Financial regulation: 2003 Q3

1. INTRODUCTION

In 2003 Q3, relatively few new financial provisions were enacted.

Three regulations were published in relation to credit institutions. First, the regulations on minimum capital have been amended in order to transpose certain Community provisions, to implement higher-ranking provisions and to make specific amendments deemed advisable in the light of the experience in recent years. Further, the opportunity has been taken to regulate the characteristics of credit institutions' preference shares, along with the attendant tax arrangements. Finally, a new image-transmission procedure has been set in place in the SNCE (National Electronic Clearing System) to replace the delivery of facsimiles, and direct debit payments are included among the documents subject to processing in the various sub-systems.

In connection with the securities markets, a series of measures reinforcing the transparency of listed public limited companies and of savings banks have been enacted. This should contribute to improving the workings of financial markets.

Regarding other financial regulation, three rules of interest may be mentioned. First, the legal regime governing capital movements and cross-border economic transactions has been significantly updated, so as to ensure the full adaptation of Spanish law to Community law, and specific measures to prevent money laundering have been laid down. Second, a series of rules designed to co-ordinate the actions of the Security Forces and Corps and the Banco de España Monetary Offence Investigation Brigade in combating counterfeit banknotes and coins. And, finally, the Insolvency Law has been enacted, with a view to overhauling Spanish insolvency law.

2. CREDIT INSTITUTIONS: AMENDMENT OF MINIMUM CAPITAL REGULATIONS

The Banco de España has issued Circular CBE 3/2003 of 24 June 2003 (BOE of 7 July 2003), amending CBE 5/1993 of 26 March 1993 on the determining and monitoring of minimum capital, in order to transpose certain Community provisions, implement higher-ranking provisions and to make specific amendments deemed advisable in the light of the experience in applying CBE 5/1993. The main changes introduced are discussed below.

2.1. Coverage of commodities risk positions

Royal Decree 1419/2001 of 17 December 2001 (1) initiated the transposition of Directive 98/31/EC of the European Parliament and of the Council of 22 June 1998 (2). This Directive broadened the definition of the trading book to include positions in commodities (basic raw materials, excluding gold); it established the capital requirements for the coverage of risk positions, in respect both of investment and trading, in commodities and in gold; and it allowed the use of in-house models for the calculation of capital requirements and to cover trading-book, exchange-rate and commodities and gold positions market risks. In the implementation of the aforementioned Royal Decree, CBE 3/2003 sets the capital requirements for commodities positions and the minimum conditions that the in-house risk management models, the organisation of the institution and its internal controls must satisfy so that, following an individualised evaluation thereof to verify risk measurement, they may be used for the calculation of capital requirements for the purposes of covering the above-mentioned risks.

2.2. Coverage of risk positions in gold

Ministerial Order ECO/3451/2002 of 27 December 2002, which partially amended the Order of 30 December 1992 on the capital adequacy rules of credit institutions, set the level of capital required for the coverage of gold position risk. Against this background, CBE3/2003 established the method for calculating positions in gold, which is very similar to that already laid down for positions in currency. For these purposes, the net position in gold is taken as the difference, at a given time, between the sum of balance sheet assets – including their certain proceeds – and of purchase commitments, and the sum of balance sheet liabilities – including their certain costs – and of sale commitments, all these denominated in terms of gold. The net position in gold is called “long” when the aforementioned difference has a positive sign, and “short” when it has a negative sign.

2.3. Capital requirements for derivative instruments concerning underlyings other than interest and exchange rates

Directive 98/33/EC of the European Parliament and of the Council of 22 June 1998 (3), in addition to specifying the weight applicable to certain risks, amended the definition of organised markets (4), established the capital requirements for OTC (over the counter) – traded derivative instruments concerning underlyings other than interest and exchange rates (commodities and precious metals, except gold), and introduced greater refinement into the calculation of the effects of reducing the potential credit risk of the instruments included in netting agreements. Implementing the regulatory powers attributed in this connection, CBE 3/2003 transposes the Directive in question into Spanish law.

Regarding the capital requirements for commodity price risk, the Circular lays down how the net position in a commodity is to be calculated. It will include holdings of the commodity and the derivatives which have said commodity as the underlying instrument (financial futures contracts, options, call options, etc.), and positions classified as trading-book and investment will both be taken into account. Positions that are merely commodity-financing ones may be excluded from the calculation of commodities risk.

