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**Testimony on the Draft Law creating the Independent Administrative  
Financial Ombudsman Service for the out-of-court settlement of  
disputes between financial institutions and their customers\***

Economic Affairs and Digital Transformation Committee/Congress of Deputies

Madrid

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Governor

\* English translation from the original in Spanish

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Ladies and gentlemen,

Thank you for requesting that I appear before this parliamentary committee to provide my perspective on the Draft Law creating the Independent Administrative Financial Ombudsman Service for the out-of-court settlement of disputes between financial institutions and their customers.

### **The draft legislation in the context of the financial supervision model**

To properly contextualise the matter we are concerned with today, first allow me some thoughts on **financial supervisory arrangements in Spain**, because they are important as they may affect supervisory efficiency and efficacy. The model should also resolve any conflicts that might arise between the different areas that are supervised.

As I have said on previous occasions, and before other parliamentary committees,<sup>1</sup> despite the headway made in recent years, there is still scope to further bolster Spain's financial supervisory architecture and make the financial sector more resilient to future crises.

In the years following the global financial crisis, some countries made changes to their supervisory architectures and more integrated models with an increased role for central banks became prevalent. Among these integrated architectures, a model based on two distinct authorities stands out, where one is entrusted with supervising the solvency of all financial institutions (banks, investment firms and insurance companies) and another is responsible for overseeing matters related to the conduct of financial intermediaries and institutions as a whole and for protecting bank customers, investors and insurance policy holders.

In my opinion, an institutional framework that **distinguishes between responsibilities for supervising the solvency of all financial institutions** – irrespective of their nature (banks, insurance companies, investment firms, etc.) – **and for overseeing such institutions' conduct with their customers, by allocating different powers to two agencies**, is a **suitable way of managing the possible conflicts of interest** that might arise between such responsibilities **and enhances supervisory efficiency and efficacy**. This is particularly important in economic contexts like the current one, where supervised institutions are increasingly interlinked. Evident synergies can be harnessed from jointly supervising these institutions, using similar approaches, methodologies and resources.

It is precisely **this supervisory framework** – in which prudential and conduct supervision are clearly distinguished, with each function discharged for the entire financial system by a separate institution – that **should be analysed in order to enhance Spain's financial supervisory architecture**.

Spain's current financial supervision framework is split between three supervisors – the Banco de España, the National Securities Market Commission (CNMV) and the Ministry of Economic Affairs and Digital Transformation, via the Directorate General of Insurance and

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<sup>1</sup> See the testimonies on the main challenges for the Spanish economy in the wake of COVID-19 and before the Audit Committee on Democratic Quality, the Fight against Corruption, and Institutional and Legal Reforms, and the presentation of the Banco de España's *Annual Report 2020*.

Pension Funds –, each discharging dual prudential and conduct supervisory functions in their respective sector of competence (banking, securities and insurance, respectively). It therefore comes as no surprise that the present dispute resolution framework is a clear reflection of such sectoral distribution, insofar as dispute resolution is one of the components of institutions' conduct.

Under the aforementioned supervisory framework, achieving a more efficient supervisory model would require **all banking sector, capital market and insurance sector conduct supervision powers to be concentrated at the institution that is entrusted with protecting investors: the CNMV**. Under this framework, resolution of disputes in the financial arena would also be assumed by this authority, irrespective of sector. In turn, **matters related to supervising the solvency of the three financial sectors would fall to the Banco de España**.

**Within the narrow scope of individual dispute resolution**, the draft legislation<sup>2</sup> we are discussing today opts to **create a single agency entrusted with settling all financial complaints**, which replaces the three sectoral complaints services but **leaves the power to supervise conduct with each of the financial supervisory authorities**. **The proposed model would thus be a hybrid model which does not fully correspond to either the sectoral or the two-pillar approach**.

#### **The challenges for inter-institutional collaboration**

**Leaving to one side the loss of the potential advantages of the integrated model, the main challenge** posed by the new institutional framework proposed in the draft legislation **is ensuring that separating the complaint resolution function off from the supervisory authorities does not hinder the smooth performance of their conduct supervision tasks**.

