied by the following documents:

- a) Draft memorandum and articles of association, accompanied by a registry certificate clearing the proposed company name.
- b) A programme of operations, specifying the types of business envisaged and the administrative, accounting and internal control procedures, as well as the internal control and communication procedures and bodies established to anticipate and prevent the performance of transactions relating to money laundering¹¹.
- c) A list of the members who are to incorporate the company, specifying their holdings in its share capital. In the case of members who are legal persons, any holdings in their capital that exceed 5 per cent of the same shall be detailed. Should members be going to have significant holdings then, if they are natural persons, information shall also be submitted on their professional career and activity and their financial position; and if they are legal persons, their annual accounts and Directors' report, together with the auditors' report, if any, for the last two years, the composition of their governing bodies and the detailed structure of the group they belong to, if any.
- d) A list of the persons who are to form the first Board of Directors and perform the duties of general manager or similar duties, with detailed information on the

¹⁰ Article 2.6 incorporated by Royal Decree 1332/2005, of 11 Novewmber.

¹¹ Article 3.b) drafted by Royal Decree 54/2005, of 21 January.

professional careers and activity of all of them.

e) Evidence of the existence of a deposit with the Banco de España, in cash or public debt, equivalent to 20 per cent of the minimum share capital established in Article 2.

In any event, in the processing of the application, the promoters may be asked for all such information, reports or records as may be deemed appropriate to verify compliance with the conditions and requirements established herein.

Article 4. *Refusal of applications*¹²

1. The Ministry of Economy and Finance shall refuse authorisation to form a bank, giving reasons for its decision, when the requirements of Articles 2 and 3 are not fulfilled and, in particular, when, considering the need to guarantee sound and prudent management of the planned institution, the suitability of the shareholders who are going to have a significant holding therein is not considered adequate. For these purposes:

a) A significant holding in a bank shall mean one that directly or indirectly amounts to 5 per cent or more of its capital or voting rights, or that makes it possible to exercise a significant influence thereover.

b) Suitability shall be assessed on the basis, inter alia, of:

1) The business and professional repute of the shareholders in the sense of Article 2.2. This repute shall be presumed whenever the shareholders are general government bodies or agencies

2) The assets such shareholders have available to meet their commitments.

3) The transparency in the structure of the group, if any, to which the entity belongs and, in general, the existence of serious difficulties in inspecting or obtaining the necessary information on its activities.

4) The possibility that the entity may be exposed, inappropriately, to the risk of the non-financial activities of its promoters or, in the case of financial activities, that the stability or control of the entity may be affected by the high risk of such activities.

5) The possibility that the effective exercise of supervision of the institution may be hampered by its close links with other natural or legal persons, owing to the legal, regulatory or administrative provisions of the country to whose laws any such natural or legal persons are subject, or owing to problems relating to the application of such provisions.

¹² See Article 43.4.5 of Law 26/1988, of 29 July.

For these purposes, close links shall be deemed to exist where two or more natural or legal persons are linked by:

- a) A control relationship in the sense of Article 4 of Securities Market Law 24/1988; or
- b) The ownership, directly or indirectly, or through a control relationship, of 20 per cent or more of the voting rights or capital of an undertaking or institution¹³.

2. In the event of refusal of the application, notwithstanding the appeals that may lie against the decision taken, the Banco de España shall proceed to return the deposit made under the provisions of Article 3.e). The deposit shall also be returned if an application is abandoned.

Article 5. *Commencement of activities*

1. Within one year of notification of the authorisation to form a bank, the promoters shall execute the relevant deed of incorporation of the company, register it at the Mercantile Registry and subsequently in the Special Register of the Banco de España, and the bank shall commence its operations. Otherwise, the authorisation may be revoked under Article 57 bis of the Banking Law (*Ley de Ordenación Bancaria*) of 31 December 1946¹⁴.

2. The deposit envisaged in Article 3.e) shall be released when the company has been incorporated and registered in the Special Register of the Banco de España, and also if the authorisation is revoked in accordance with the preceding paragraph.

Article 6. *Temporary restrictions on the activity of new banks*

1. Newly formed banks shall be subject to the following temporary restrictions:

1) During the first three years following the commencement of their activities, they shall not pay dividends, with all their freely disposable profits being set aside to reserves, unless authorised to do so by the Banco de España, which shall take into account the financial situation of the institution and, in particular, its compliance with its solvency obligations.

2) During the first five years from the commencement of their activities:

- a) They shall not be able, directly or indirectly, to grant credit, loans or guarantees

¹³ Article 4.1.b) 5) drafted and incorporated Royal Decree 692/1996, of 26 April.