2.4. Elimination of individual limits for currency positions

The individual limits set for currency positions have been eliminated, as the introduction of the euro and the experience built up by Spanish credit institutions in the management of their foreign currency transactions, along with the adequacy of their internal control and foreign exchange risk assessment systems, preclude any such need for these limits. Any financial institution wishing to operate in foreign currency and in gold must have, in keeping with its level of activity, appropriate risk measurement and information systems for the purposes of management, monitoring and control. In particular, the risk-assumption policies approved by the governing bodies should be clearly established, including internal measurement procedures, operational limits, the frequency of their revision, the body or person responsible and other relevant aspects. Likewise, institutions should provide the Banco de España with all the documentation on internal control

1) This partially amended Royal Decree 1343/1992 of 6 November 1992 implementing Law 13/1992 of 1 June 1992 on the capital and consolidated supervision of financial institutions.

(2) This Directive amended Directive 93/6/EEC of the Council of 15 March 1993 on the capital adequacy of investment firms and credit institutions.

(3) This Directive partially amended Council Directive 89/647/EEC of the Council on a solvency ratio for credit institutions, and Council Directive 93/6/EEC on the capital adequacy of investment firms and credit institutions.

(4) For these purposes, organised markets are considered to be those regulated by the competent authorities and which: *a)* operate regularly; *b)* are governed by rules, set or approved by the competent authorities of the country in which the market is established, which determine the market operating and access conditions and the conditions a contract must meet before it is actually traded on the market; *c)* have a clearing mechanism that requires deposits to be set aside in the form of guarantees that are adjustable daily on the basis of transactions and price developments.

systems set up for this area, on compliance therewith and the functioning thereof, on existing internal limits and, where appropriate, on the models used, their quantitative parameters and the evaluations made as to their goodness, which may be required of them at any time.

2.5. Other amendments

Finally, the word-for-word content of the three higher-ranking provisions issued since the previous amendment of Circular 5/1993 has been incorporated: the above-mentioned Royal Decree 1419/2001, the Ministerial Order dated 13 April 2000 and the Ministerial Order ECO/3451/2002 of 27 December 2002, regarding risk weighting. Further, specific one-off or minor amendments deemed advisable owing to experience in the application of the rules on credit institutions' capital have been addressed.

3. CREDIT INSTITUTIONS: AMENDMENT OF PREFERENCE SHARE REGULATIONS

Advantage has been taken of the occasion of the enactment of *Law 19/2003 of 4 July 2003* (BOE of 5 July) – on the legal regime governing capital movements and cross-border transactions and on specific measures for the prevention of money laundering, which will be discussed later – to regulate the characteristics of credit institutions' preference shares, along with their tax regime.

3.1. Requirements for preference shares

Preference shares shall meet the following requirements:

a) They shall have been issued by a credit institution or an entity resident in Spain or in European Union territory that does not have tax-haven status. Also, their voting rights shall relate in their entirety directly or indirectly to the controlling credit institution of a consolidated group or sub-group of credit institutions, and whose activity or exclusive corporate purpose is the issuance of preference shares.

b) In the case of issues made by a subsidiary institution, the funds obtained shall be deposited in their entirety and permanently, once issuance and management costs have been discounted, at the controlling credit institution or at another entity of the consolidated group or sub-group. The deposit thus set up shall be used by the depository institution for the offset of losses, both in its liquidation and in the overall financial restructuring of the institution or of its consolidated group or sub-group, once reserves have been depleted and ordinary capital reduced to zero. In such instances, preference shares must have the joint and irrevocable guarantee of the controlling credit institution or of the depository institution.

c) Entitlement to a pre-set return of a non-cumulative nature. The accrual of this return will be conditional upon the existence of distributable profits at the controlling credit institution or at the consolidated group or sub-group.

d) Their holders shall not be granted voting rights, unless this is in exceptional cases established in the respective issuance conditions.

e) Pre-emptive rights in respect of future new issues shall not be granted.

f) They shall in principle be non-redeemable, although early redemption may be agreed upon as from the fifth year after the share payment date, following authorisation from the Banco de España.

g) They shall be listed on a regulated secondary market.