This challenge stems from the fact that **the detailed information gained from individual complaints is of huge importance to the supervision of financial institutions' conduct**. Repeated complaints expose problems in the design of banking products and services, in the definition of their respective target customers, in their advertising, in the systems and incentives established to market them and, in general, in institutions' internal procedures. And this information is key to properly targeting supervisory action.

By way of example, in supervising banks' conduct, at the Banco de España we have developed a methodology that provides each bank's profile with a supervisory rating and serves to establish the supervisory programme priorities. To such end, different parameters are combined, including most notably, on account of its particular importance to the consideration of conduct risk, information from the complaints received by banks and from those subsequently processed at the Banco de España.

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<sup>2</sup> The draft legislation complies with the direct mandate in the first additional provision of Law 7/2017 of 2 November 2017, which transposed into Spanish legislation Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes.

Under the new framework proposed by the draft legislation, ensuring supervisory efficacy will therefore require the establishment of **appropriate coordination and information sharing between the new Service and the three sectoral supervisors**. The need for the Service and the supervisors to be coordinated will be particularly important in the **changeover period** until the former is effectively in place.<sup>3</sup>

In this respect, **the draft legislation expressly envisages various cooperation mechanisms: information sharing** between the authorities, the details of which will be laid down in the implementing regulations, and the possibility of entering into **collaboration agreements** for different matters. Specifically, the draft legislation stipulates that “all pertinent information” on possible conduct infringements “that are the main object of the dispute” shall be reported to the supervisory authority or competent body.

In addition, the fact that the **supervisory authorities will continue to be responsible** for preparing and defining **best practices and the criteria for handling customer enquiries should aid** supervisory tasks. Such criteria enable legislative loopholes to be removed and some practical aspects of institutions’ operations, which should be corrected through non-sanctioning proceedings, to be addressed. Dissemination of these criteria is also very important. The draft legislation establishes that the supervisory authorities should jointly prepare an annual compendium of best practices and uses.

In any event, to ensure consistent application of the standards of conduct and best practices in the different domains (supervision and dispute resolution) it would be desirable for the supervisory authorities to be heard by the Financial Ombudsman Service’s Special Division, which under the draft legislation will be responsible for unifying criteria and whose decisions will be binding on the members and the Divisions. Powers to unify criteria, which should also be mandatory and not optional, could alternatively be conferred on the Service’s Governing Board, which will include representatives from the supervisors.

The draft legislation envisages the creation of an **Advisory Committee**,<sup>4</sup> whose reports on the preparation of draft bills and draft regulations that affect standards of conduct, among other matters, shall be mandatory. As the draft legislation itself envisages, this committee’s functions should, as its name suggests, be to advise the Financial Ombudsman Service. However, some thought should be given to the fact that its remit includes the preparation of legislation, given that this is a power conferred on the lawmaker and the financial supervisors, some of which have their own advisory bodies. In addition, the procedure for approving laws includes a public hearing phase for the sectors concerned, so the Financial Ombudsman Service’s participation in legislative processes would be guaranteed.

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<sup>3</sup> The Financial Ombudsman Service will be launched on the date set by the Minister for Economic Affairs and Digital Transformation. The supervisors must continue processing and resolving the complaints that had entered their systems up to the day before the launch of the new Service. This will mean that, for a period, four different authorities will be operating and resolving complaints simultaneously.

<sup>4</sup> Under the draft legislation, the Advisory Committee shall be chaired by the Chair of the Financial Ombudsman Service. The committee shall also comprise the Deputy Chair, three members appointed on behalf of the Council of Consumers and Users, three members appointed by the sectoral associations representing the financial arena, four members appointed by the regional governments and the city enclaves of Ceuta and Melilla, and two independent financial experts of good repute from academia.

## Binding decisions and the court appeal system

The present system for settlement of individual disputes in Spain rests on **two pillars**. Banks' **customer service departments** are the first pillar. They are the first port of call for customers who have disputes with their banks and are overseen by the three supervisory authorities to ensure their proper functioning. The second pillar is precisely the **dispute resolution system**, which is designed to settle disputes between banks and their customers when they have been unable to reach an agreement through the bank's customer service department.<sup>5</sup>

For some years now there have been doubts about the effectiveness of this second pillar. In particular, the Banco de España has repeatedly commented on the weaknesses and complexity of the complaints system,<sup>6</sup> aspects that have also been highlighted by the Ombudsman.