¹⁴ See Article 57 bis of the Banking Law of 31 December 1946, the Order of 12 March 1947 and Articles 30 and 43.1 of Law 26/1988, of 29 July.

of any kind in favour of their members, Directors or senior officers, or in favour of the first-degree relatives of such persons, or of the companies in which any of the aforesaid persons have shareholdings of more than 15 per cent or of which they are a director. In the case of shareholders who are legal persons belonging to their economic group, then all the undertakings belonging to the latter come within this prohibition. This latter restriction shall not apply to operations with credit institutions.

b) A company or group shall not own, directly or indirectly, more than 20 per cent of the capital of the bank, or exercise control thereover. For these purposes, the definition of "group" shall be that of Article 4 of Securities Market Law 24/1988, of 28 July,

c) Inter vivos transfers and the charging or pledging of shares shall require the prior authorisation of the Banco de España, a restriction that shall be stated in the company's articles of association.

2. Decisions shall be taken on the applications for authorisation envisaged in this article within two months of their receipt. When no decision has been taken on an application within the aforementioned period, it shall be deemed refused. To establish the effectiveness of a presumed refusal, the certification of presumed acts referred to by Article 44 of Law 30/1992, of 26 November, on General Government and the Common Administrative Procedure should be applied for.

3. Breach of the operating restrictions mentioned in paragraph 1 above, or a substantial deviation from the programme of operations mentioned in Article 3.b) during the first three years, may give rise to revocation of the authorisation in accordance with the provisions of Article 57 bis.1.d) of the Banking Law of 31 December 1946.

Article 7. *Authorisation of banks subject to the control of foreign persons*

1. The formation of Spanish banks over which control, in the terms of Article 4 of Securities Market Law 24/1988, of 28 July, is going to be exercised by foreign persons, is subject to the provisions of the preceding articles hereof.

2. In the event that control of the Spanish bank is going to be exercised by a credit institution, investment firm or insurance or reinsurance undertaking authorised in another EU Member State, by the entity controlling such an entity, or by the same natural or legal persons who control a credit institution, investment firm or insurance or reinsurance undertaking authorised in another Member State, the Banco de España, before issuing the report referred to in Article 1.1 shall consult the authorities responsible for supervising the foreign credit institution, investment firm

or insurance or reinsurance undertaking in question¹⁵.

3. In the event that control of the Spanish bank is going to be exercised by one or more persons, whether or not credit institutions, domiciled or authorised in a non-EU Member State, then the provision of a guarantee covering all the activities of such institution may be required. In addition to the reasons envisaged in previous articles, authorisation may also be refused when Spain has been notified, in accordance with Article 9 of the Second Banking Co-ordination Directive of 15 December 1989, of a decision taken by the Council of the European Communities because it appears that Community credit institutions do not receive in the country concerned a treatment offering the same competitive opportunities as are available to national institutions and that the conditions of effective market access are not fulfilled.

In this case, the Minister of Economy and Finance may also suspend the granting of an authorisation or restrict its effects.

Authorisations granted to the banks mentioned in this paragraph shall be notified by the Banco de España to the Commission of the European Union, and to the competent authorities of the other Member States, specifying the structure of the group to which the controlled institution belongs¹⁵.

Article 8. *Alteration of the memorandum and articles of association*¹⁶

1. Alteration of a bank's memorandum and articles of association shall be subject to the authorisation and registration procedure established in Article 1, although a decision must be taken on the application for authorisation within two months of its receipt at the Directorate General of the Treasury and Financial Policy. If no decision is taken within this period then the application shall be deemed approved. To establish the effectiveness of a presumed approval, the certification of presumed acts referred to by Article 44 of Law 30/1992, of 26 November, on General Government and the Common Administrative Procedure should be applied for.

2. Alterations of the memorandum and articles of association with the following purposes shall not require prior authorisation, although they must be notified to the Banco de España for recording in the Special Register:

- a) To change the situation of the registered office within national territory.
- b) To increase the share capital.
- c) To incorporate the literal wording of mandatory or prohibitory provisions of laws

¹⁵ Article 7.2 and article 7.3, last paragraph drafted by Royal Decree 1332/2005, of 11 November.

¹⁶ See Banco de España Circular 7/1993, of 27 April. (BOE of 5 May 1993).

or regulations, or to comply with judicial or administrative decisions.

d) Any other alterations for which the Directorate General of the Treasury and Financial Policy, in answer to a prior consultation made for the purpose by the bank concerned, has considered the authorisation procedure unnecessary, owing to its scant relevance.