h) In the event of liquidation, winding-up or other such cases that may give rise to the application of the priorities envisaged in the Commercial Code, both of the issuing credit institution and of the controlling institution of the consolidated group or sub-group, preference shares will entitle holders to obtain exclusively the redemption of their face value along with the accrued, unpaid return. For the purposes of seniority of debt, these instruments will be immediately behind all the creditors, whether subordinated or not, of the issuing credit institution or of the controlling credit institution of the consolidated group or sub-group, and before ordinary shareholders and, if any, equity unit holders.

i) At the time of issuing these instruments, the nominal amount outstanding may not exceed 30% of the core capital of the consolidated group or sub-group, including the amount of the issue itself, without prejudice to the additional limits that may be established for solvency purposes. If this percentage were to be exceeded after the issue had been made, the credit institution should submit a plan to the Banco de España for authorisation, aimed

at resuming compliance with the above-mentioned percentage. Nonetheless, the Banco de España may alter the percentage in question.

3.2. Tax regime for preference shares

The tax regime for these instruments will be as follows:

a) The income arising on preference shares shall be considered a deductible expense for the issuing institution.

b) Such income shall be classified as returns obtained on the transfer of capital to third persons, in accordance with Law 40/1998 of 9 December 1998 on Personal Income Tax and Other Tax Provisions. Further, they shall not be subject to any withholding, since the exemption laid down in Law 41/1998 of 9 December 1998 on the Taxation of Non-Residents' Income and Tax Provisions is applicable.

c) Were income to be obtained by taxpayers subject to non-resident personal income tax without a permanent establishment, such income shall be exempt from this tax under the same terms established for returns arising on government debt in Law 41/1998 of 9 December 1998 on the Taxation of Non-Residents' Income and Tax Provisions.

d) Finally, operations arising from the issuance of preference shares shall be exempt from capital transfer tax and stamp duty.

The regime envisaged for preference shares will also be applicable to issues of debt instruments by institutions meeting certain requirements and whose activity or exclusive purpose is the issuance of preference shares and/or other financial instruments, provided they meet organised-market listing requirements and, where appropriate, the requirements governing permanent deposit and guarantee on the part of the controlling institution.

4. NATIONAL ELECTRONIC CLEARING SYSTEM: NEW IMAGE-TRANSMISSION PROCEDURE INTRODUCED TO REPLACE THE DELIVERY OF FACSIMILES, AND INCORPORATION OF NEW DOCUMENTS

Royal Decree 1369/1987 of 18 September 1987 (5), Ministerial Order of 29 February 1988 (6) and Banco de España Circular CBE 8/1988 of 14 June 1988 (7) regulated the structure and functioning of the SNCE (National Electronic Clearing System), composed of the SNI (National Exchange System) and the SNL (Spanish Settlement System). Later, Banco de España Circular CBE 11/1990 of 6 November 1990 defined the operating rules of the current account cheque and promissory note sub-system, which forms part of the SNI and is regulated by Regulation SNCE-004.

Subsequently, CBE 4/1996 of 29 March 1996 defined a new procedure for processing non-truncatable documents, based on the optional delivery of facsimile reproductions in lieu of the original documents. This measure aimed to expedite the exchange of non-truncatable documents via the sub-system.

The technological advances in image capture and transmission procedures made it possible for *CBE 4/2003 of 24 June* (BOE of 7 July 2003) to further improve these exchange procedures. This improvement consisted of introducing a software application that enables document delivery to be replaced by electronic transmission of their images.

Initially the new system will be used in document exchanges via the current account cheque and promissory note sub-system in which at present the original document or a physical image thereof (facsimile) is exchanged. Subsequently, it will be employed in the commercial paper and sundry operations sub-systems, in which the exchange of documents is also planned.

Finally, the Circular has added *direct debit payments* to the documents that can be processed by the current account cheque and promissory note sub-system and by the commercial paper sub-system, whenever these documents have been traded by credit institutions. For the purposes of processing in the sub-system, *direct debit payments* are documents issued by credit institutions at their customers' request whereby the credit institutions undertake to make the specified payment (provided they have not received express instructions not to pay it and provided there are sufficient funds in the paying customer's account).

(5) See "Regulación financiera: cuarto trimestre de1987", in *Boletín económico,* Banco de España, January 1988, p. 51.

(6) See "Regulación financiera: primer trimestre de 1988", in *Boletín económico,* Banco de España, April 1988, p. 65.