The main reason for doubting their efficacy is not that the complaints services do not function properly, but rather that, under the current regulations, their **decisions are not binding**. Indeed, in recent years, the percentage of complaints settled in favour of customers but not complied with by banks has remained high.<sup>7</sup> I have said on many occasions that the decisions of the existing complaints services should be binding.<sup>8</sup>

In this respect, **the draft legislation envisages that decisions will be binding for complaints relating to claims for less than €20,000** or for an indeterminate amount relating to breach of conduct regulations or terms and conditions deemed unfair by the Spanish Supreme Court or the Court of Justice of the European Union (CJEU).

However, based on the principle of the right to an effective remedy, the parties naturally have the option of going to court. Specifically, **under the draft legislation, binding decisions may be appealed through contentious-administrative proceedings**. In this case, we at the Banco de España have repeatedly underlined the need to **seek an alternative channel to the courts**, not only to ease judicial bottlenecks where these matters affect a large number of customers, but also to provide the public with a quick, simple, free and efficient system for settlement of financial sector disputes. A multitude of transactions are conducted with customers every day and a rapid response is required as the best guarantee of the industry functioning smoothly.

For instance, a **system could be established for banks to sign up to**, whereby they would agree, in advance, to comply with the decisions issued by the Financial Ombudsman Service, whose decisions would, therefore, be binding on them. The decisions would also be non-appealable through the courts, thus preventing the delays and costs arising from

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<sup>5</sup> Specifically, the current regulatory framework allows customers to approach the complaints services if their bank's customer service department has not provided them with a satisfactory answer, or if they have received no answer within one month from filing their complaint.

<sup>6</sup> See the latest editions of the Banco de España's Complaints Report.

<sup>7</sup> In some 70% of complaints, banks accept the Banco de España's criteria and rectify their conduct.

<sup>8</sup> See my address "Bank governance and conduct", at the Finanza forum on finance on 16 September 2021.

appeals lodged by banks.<sup>9</sup> Recent experience of the Code of Good Practice for mortgagors experiencing financial hardship, for example, shows that such measures can be effective, as almost all banks that grant mortgage loans have signed up to the Code.<sup>10</sup>

In any event, the question of setting limits on the cases in which dispute settlement systems can, effectively, be mandatory for traders is currently being discussed by the European Commission,<sup>11</sup> so we need to consider the outcome of this debate and adjust our national regulations as necessary.

The **powers granted to the contentious-administrative courts to hear appeals against the binding decisions** are another aspect deserving of reflection, insofar as this **may pose practical difficulties**. These courts will be required to uphold or dismiss the appeals based on conduct regulations and good financial practice, and on regulations and case law on unfair terms and conditions, even though **these matters fall under civil law**.

Also, **appeals filed against decisions on complaints relating to claims for more than €20,000 will be dealt with by the civil courts, meaning that two different jurisdictions will be settling the same matters**. The civil and contentious-administrative courts may possibly apply different criteria, as there are no mechanisms in place for Spanish courts to unify their criteria, since the same matters are never heard by different types of courts.

**The new Financial Ombudsman Service will have a broader remit than the existing complaints services insofar as what and who it covers**

The remit of the new Financial Ombudsman Service is broader than that of the existing complaints services, in terms both of who and what it covers. It includes settling claims arising from alleged breaches of standards of conduct and good banking practice, and from unfair contractual terms and conditions in accordance with Supreme Court case law, CJEU judgments and final judgments recorded in the Registry of General Contractual Terms and Conditions. Accordingly, under the draft legislation, **the Financial Ombudsman Service will be able to issue decisions on a wider range of matters than the existing complaints services**, which have no power to settle complaints relating to unfair contractual terms and conditions.

It will also be able to handle complaints filed against entities that are not supervised by the financial authorities, including complaints relating to new financial products and services currently being developed, thus **broadening the range of entities covered**. The draft legislation extends its remit to users of fintech entities and operators, and to the provision of crypto-asset services, on the terms to be established in the future regulation of the European Parliament and of the Council on crypto-asset markets.