The Banco de España shall be notified within 15 business days following adoption of the resolution to alter the memorandum and articles of association. If the alteration exceeds the scope of the provisions of this paragraph, the Banco de España shall notify the persons concerned within 30 days of receipt of the notification in order that they may revise the alterations or, if appropriate, submit to the authorisation procedure of paragraph 1.

TITLE II

Cross-border activity of credit institutions

CHAPTER I

Opening of branches and freedom to provide services in Spain of foreign credit institutions

Article 9. *Authorisation of branches of foreign credit institutions*

1. For the purposes of this Title, "branch" shall mean a place of business which constitutes a legally dependent part of a credit institution and which carries out directly all or some of the operations typical of the business of credit institutions; any number of places of business set up in the same Member State by a credit institution with headquarters in another Member State shall be regarded as a single branch.

2. The opening in Spain of branches of foreign credit institutions that are not authorised in another EU Member State shall require the authorisation of the Minister of Economy and Finance, following a report from the Banco de España. For this purpose the provisions of the preceding articles of this Royal Decree shall be observed, insofar as they are applicable, with the following modifications¹⁷:

a) The minimum share capital shall mean the endowment capital held by the institution in Spain on a permanent and indefinite basis and available to cover the branch's losses.

b) Article 2.1.a), d), e) and f) shall not be applicable. Article 3.c) and the reference

¹⁷ See Articles 30 bis.1 and 43.1 of Law 26/1988, of 29 July.

to the members of the Board of Directors in Article 3.d) shall not be applicable either. The mention of the draft memorandum and articles of association in Article 3.a) shall be deemed to refer to the draft deed of incorporation of the branch and to the current memorandum and articles of association of the credit institution itself, and the Banco de España shall be notified of any subsequent changes to any of these documents.

c) There shall be at least two persons who effectively direct the business of the branch and are directly responsible for its management. The repute, knowledge and experience requirements of Article 2 shall be applicable to such persons.

d) The objects of the branch shall not include activities which the institution is not authorised to perform in its home country.

e) The documentation accompanying the application shall contain such information as may be necessary for precise knowledge of the legal and management characteristics of the applicant foreign credit institution, as well as its financial situation. A description shall also be included of the organisational structure of the institution and of the group, if any, of which it forms part. Also, evidence shall be submitted to show that it possesses any authorisations that may be required in its home country for it to open the branch, or a certificate stating that no such authorisations are required.

Authorisation may also be refused by application of the principle of reciprocity.

3. The opening in Spain of branches of credit institutions authorised in another EU Member State shall not require prior authorisation, or any specific endowment capital, nor shall it be subject to the provisions of the foregoing articles of this Royal Decree. However, it shall be conditional upon the Banco de España's receiving a communication from the supervisory authority of the credit institution containing at least the following information¹⁸:

a) A programme of operations indicating, in particular, the business envisaged and the structural organisation of the branch.

b) The address in Spain for requesting all the necessary information from the branch.

c) The names and career details of those responsible for the management of the branch.

d) The amount of own funds and the solvency ratio of the credit institution and of the consolidated group, if any, of which it forms a part.

¹⁸ See Articles 51, 52 and 53.1 of Law 26/1988, of 29 July.

e) The details of any deposit-guarantee scheme that may cover the deposits of the branch.

4. When the Banco de España receives a communication of the kind mentioned in paragraph 3, it shall notify the credit institution of its receipt and the latter shall then register the branch at the Mercantile Registry and afterwards in the Special Register of the Banco de España, notifying the latter of the effective date of commencement of business.

The Banco de España may set a waiting period, of not more than two months from the receipt of the communication of the supervisory authority of the credit institution, for the commencement of business of the branch, in order to prepare for its supervision. It may also inform the credit institution, if appropriate, of the conditions under which its activities must be carried on in Spain. In the event that the activities specified in the communication include any that are not listed in Article 52 of Law 26/1988, of 29 July, and the activity concerned is prohibited or restricted for credit institutions, the Banco de España shall notify such circumstance to the institution and to its supervisory authority.

When one year has elapsed from notification to the credit institution of receipt of the communication sent by its supervisory authority, or from the end of the waiting period set by the Banco de España, without the institution having opened the branch, it shall restart the procedure of paragraph 3^{19 20}.

5. Should the credit institution, once the branch is open, plan to change the content of any of the information referred to in sub-paragraphs a), b), c) or e) of paragraph 3, it shall first notify the Banco de España, without prejudice to any notification that must be sent to its supervisory authority, at least one month before making the change, so that the Banco de España can pronounce and act in accordance with the provisions of the foregoing paragraphs. It shall also notify the Banco de España of the closure of the branch, at least three months before the planned date^{19 21}.