(7) See "Regulación financiera: segundo trimestre de 1988", in *Boletín económico,* Banco de España, July-August 1988, p. 79.

5. TRANSPARENCY OF LISTED PUBLIC LIMITED COMPANIES

To improve the workings of the financial markets, it was considered fundamental to foster the principle of transparency—which implies that all information of importance to investors is transmitted to the markets and that it is true and correct—and to introduce measures regulating directors' duties and corporate governance.

For this purpose, *Law 26/2003 of 17 July 2003* (BOE of 18 July 2003), amending Securities Market Law 24/1988 of 28 July 1988 and the consolidated text of the Public Limited Companies Law approved by Royal Legislative Decree 1564/1989 of 22 December 1989, was enacted to strengthen the transparency of listed public limited companies.

The legal reform was completed with the amendment of Law 31/1985 of 2 August 1985 on the Regulation of Basic Rules on Governing Bodies of Savings Banks and with other provisions that extend to securities issuers some of the precepts established for listed firms. The main new features are outlined below.

5.1. Amendment of the Securities Market Law

The amendment adds to Securities Market Law 24/1988 of 28 July 1988 a new title ("Listed Firms") addressing public limited companies whose shares are traded in an official securities market.

Under this new title, mention may be made firstly of shareholders' agreements, defined in Law 26/2003 as agreements that regulate the exercise of voting rights in general shareholders' meetings or that affect the free transferability of shares in listed public limited companies. The entering into, extension or amendment of a shareholders' agreement must be notified immediately to the firm itself and to the CNMV (Spanish National Securities Market Commission). Once these notifications have been made, the document setting forth the shareholders' agreement must be lodged with the Mercantile Registry and publicly disseminated as a material event. Until such notification, lodgement and public dissemination as a material event have taken place, the shareholders' agreement shall not be effective.

If public dissemination may seriously prejudice the firm, at the request of the interested parties the CNMV can decide that a shareholders' agreement notified to it or part thereof will not be made public, and waive the requirement to notify the agreement to the firm itself, lodge the document in which it is set forth with the Mercantile Registry and publicly disseminate it as a material event, determining the time during which it can be kept secret by the interested parties.

Regarding *corporate bodies*, the listed firm's general meeting of shareholders shall approve specific rules addressing all matters concerning the general meeting. These rules shall be notified to the CNMV and registered with the Mercantile Registry in accordance with standard procedure.

The Board of Directors shall establish *rules on the internal regime* and workings of the Board in accordance with law and the firm's bylaws, which shall contain specific measures to ensure optimum administration of the firm. These rules shall be notified to the CNMV and registered with the Mercantile Registry.

As regards the *obligations of a listed firm's directors*, it is stipulated that, if those directors have publicly solicited proxy voting authority, they may not exercise such proxy votes on those agenda items in respect of which they have a conflict of interest. Directors must also refrain from carrying out, or suggesting to anyone that he carry out, a transaction involving shares of the firm itself or of subsidiary, associated or related firms about which, due to their position, they have inside or confidential information, unless that information is made publicly known.

The footnotes to a firm's annual accounts must disclose the transactions by directors or by persons acting on their behalf with the firm itself or with group firms during the financial year addressed by the annual accounts, whenever those transactions fall outside the firm's ordinary business activities or are not made on an arm's-length basis.

Fourth, listed public limited companies must publicly disseminate a yearly *corporate governance report* and communicate it to the CNMV, which will send a copy to the relevant supervisory authorities. The report shall be publicly disseminated as a material event and give a detailed explanation of the firm's system of corporate governance and of how it works in practice. The report's content and structure will be determined by the Ministry of Economy and, with this Ministry's express authorisation, by the CNMV.

In addition, listed public limited companies have to comply with the requirements imposed on them by the Public Limited Companies Law to disseminate information by any technical, IT

or teleprocessing medium, without prejudice to shareholders' rights under applicable legislation to request information in printed form. Listed public limited companies must have a web page as a means of catering for shareholders exercising their right to be informed and as a medium for disseminating key information.

Finally, the type of infringement constituted by non-compliance with the provisions of Law 26/2003 is defined.

5.2. Amendment of the consolidated text of the Public Limited Companies Law

The consolidated text of the Public Limited Companies Law approved by Royal Legislative Decree 1564/1989 of 22 December 1989 was modified by inclusion of the following amendments, among others.