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<sup>9</sup> To encourage banks to sign up to the system, a threshold could be established below which decisions would be binding. For instance, if decisions on all claims for less than €1,000 were binding, this would cover more than 90% of all banking complaints.

<sup>10</sup> We have other experience, such as the new Code of Good Practice for potentially vulnerable mortgagors and the solvency support measures for renegotiation of State-backed financial debt of firms and the self-employed, to which almost all banks have signed up.

<sup>11</sup> These discussions are being held as part of the review of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes, which was transposed into Spanish law through Law 7/2017 of 2 November 2017 which includes the mandate for creation of the Financial Ombudsman Service.

**In consequence, all areas of the financial sector will be covered, establishing a level playing field for all financial market operators,** whether or not they are subject to financial regulation and supervision.

In this respect, adequate responsiveness will be needed, in the light of a potential increase in the number of complaints, not only as a result of the creation and introduction of the Financial Ombudsman Service, but also in view of the wider range of entities against which complaints may be filed and of activities that are currently beyond the supervisory remit of the financial authorities.

### **Funding the Financial Ombudsman Service**

The draft legislation establishes a **funding system for the Financial Ombudsman Service**, essentially based on **a charge paid by the financial sector**. The charge is set at €250 and is **levied for processing complaints, irrespective of what the final decision is**. The aim being to encourage banks to settle their customers' complaints amicably, before they resort to the Financial Ombudsman Service.

However, this system could encourage banks to accept complaints relating to claims for less than €250, whether or not they have acted in accordance with the law and good practice, since continuing the procedure with the Financial Ombudsman Service would always be more expensive. Ultimately, **it could also result in an increase in disputes between customers and financial institutions**.<sup>12</sup> In this respect, in its opinion on the draft bill, the Council of State ruled that the charge system was disproportional. To avoid these potential problems, other alternatives could be explored, such as **requiring that the charge be paid according to the number of complaints found against a bank, rather than merely the number of complaints handled**.

### **Promoting financial education**

Promoting financial stability requires not only sound regulation and supervision, but also **appropriate financial education for the population at large**, so that people can understand the financial products they purchase and the risks and opportunities involved. The importance of this preventive approach – through education – underpins the Financial Education Plan sponsored by the Banco de España, the CNMV and the Ministry of Economic Affairs and Digital Transformation.

In this setting, the draft legislation establishes the **obligation for the Financial Ombudsman Service to cooperate with the sponsors of the Financial Education Plan**. It envisages that teaching materials be developed, or disseminated on the Service's website. It also calls for active cooperation with the Ministry of Education and Vocational Training (which is now also a member of the Financial Education Plan) to increase financial education content in its syllabuses.

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<sup>12</sup> A high proportion of claims are for less than €250. Indeed, according to the provisional 2022 data, of all the complaints claiming refunds handled by the Banco de España's Complaints Service, 48.6% of those in which the bank rectified after the Complaints Service found against it, or accepted liability before a decision was made, entailed refunds equal to or less than €250.

In this respect, I should stress that **the knowledge gained from settling complaints is an essential element for the correct design and implementation of financial education strategies**. Indeed, complaints and enquiries both enable us to identify gaps in the general public's financial knowledge and potential difficulties in their understanding of the products and services that financial intermediaries offer. And, naturally, they can enlighten financial education actions. In consequence, **collaboration and exchange of information between the Financial Ombudsman Service and the supervisory authorities will also be fundamental in this respect**.

### **Recognition of the Banco de España's Complaints Service**

To conclude, I wish to recognise the work that the Complaints Service has been doing for more than 35 years. A pioneering service in Europe, it also played a part in inspiring the investment and insurance complaints services that were subsequently established in Spain.

Over these years, the Complaints Service has been a direct witness of the disputes involving customers and has adapted to the changing needs of society. The Banco de España has handled almost 400,000 complaints filed by financial service users and customers, and since 2003 has dealt with more than 600,000 telephone and written enquiries.

The complaints settlement system has been – and continues to be – one of the best exponents of the vocation for public service that guides the Banco de España's actions. If this draft legislation is enacted by Parliament, it is to be hoped that the Financial Ombudsman Service will continue to settle disputes between banks and their customers with the same vocation.

Thank you.