Article 10. *Representative offices*

Representative offices shall not carry on any lending, deposit-taking or financial-intermediation activities, nor provide any other kind of banking service, but must limit themselves to performing activities that are merely of an informational or marketing nature, relating to banking, financial or economic issues. However, they may promote the channelling of funds of third parties, through credit institutions operating in Spain, towards the institution they represent, and serve as physical

¹⁹ Paragraphs 4 and 5 are adapted to the provisions of Royal Decree 692/1996, of 26 April.

²⁰ See Article 53.2 of Law 26/1988, of 29 July.

²¹ See Article 53.3 of Law 26/1988, of 29 July.

support for the provision of services without an establishment referred to by Article 54 of Law 26/1988, of 29 July.

The Banco de España shall be responsible for authorising the establishment in Spain of representative offices of foreign credit institutions. The activities envisaged shall be specified in the application, as well as the name and career details of the person who is to be in charge of the office. The Banco de España shall pronounce within three months of receipt of the application. If no express pronouncement is made within this period then the application may be deemed approved. To establish the effectiveness of a presumed approval, the certification of presumed acts referred to by Article 44 of Law 30/1992, of 26 November, on General Government and the Common Administrative Procedure should be applied for. Subsequent changes to the address of the representative office, the scope of its activities or the person in charge, as well as its closure, shall be notified to the Banco de España.

Article 11. *Provision of services without a branch by a foreign credit institution*

1. Credit institutions authorised in another EU Member State may commence activities in Spain for the first time, under the freedom to provide services, when the Banco de España has received a notification from their supervisory authorities specifying the activities they intend to carry on. This requirement shall apply whenever a credit institution intends to carry on in Spain for the first time any other activity not included in the said notification²².

2. When a foreign credit institution not authorised in another EU Member State intends to provide services without a branch in Spain it shall notify the Banco de España in advance, specifying the activities it intends to carry on. The Banco de España may request further details of the information provided, and make the carrying-on of the activities subject to compliance with certain requirements to ensure compliance with the legal provisions adopted in the interest of the general good.

Article 12. *Credit institutions operating through financial institutions*²³

1. The administrative arrangements for credit institutions authorised in another EU Member State laid down in Articles 9 and 11 hereof shall be applicable to the opening of branches and the freedom to provide services in Spain by financial institutions authorised or domiciled in another EU Member State that comply with the following requirements:

a) Financial institutions shall be deemed to be entities that are not credit institutions and whose principal activity consists in acquiring holdings in other entities or

²² See Articles 51, 52, 53 and 54 of Law 26/1988, of 29 July.

²³ See Article 55 of Law 26/1988, of 29 July.

carrying on one or more of the activities listed in Article 52 of Law 26/1988, of 29 July, on Discipline and Administration of Credit Institutions, except those of paragraphs a), m) and n).

b) Such financial institutions must be controlled by one or more credit institutions, which must hold 90 per cent or more of its voting rights and have the same nationality as the financial institution.

c) Financial institutions shall be subject to a legal regime that entitles them to pursue the activities that they intend to carry on in Spain, and they must actually carry on such activities in the state in which they have their registered office.

d) The controlling credit institution(s) must have demonstrated, to the satisfaction of its/their supervisory authorities, that its/their management of the financial institution is prudent and, with the consent of such authorities, must have declared themselves guarantors of the obligations assumed by such institutions, with joint and several liability.

e) The financial institutions and their controlling credit institutions must be subject to supervision on a consolidated basis, according to the applicable prudential legal criteria.

2. The communication to the Banco de España provided for in Article 9.3. shall contain the following:

1) A certificate issued by the supervisory authority of the controlling credit institution(s) evidencing compliance with the requirements listed in paragraph 1.

2) The other elements required for the establishment of branches or the provision of services by credit institutions authorised in other EU Member States. However, the information specified in Article 9.3.d) and e) shall be replaced, respectively, by information on the own funds of the financial institution and on the consolidated solvency ratio of the controlling institution, as well as information on any investor-guarantee scheme to which the financial institution may belong.

3. When the particular activity of any of the above-mentioned financial institutions corresponds to that carried on in Spain by specialised credit institutions (*establecimientos financieros de crédito*), as defined by additional provision one of Law 3/1994, the Banco de España, upon completion of the formalities provided for in Article 9.3, shall register the branches in Spain of such institutions in the relevant Special Register. When that activity is carried on in Spain by a category of financial institution subject to the control of another national supervisory authority, the Banco de España shall forward to that authority the communication received from the supervisory authority of the EU Member State in which the institution has been authorised or is domiciled; the other national supervisory authority shall, when the branch has been registered at the Mercantile Registry, register it in its records, and

may set the waiting period referred to in Article 9.4 and inform it of the conditions, if any, under which its activities must be carried on in Spain. The Banco de España shall notify the financial institution of the forwarding of the communication.