Votes on proposals relating to general meeting agenda items of any kind can be delegated or exercised by shareholders by post, electronic medium or any other means of remote communication, provided that the identity of the party exercising his voting right is duly ensured.

As regards the right to information, up to seven days before the scheduled date of the general meeting, shareholders may ask directors for the information or clarifications they deem to be necessary or submit in writing the questions they consider to be pertinent to the matters on the agenda. This information can also be requested during the general meeting and the directors are obliged to furnish it (in writing up to the date of the general meeting), except in cases in which, in the Chairman's judgement, public dissemination of the requested information would harm the firm's interests.

Directors' are to carry out their duties with the diligence of an orderly businessman and loyal agent, and comply with the requirements of laws and articles of association in a manner befitting the general interest of the firm. No director may, for his own benefit or that of persons connected to him, make any investments or transactions related to the firm's assets that have become known to him by reason of his office if that investment or transaction would have been offered to the firm or if the firm would have been interested in it, unless the firm has rejected the investment or transaction in a decision uninfluenced by the director.

In addition, directors must notify the Board of Directors of any direct or indirect conflict they may have with the firm's interests. In the event of such conflict the director involved shall abstain from intervening in the transaction to which the conflict refers. Also, directors, even after leaving office, have to maintain secrecy regarding confidential information and may not disclose information, data, reports or background details known to them as a result of their office, which, accordingly, may not be communicated to third persons or disseminated if a knowledge thereof could harm the firm's interests.

Directors shall be liable (personally in the case of de facto directors and jointly in the case of members of the governing body) to the firm, to shareholders and to corporate creditors for the injury caused by their acts or omissions contrary to law or to the by-laws or by acts or omissions in violation of the duties of their office.

5.3. Other amendments

Finally, Law 26/2003 extends to savings banks that issue securities the requirement to prepare and make public the corporate governance report mentioned above. It also requires savings banks to set up a Board committee on compensation and a Board committee on investment.

6. LEGAL REGIME GOVERNING CAPITAL MOVEMENTS AND CROSS-BORDER TRANSACTIONS, AND CERTAIN MEASURES TO PREVENT MONEY LAUNDERING

Exchange Control Law 40/1979 of 10 December 1979 has, after more than 20 years in place, been characterised by its singularity in that it did not prohibit or restrict anything and did not impose any demands or administrative requirements. Rather, it was limited to generally empowering the government to establish such restrictions or controls as it deemed to meet the needs dictated by the prevailing economic situation at the time.

Further, Law 40/1979 contained major contradictions and had such regulatory gaps as the failure to address monetary offences. Accordingly, the reform of Law 40/1979 of 10 December 1979 effected by Organic Law 10/1983 of 16 August 1983 was left totally devoid of legal content when the only monetary offence still standing was abolished in 1996 (8). Also, the penalties established by Law 40/1979 proved to be inconsistent and out of touch with the current freedom of capital movements, although it was

(8) It consisted of the export of coins, banknotes and bearer banker's drafts for an amount exceeding five million pesetas or the equivalent thereof without having obtained prior authorisation.

partially amended by Payment Systems and Securities Settlement Law 41/1999 of 12 November 1999, which defined very serious offences and did away with the residual concept of a mild violation.

Moreover, Law 40/1979 exhibited incongruities with the new liberalised stage initiated by the Treaty establishing the European Community, which proclaimed the freedom of capital movements and prohibited restrictions not only on capital movements and payments between Member States, but also on those between Member States and third parties.

To ensure the full adaptation of Spanish law to Community law and, in particular, to the provisions of the Treaty establishing the European Community, Spain instituted a major update of Law 40/1979, which was repealed practically in its entirety by *Law 19/2003 of 4 July 2003* (BOE of 5 July 2003) on the legal regime governing capital movements and cross-border economic transactions and on certain measures to prevent money laundering. In addition, a new set of penalties has been drawn up in which express definitions of the various offending actions and omissions have been included and more precise penalties applicable in each case have been established.

Law 19/2003 is divided into two chapters: the first contains the general regime governing capital movements and cross-border economic transactions, and the second establishes penalties in respect of capital movements, in accordance with the principles of legality, uniformity and proportionality and upholding the assurance of due procedure. The additional provisions amend Law 19/1993 of 28 December 1993 on certain measures to prevent money laundering by improving the mechanisms in place to control cash and other payment instruments, in view of the risk that they represent from the standpoint of money laundering and terrorist financing. Finally, amendments are made to General Tax Law 230/1963 of 28 December 1963 to increase the effectiveness with which money laundering investigations are carried out. Some of the main new features are summarised below.