4. In the event that a financial institution ceases to comply with any of the conditions specified in paragraph 1, it shall notify the Banco de España immediately. If an administrative authorisation is required for the pursuit of the branch's activities in Spain, the latter shall apply for such authorisation within six months or close the branch. Until the authorisation has been obtained, the competent national supervisory authority may place restrictions or conditions on the carrying-on of its activity.

CHAPTER II

Opening of branches and freedom to provide services abroad by Spanish credit institutions

Article 13. Opening of branches abroad by Spanish credit institutions²⁴

1. Spanish credit institutions intending to open a branch abroad shall apply first to the Banco de España. They shall submit, along with the information on the state in whose territory it is intended to set up the branch and the intended address thereof, the information envisaged in Article 9.3.a) and c) hereof.

2. The Banco de España shall take a decision, giving reasons, within three months of receiving all the information. When no decision has been taken on the application within this period, it shall be deemed refused. To establish the effectiveness of a presumed refusal, the certification of presumed acts referred to by Article 44 of Law 30/1992, of 26 November, on General Government and the Common Administrative Procedure should be applied for. When the intended branch is to be opened in the territory of another EU Member State, the application can only be refused by the Banco de España if it has reason to doubt the adequacy of the administrative structure or the financial situation of the credit institution, taking into account the activities envisaged, or when the programme of operations presented includes activities for which the institution does not have authorisation. If it is intended to open the branch in a non-EU Member State, the Banco de España can refuse the application on the basis of, in addition to the foregoing reasons, the fact that it considers that the activity of the branch is not going to be subject to effective control by the supervisory authorities of the host country, or that there exist legal or some other kind of obstacles that prevent or hamper control and inspection of the branch by the Banco de España

3. When the branch is going to be set up in another EU Member State, the Banco de España shall, within the aforementioned three-month period, send a copy of the

²⁴ See Articles 30 bis.1, 3 and 4 and 49 of Law 26/1988, of 29 July.

institution's authorisation to the competent authorities of such state, along with the information referred to in Article 9.3 hereof. A copy of this communication shall be sent to the applicant institution.

4. Any change in the information referred to in paragraph 1 shall be notified by the credit institution to the Banco de España at least one month before it is made.

No material change may be made to the programme of operations of the branch if the Banco de España objects, within the aforementioned one-month period, by means of a reasoned decision notified to the institution. Such objection shall be based on one or more of the grounds mentioned in paragraph 2 of this article.

Article 14. *Representative offices*²⁵

Spanish credit institutions, before making any application to foreign authorities, shall notify the Banco de España of their intention to open a representative office abroad, stating the activities envisaged. They shall also notify the Banco de España of the opening, once it has taken place, and the closure of such offices.

Article 15. *Provision of services without a branch abroad*²⁶

Spanish credit institutions intending to carry on their activities under the freedom to provide services in another state for the first time shall first notify the Banco de España, stating which of its authorised activities it intends to carry on. When the services are going to be provided in another EU Member State, the Banco de España shall send a copy of this information to the competent authorities of such state within one month of its receipt, notifying the institution of this communication.

Article 16. *Operating through a financial institution*²⁷

The provisions of the foregoing articles may also be applied to the provision of services, directly or through the opening of a branch, in other EU Member States by those Spanish financial institutions which are controlled by Spanish credit institutions and comply with the requirements of Article 12 hereof. The application shall also be subscribed to by the controlling credit institution or institutions.

When the financial institution is subject to the supervision of an authority other than the Banco de España, the latter shall send a copy of the application to that authority and, in the case of the opening of branches, shall refuse authorisation if that authority objects thereto on the basis of the grounds set out in Article 9.3. For

²⁵ See Article 7.3 of Royal Decree 1370/1985, of 1 August.

²⁶ See Articles 30 bis.3 and 4 and 50.1 of Law 26/1988, of 29 July.

²⁷ See Article 50.2 of Law 26/1988, of 29 July.

subsequent actions the specific supervisory authority shall be directly competent. However, the Banco de España shall be responsible for seeing that the conditions laid down in Article 12 continue to be met.

Article 17. *Operating through other credit institutions*²⁸

1. The rules set out in Article 30 bis.5 of Law 26/1988 shall be applicable when a credit institution or group of credit institutions forms a foreign credit institution or acquires a holding in an existing institution, either directly, or indirectly through controlled institutions.

2. In the case of the formation of a holding, the application for authorisation submitted to the Banco de España must be accompanied by at least the following information:

a) The amount of the investment and the percentage that the holding represents in the capital and in the voting rights of the institution that is going to be formed. Where applicable, the institutions through which the investment is to be made shall be stated.

b) The information specified in Article 3.a), b) and d). That specified in Article 3.c) shall be replaced by a list of the members who are going to have significant holdings.

c) A full description of the banking legislation applicable to credit institutions in the state in which the new institution is going to be set up, as well as the legislation relating to taxation and the prevention of money laundering.

3. When a holding is going to be acquired that amounts to a significant holding under the provisions of Article 56 of Law 26/1988, or it is planned to increase such a holding, to reach or exceed any of the percentages indicated in Article 57.2 of such law, the information indicated in the preceding paragraph shall be submitted, although that mentioned in sub-paragraph b) may be limited to public information. Also, the period within which it is intended to make the investment, the annual accounts for the past two years of the institution in which the holding is to be taken or increased and, where applicable, the rights of the applicant institution to appoint representatives on the Board of Directors and the management bodies thereof shall be indicated.

4. In any event, applicants may be required to provide all such data, reports and information as the Banco de España may deem useful to enable it to reach an appropriate decision and, in particular, to enable the possibility of supervising the group on a consolidated basis to be assessed.

²⁸ See Article 30 bis.5 of Law 26/1988, of 29 July.

TITLE III

Other issues relating to the legal regime for credit institutions

Article 18. *Significant holdings in credit institutions*

1. For the purposes of the provisions of Title VI of Law 26/1988, the shares, contributions to capital and voting rights that may make up a significant holding include:

- a) Those acquired directly by a natural or legal person.
- b) Those acquired through companies that a natural person controls or has a relevant holding in.
- c) Those acquired by companies forming part of the same group as a legal person, or in which entities of the group have relevant holdings.
- d) Those acquired by other persons acting on behalf of or in concert with the acquirer or with companies belonging to the same group.

2. Companies shall be deemed controlled in the sense of Article 4 of Law 24/1988 and relevant holdings shall correspond to any of the percentages laid down in Article 185 of the Public Limited Companies Law.

3. Indirect holdings shall be taken at their full value when the indirect holder controls the company that is the direct holder, or otherwise at the percentage thereof corresponding to the holding of the indirect holder in the direct-holder company.

4. When a significant holding is held, in whole or in part, indirectly, any changes in the persons or entities through which the holding is held shall be notified in advance to the Banco de España, which may object thereto under the provisions of Article 58.1 of Law 26/1998.

5. For the same purposes, a significant influence shall be deemed to exist whenever it is possible to appoint or replace a member of the Board of Directors of the credit institution.

Article 19. *Information on the capital structure of credit institutions*²⁹

1. Independently of the obligation established in Article 61.1 of Law 26/1988, of 29 July, credit institutions shall notify the Banco de España, in such manner as the

²⁹ See Banco de España Circulars 4/1994, of 22 July. (BOE of 27 July 1994) and 6/1995, of 31 October. (BOE of 14 November 1995).

latter may establish:

a) During the month following each calendar quarter, of the composition of its share capital, with a list of all the shareholders, in the case of banks and specialised credit institutions, or all the holders of contributions to capital, in the case of credit co-operative banks, which are considered, at the end of such period, to be financial institutions, or have registered in their name shares or contributions to capital representing 0.25 per cent or more of the share capital of the institution, in the case of banks, 1 per cent in that of credit cooperative banks, or 2.5 per cent in that of specialised credit institutions³⁰.

b) As soon as the credit institution becomes aware of them, of transfers of shares or contributions to capital that involve the acquisition by a person or group, in the sense of Article 4 of Law 24/1988, of 28 July, of 1 per cent or more of its share capital.

2. The Banco de España, as soon as it becomes aware thereof, shall notify the Ministry of Economy and Finance of transfers of the shares or contributions to capital of a credit institution that involve a change in its control, in the sense of Article 4 of Law 24/1988, of 28 July. Also, the Banco de España shall inform the Commission of the European Union, and the competent authorities of the other Member States, of the changes in the capital structure established in this paragraph³¹.

Article 20. *Publication of holdings*

1. Credit institutions shall include in their annual report:

a) Individual information on the holdings in their capital that amount to 5 per cent or more of such capital or of the voting rights, and which, as at the year-end, belong to domestic and foreign credit institutions, or to groups, in the sense of Article 4 of the Securities Market Law (*Ley del Mercado de Valores*), which contain a domestic or foreign credit institution.

b) Individual information on the institution's own holdings in the capital of other domestic or foreign credit institutions, when such holdings amount to the percentage mentioned in sub-paragraph a) or more.