6.1. General regime governing capital movements and cross-border economic transactions

Law 19/2003 establishes the principle of freedom of capital movements and of cross-border economic transactions. Any acts, business arrangements, transactions and operations between residents and non-residents that entail, or that may give rise to, cross-border payments or receipts, cross-border transfers in either direction or changes in external debit or credit positions can thus be freely carried out, subject only to the constraints defined in this law and in specific sectoral legislation.

Certain disclosure obligations have been established whereby the natural or legal persons resident or non-resident in Spain that carry out these operations have to furnish to the Ministry of Justice and to the Banco de España, as and when stipulated, the information required of them for administrative and statistical purposes.

Finally, the Government may suspend the liberalised regime established by this Law in the event of acts, business arrangements, transactions or operations that, owing to their nature, form or conditions of execution, affect or may affect activities related (even if only occasionally) to the exercise of public power, or activities directly related to national defence or that affect or may affect public order, public security and public health.

6.2. Penalties

The Law classifies infringements as very serious, serious and minor. Very serious infringements notably include operations prohibited by measures introduced by the Government or the European Union. Serious infringements include the failure to declare operations amounting to more than €6 million and untruthfulness, omission or inexactness exceeding €6 million in declarations of operations. Minor infringements under the Law are declarations by subject parties outside the regulatorily stipulated time periods, failure to declare an operation not exceeding €6 million and untruthfulness, omission or inexactness not exceeding €6 million in declarations of operations.

Depending on the infringement committed, the penalties vary from a fine of not less than €30,000 based on the economic content of the operation and a public or private reprimand for very serious infringements to a fine of up to one-quarter of the operation's economic content (subject to a minimum of €3,000) and a private reprimand for minor infringements.

6.3. Measures to prevent money laundering

The Law introduces a number of amendments to Law 19/1993 of 28 December 1993 on certain measures to prevent money laundering.

First, it extends the list of parties deemed to engage in professional or business activities particularly prone to being used for money laundering. Specifically, in addition to those specified in Law 19/1993, it includes natural or legal persons that in the exercise of their profession act as auditors, external accountants or tax advisers and notaries, lawyers and "*procuradores*" (Spanish court attorneys) when they participate in conceiving, executing or advising on transactions for the account of customers relating to the purchase or sale of real estate or business entities; the management of funds, securities or other assets; the opening or management of bank accounts, savings accounts or securities accounts; or the organisation of contributions needed to set up, operate or manage enterprises or to set up, operate or manage trusts, firms or similar organisations, or when they act on behalf of and for the account of customers in any financial or real estate transaction.

As a new feature, the source, destination and holding of funds must be declared, subject to regulatorily specified exceptions, by those natural and legal persons that, for their own account or that of third parties, carry out the following movements of payment instruments:

a) Exit from or entry into Spanish territory of coins, banknotes and bearer banker's drafts denominated in Spanish or any other currency and in any physical medium, including electronic ones, conceived for use as a payment instrument, in an amount exceeding €6,000 per person per trip.

b) Movements in Spanish territory of payment instruments consisting of cash, banknotes and bearer banker's drafts denominated in Spanish or any other currency and in any physical medium, including electronic ones, conceived for use as a payment instrument, in an amount exceeding €80,500.

Finally, the responsibilities and functions of the managers of foundations are broadened as permitted by Law 50/2002 of 26 December 2002 on Foundations. These managers are required to see that foundations are not used to route funds or resources to persons and entities linked to terrorist groups or organisations, in accordance with legislation regulating measures to prevent and block terrorist financing. For this purpose, all foundations shall retain for six years the records identifying all persons who receive funds or resources from the foundation. These responsibilities also apply to associations providing a public service in the exercise of the functions assigned to them by Article 34 of Organic Law 1/2002 of 22 March regulating the Right of Association.