2. In the case of consolidated groups of credit institutions, the information required in the preceding paragraph shall be included in the group's annual report and shall refer, in the case of sub-paragraph a) to the holdings in any of the credit institutions belonging to the group, and in the case of sub-paragraph b), to the group's aggregate holdings.

³⁰ Article 19.1.a) drafted by Royal Decree 692/1996, of 26 April.

³¹ Article 19.2 drafted by Royal Decree 1335/2005, of 11 November.

Article 21. *Operational branch offices*

Credit institutions shall be free to open new branch offices within Spanish territory at any time, without prejudice to the rules on prior authorisation that may apply to them under Article 11.3 of Law 13/1985, of 25 May, and to any restrictions there may be in their articles of association.

Article 22. *Agents of credit institutions.*³²

1. For the purposes of this article agents of credit institutions are deemed to be those natural or legal persons to which the institution has granted powers of attorney so that they may act on its behalf, vis-à-vis its customers, in the negotiation and execution of operations that are typical of the business of credit institutions. This does not include agents with power of attorney for a single specific operation, or persons tied to the institution, or other institutions of the same group, by an employment relationship.

2. The activity of agents cannot extend to the execution of bank guarantees, suretyships or other off-balance sheet exposures.

3. The agency agreements referred to by this article shall be in writing, and shall specify the types of operation in which the agent may act.

4. Credit institutions operating in Spain shall communicate to the Banco de España once a year, in such manner as may be determined by the latter, a list of its agents, indicating the scope of their powers. This list shall be updated to reflect any new powers granted and any revocations of existing powers, as soon as they occur. The list of agents shall be included in an annex to the institution's annual report.

The Banco de España may request from the represented institutions and also from their agents all such information as it may deem necessary on matters relating to their areas of competence³³.

5. Credit institutions shall, in their agency agreements, require their agents to disclose their status as such in all their relationships with customers, unequivocally identifying the institution they represent.

6. Credit institutions shall be responsible for compliance with regulatory and disciplinary provisions in the acts performed by their agents. For these purposes, adequate control procedures shall be instituted.

³² See Article 30 bis.2 of Law 26/1988, of 29 July, and Banco de España Circular 4/1994, of 22 July. (BOE of 27 July 1994).

³³ See Banco de España Circular 5/1995, of 31 October. (BOE of 14 November 1995).

7. An agent may only represent one credit institution or the institutions of one consolidated group of credit institutions.

8. Agents of credit institutions shall not act through sub-agents.

9. When the agency agreement provides for receipt by the agent or delivery to the agent of cash, cheques or other payment instruments, these may not be paid in to or paid out of bank accounts of the agent, even temporarily.

10. Notwithstanding the provisions of Articles 11 and 15 on the provision of services, Spanish credit institutions that enter into agreements with foreign credit institutions for the regular provision of financial services to their customers, in the name or for the account of the other institution, or agency agreements in the sense indicated in paragraph 1 of this article, shall notify the Banco de España indicating the name of the correspondent and the services covered within one month of execution of the agreement.

11. When agency agreements provide for the performance of operations envisaged in the Securities Market Law, credit institutions and their agents shall also comply with the rules contained in that law and its implementing provisions.

Additional provision one. *Activities relating to securities markets.* ³⁴

When the administrative procedures stipulated in this Royal Decree reveal that a credit institution intends to carry on activities relating to securities markets, the Banco de España shall notify the National Securities Market Commission (*Comisión Nacional del Mercado de Valores*) specifying the activities concerned and indicating, where applicable, whether it is intended to carry on such activities as a member of a recognised organised market.

Additional provision two. *Amendment of Decree 1838/1975, of 3 July, on the formation of savings banks and the distribution of their net profits*

The following wording is hereby given to Article 4 of Decree 1838/1975, of 3 July, on the formation of savings banks and the distribution of their net profits:

.....³⁵

Additional provision three. *Amendments to Royal Decree 84/1993, of 22 January, which approved the regulations implementing Law 13/1989, of 26 May, on credit cooperative banks*

The following amendments are incorporated into Royal Decree 84/1993, which

³⁴ See Articles 65 et seq. of Law 24/1988, of 28 July.

³⁵ Text incorporated into Decree 1838/1975, of 3 July.

approved the regulations of the Credit Co-operative Banks Law:

Article 2.1.b) shall hereafter read as follows:

..... 36

Article 3.1.a), b) and c) shall hereafter read as follows:

..... 36

Additional provision four. Authorisation for the transformation of existing companies into banks.

Companies may only be authorised to become banks when they are credit institutions covered by paragraph one d) or paragraph two of Article 1.2 of Royal Legislative Decree 1298/1986, of 28 June , as worded by Article 5 of Law 3/1994, or specialised credit institutions formed under additional provision one of Law 3/1994. To obtain authorisation it shall be necessary to comply with the requirements set out in Title I hereof, although the provisions of Article 2.1.b) shall be deemed complied with provided that the sum of the net worth resulting from a recently audited balance sheet and the cash contributions is at least three billion pesetas. Moreover, the authorisation may waive compliance with the temporary restrictions stipulated in Article 6.

Additional provision five. *Repayable funds from the public*

For the purposes of the prohibition of Article 28.2 b) of Law 26/1988 ,of 29 July , the liabilities that are counterpart entries for payment instruments, such as gift vouchers or pre-paid electronic cards, shall be considered repayable funds from the public. However, this shall not extend to those instruments of the same nature that can only be used to acquire the goods sold or services provided by the issuer of the instrument.

Additional provision six. *Amendments to Royal Decree 1369/1987, of 18 September, which created the National Electronic Clearing System (Sistema Nacional de Compensación Electrónica)*

The following amendments are made to Royal Decree 1369/1987,of 18 September. :

1) Article 2.2 of Royal Decree 1369/1987 , of 18 September, shall hereafter read as follows:

³⁶ Text incorporated into Royal Decree 84/1993, of 22 January.

2) Article 3.1 of Royal Decree 1369/1987, of 18 September, shall hereafter read as follows:

Transitional provision one. *Credit institutions with own funds of less than the minimum share capital or endowment capital*

Credit institutions which have, as of the date of entry into force hereof, adjusted own funds, having made the deduction provided for in Article 2.4 hereof, of less than the minimum share capital or endowment capital fixed for newly formed institutions shall, while this situation endures, comply with the following rules:

- a) In the case of banks, they shall not reduce their share capital or repay contributions to capital to their members. Savings banks shall not reduce their endowment capital.
- b) Adjusted own funds shall not fall below their highest level since the date of entry into force hereof, unless temporarily authorised by the Banco de España in the case of a restructuring operation for the purpose of restoring the institution's solvency. In the case of credit co-operative banks the repayment of contributions to capital to members shall be conditional upon the maintenance of this level.
- c) They must increase their adjusted own funds to the minimum level indicated in the relevant provisions when there are changes in the composition of their share capital that entail new controlling members or groups in the sense of Article 4 of Securities Market Law 24/1988, of 28 July.
- d) In the event of a merger between two or more institutions whose adjusted own funds are less than the minimum share capital provided for, at the time of registration of the merger at the Mercantile Registry the primary capital of the resulting institution must, in the absence of an express authorisation by the authorities that must resolve on the merger, reach the minimum capital required for newly formed institutions.

Transitional provision two. *Credit institutions or branches pending authorisation*

The promoters of applications for the formation of credit institutions or the opening of branches in Spain that are pending authorisation as at the date of entry into force of this Royal Decree shall have a three-month period to adapt their applications as

³⁷ Text incorporated into Royal Decree 1369/1987 ,of 18 September .

appropriate to its content. If upon the expiry of said period they have failed to carry out this adaptation, then their applications shall be deemed abandoned and the deposits made for the purpose shall be returned.

SOLE REPEALING PROVISION

1. All provisions of an equal or lesser rank that contradict this Royal Decree are hereby repealed, and in particular:

a) Royal Decree 1144/1988, of 30 September, on the formation of private banks and establishments in Spain of foreign credit institutions, although Articles 1 to 8 referred to by Royal Decree 771/1989, of 23 June, which establishes the legal system for credit institutions with limited operational scope, remain in force for the purposes envisaged in this latter provision.

b) Article 9.1.c) and transitional provision four of Royal Decree 84/1993, of 22 January, which approved the regulations implementing Law 13/1989, of 26 May, on Credit Co-operative Banks

c) Additional provision three of Royal Decree 1343/1992, of 6 November, which implements Law 13/1992, of 1 June, on own funds and supervision on a consolidated basis of financial institutions.

Final provision one. *Implementation and enforcement provisions*

Notwithstanding the specific provisions of this Royal Decree, the Minister of Economy and Finance or, with his express authorisation, the Banco de España, may issue the necessary provisions for its implementation and enforcement.

Final provision two. *Legal status*

This Royal Decree is issued pursuant to the provisions of Article 149.1.11 and 13 of the Constitution.

Final provision three. *Entry into force*

This Royal Decree shall enter into force on the day following its publication in the Official State Gazette.