7. CO-ORDINATION OF THE ACTIONS OF THE SECURITY FORCES AND CORPS AND THE BANCO DE ESPAÑA MONETARY OFFENCE INVESTIGATION BRIGADE IN COMBATING COUNTERFEIT BANKNOTES AND COINS

EU Council Regulation 1338/2001 of 28 June 2001, which lays down measures necessary for the protection of the euro against counterfeiting, imposes on Member States the obligation, among others, to ensure that, as soon as any case of counterfeiting is detected, information at national level is communicated to the national central office. To this end, Member States shall take all measures necessary to ensure the exchange of information between the national central office and the Europol national unit.

Law 24/2001 of 27 December 2001 on fiscal, administrative and social measures added an additional provision to Law 48/1998 of 17 December 1998 on the introduction of the euro deeming the Banco de España to be the competent national authority in this connection and designating it, for the purposes of Regulation 1338/2001, as Spain's National Analysis Centre (NAC) and Coin National Analysis Centre (CNAC).

In order to ensure that the actions of the Security Forces and Corps are duly co-ordinated in combating counterfeit banknotes and coins of all types and to duly comply with the obligations imposed by national and international regulations, *Royal Decree 857/2003 of 4 July 2003* (BOE of 15 July 2003) was enacted on co-ordination of the actions of the Security Forces and Corps and the Banco de España Monetary Offence Investigation Brigade in combating counterfeit banknotes and coins.

Any unit of the Security Forces and Corps that detects counterfeit banknotes and coins or which is presented with an opportunity to intervene shall communicate the available information, as soon as it is detected, to the Banco de España Monetary Offence Investigation Brigade (BIBE by its Spanish abbreviation) for the purpose of the co-operation envisaged in Royal Decree 857/2003, without prejudice to continuing with the actions required to carry out its criminal police duties.

Units of the Security Forces and Corps also have to forward to BIBE certain data and documents specified in Royal Decree 857/2003 for the purpose of complying with the obligations laid down by Regulation 1338/2001 and other applicable rules to combat counterfeit banknotes and coins.

Once the BIBE has received the counterfeits, it shall immediately forward them to the NAC (if banknotes) or to the CNAC (if coins) of the Banco de España, and shall provide these centres with any other information relevant to the execution of their duties regarding counterfeit banknotes and coins, along with any counterfeiting instruments and tools, which shall in any event be placed at the disposal of the competent legal authorities.

8. INSOLVENCY LAW

Spanish insolvency law has been extensively reformed by the enactment of *Law 22/2003 of 9 July 2003 on Insolvency* (BOE of 10 July 2003). This was a matter pending in the modernisation of Spanish law, given the archaic, dispersed nature of the provisions in force in this area. The main changes are briefly described below.

8.1. Specific provisions in the financial sector

The Law respects the specific legislation applicable to credit institutions, insurers and transactions relating to payment and clearing systems for securities or derivative financial instruments, largely imposed by European Union law, which affects certain aspects of insolvency. The provisions of this Law shall only apply in this area when the special provisions are silent and insofar as they are compatible with the nature of such systems.

The second additional provision of the Law thus provides that, in the event of the insolvency of credit institutions or legally similar entities, investment services firms and insurers, as well as the member institutions of official securities markets and participants in securities clearing and settlement systems, the special provisions for insolvency situations established in their specific legislation shall apply, except those relating to the composition, appointment and workings of the insolvency administration body.

The law also makes certain changes to provisions of a financial nature to adapt them to the provisions of the Insolvency Law. Notable, among others, are Law 24/1988 of 28 July 1988 on the Securities Market and Law 44/2002 of 22 November 2002 on Measures to Reform the Financial System.

Of note in the case of the former is the adaptation to this Law of the procedure for obtaining a court order declaring insolvency or the opening of suspension of payments proceedings in respect of a participant institution in the systems managed by the Systems Company (9), as well as a declaration of insolvency with respect to a registered Public-Debt-Book-Entry-Market dealer. In the case of the latter, it sets out the rules applicable to territorial certificates (10) in the event of the insolvency of a credit institution, which shall be considered to rank equally with credits with special priority and, specifically, within the group of “credits secured by voluntary or legal mortgage over real or personal property, or by a charge over assets that are not transferred to the lender”.

Finally, other provisions of a financial nature are adapted to this Law, such as Law 19/1985 of 16 July 1985 on Bills of Exchange and Cheques, Law 2/1981 of 25 March 1981 on the Mortgage Market, Law 1/1999 of 5 January 1999 regulating venture capital entities and their management companies, Law 30/1995 of 8 November 1995 on Private Insurance and Law 1/1994 of 11 March 1994 on Mutual Guarantee Companies.

8.2. Principles of insolvency reform

The Law opts for the principles of legal, disciplinary and system unity. Unity of the insolvency procedure is obtained by virtue of the flexibility of the law, which means it can be applied to diverse situations and solutions, through which payment of creditors, the ultimate aim of the insolvency, can be achieved.

One of the most significant changes made by the Law is its special treatment of actions for the enforcement of security interests over the assets of the insolvent entity. The effects of insolvency declarations on contracts have also been given particular attention. This was one of the areas least adequately regulated by the previous law and, therefore, it is one of the most original parts of the new Law. According to the latter, an insolvency declaration has, in princi-

(9) Sociedad de Gestión de los Sistemas de Registro, Compensación y Liquidación de Valores (the Systems Company) arose from the merger of the Securities Clearing and Settlement Service (SCLV) and the Spanish Public Debt Book-Entry System (CADE). This company will be able to integrate other systems already existing in Spain, such as the financial derivatives system and those managed by the Barcelona, Bilbao and Valencia stock exchanges. It will also be able to arrange interconnections and alliances with those of other countries.

(10) Territorial certificates are fixed-income securities that can be issued by credit institutions, whose capital and interest are specially secured by the loans and credit granted by the institution to the State, regional (autonomous) governments and local authorities, as well as the autonomous bodies and public-sector corporate entities reporting thereto, or other entities of a similar kind in the European Economic Area. These securities shall be subject to the same tax and financial regime as mortgage certificates.

ple, no bearing on the effectiveness of contracts where both parties have not completed their performances thereunder. However, in the interests of the insolvent entity and with guarantees for the rights of the counterparty, the possibility is envisaged of a court order terminating the contract.

The law also considers the *principle of equal treatment of creditors,* which shall be the general rule in an insolvency. Any exceptions must be limited and always justified.

8.3. Insolvency declaration and proceedings

Persons with legal standing to petition for an insolvency order against the debtor shall base their case on one of the grounds set out in the Law. The petitioner is required to prove the facts on which the petition is based. If the petition is made by the debtor itself, it shall provide evidence of its indebtedness and its insolvency, although in this case it need not only be current, but also future, when foreseen as imminent. The debtor has a duty to petition for a declaration of insolvency when it knows or should know that it is insolvent, and it is entitled to petition in anticipation of such a situation. The solutions for insolvency provided for in the Law are an agreement and winding up, the procedure for which has specific phases. The Law is flexible in its regulation of the content of the proposed agreements, which may consist of proposals for the discharge of claims or deferred payment, or both. However, the discharge may not exceed half the amount of each ordinary credit, and the deferral shall not exceed five years from the approval of the agreement, without prejudice to cases involving the insolvency of firms of special significance to the economy and the filing of anticipatory proposals for an agreement when the judge so authorises. The effects of winding up are, obviously, more severe. The insolvent shall be subject to suspension of its powers to administer and dispose of its property, which shall pass to the administration body.

8.4. Insolvency bodies

The Law simplifies the organic structure of insolvency, since the judge and the insolvency administration body are the only bodies required in the proceeding. The meeting of creditors will only have to be convened in the agreement phase when an anticipatory proposal has not been approved by means of written acceptances.

The Law makes the judge the decision-making body for the proceeding, with greater powers than previously, and widens the discretion with which such powers are exercised. This helps to make the proceeding more flexible and to adapt it to the circumstances of each case. Competence to hear insolvency proceedings is attributed to the new Commercial Courts set up further to this Law, by the Organic Law for Insolvency Reform, with the relevant change to the Judiciary Act.

The insolvency administration body shall be a collegial body, although the judge may appoint a single professional administrator. The basic functions of this body are to intervene in acts by the debtor in exercise of its property rights, or to replace the debtor when it has been suspended from exercising such rights, as well as to draft the report of the administration body, which shall be accompanied by an inventory of the debtor's assets, the list of creditors and, where applicable, an assessment of the agreement proposals presented.

8.5. Other changes

Another change made by the insolvency reform is the establishment of a procedure to ensure the public registration of rulings declaring insolvency with fault and of those decisions that appoint or remove administrators in those cases that the law itself provides. Finally, special attention is given to issues of foreign insolvency which, in a globalised economy, arise with increasing frequency.

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