Financial regulation: 2011 Q1

The author of this article is Juan Carlos Casado Cubillas, of the Directorate General Economics, Statistics and Research.

Introduction

In 2011 Q1, relatively few new pieces of financial legislation were enacted in comparison with previous periods.

The European Central Bank (ECB) has amended the legal framework for accounting and financial reporting in the European System of Central Banks (ESCB).

The Banco de España has made some changes to Eurosystem monetary policy instruments and procedures in order to adapt them to ECB regulations.

The Sustainable Economy Law was promulgated, which requires greater transparency from financial institutions and introduces a series of improvements in financial supervision and in the protection of users of financial services. In the area of credit institutions, several measures were created to strengthen the financial system, and, in particular, its solvency levels.

In the field of the securities market, five pieces of legislation were adopted: the conditions for issuing government debt for 2011 and January 2012; various amendments to solvency regulations for investment firms; the adaptation to EU law of derivatives transactions carried out by collective investment undertakings (CIUs); a new regulation on official secondary markets for futures, options and other derivative financial instruments and certain amendments to the promotion agreements of securitisation special purpose entities.

Finally, in the European arena, measures for combating late payment in commercial transactions were brought up to date.

European System of Central Banks: amendment of the legal framework for accounting and financial reporting

Guideline ECB/2010/20 of 11 November 2010 (OJ L of 9 February) which replaces and repeals *Guideline ECB/2006/16* of 10 November,[1] on the legal framework for accounting and financial reporting in the European System of Central Banks (ESCB) was issued.

Certain changes were made to the criteria for balance sheet valuation. They specifically affect holdings of special drawing rights (SDRs),[2] including designated individual foreign exchange holdings underlying the SDR basket, which shall be treated as one holding for revaluation purposes. By contrast, the revaluations of foreign currency holdings, including on-balance-sheet and off-balance-sheet transactions, will continue to be on a currency-by-currency basis.

The hedging of the interest rate risk on securities with derivatives is introduced which involves designating a derivative so that the change in its fair value offsets the expected change in the fair value of the hedged security arising from interest rate movements.

In general, hedged instruments and hedging derivatives shall be treated in accordance with the general provisions, valuation rules, income recognition and instrument-specific requirements set out in this Guideline.

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1. See «Financial Regulation: 2006 Q4», *Economic Bulletin*, January 2007, Banco de España, p. 107. **2.** SDRs are remunerated international reserve assets which were created by the IMF in 1969 to supplement other reserve assets of member countries.

Nevertheless, the Guideline sets out alternative valuation treatment, if certain requirements are met. Namely, that the instrument and the hedging derivative are shown at their market values on the balance sheet as the end of each quarter and that an asymmetric valuation approach is applied to unrealised gains/losses. Under this approach, a net unrealised loss shall be taken to the profit and loss account at year-end, and it is recommended that it is amortised over the remaining life of the hedged instrument, whereas a net unrealised gain shall be booked on a revaluation account and reversed at the following revaluation date.

If hedge accounting is discontinued, the security and the derivative that have remained in the books of the reporting entity shall be valued as stand alone instruments, in accordance with the general rules set out in this Guideline.

A hedging system is also set up for groups of securities with similar interest rates. Thus, they may be aggregated and hedged as a group only if the following conditions are met: a) the securities have a similar duration; b) the group of securities complies with the effectiveness test prospectively and retrospectively, and c) the change in fair value attributable to the hedged risk for each security of the group is expected to be approximately proportional to the overall change in the fair value attributable to the hedged risk of the group of securities.

The Guideline came into force on 31 December.

Banco de España: amendment of the general clauses applicable to monetary policy operations

The Resolution of 6 October 2010 and the Resolution of 29 December 2010 (both published in the Official State Gazette of 12 January 2011) of the Executive Commission of the Banco de España were promulgated, amending the Resolution of 11 December 1998[3] approving the general clauses applicable to monetary policy operations, in order to adopt Guideline ECB/2010/13 of 16 September 2010 and Guideline ECB/2010/30 of 13 December 2010,[4] which amended Guideline ECB/2000/7 of 31 August 2000 on monetary policy instruments and procedures of the Eurosystem.

CHANGES MADE BY THE RESOLUTION OF 6 OCTOBER 2010

In general clause II, entitled "scope of application", the possibility is established of the ECB, under exceptional circumstances, carrying out directly with selected institutions not only bilateral fine-tuning operations, but also structural operations[5] and outright transactions.[6]

In general clause IV, entitled "basic conditions of monetary policy operations", the functions of counterparties are updated. As a result, they must, always be in a position to: 1) transfer a sufficient amount of eligible assets or cash, to settle (at the settlement day), or to collateralise, until the maturity of the operation by means of corresponding margin calls, the amount allotted in a tender in a liquidity-providing operation; 2) to deliver a sufficient amount of cash to settle the amount it has been allotted in a tender in a liquidity-absorbing operation, and 3) to deliver the amount of eligible assets or cash agreed to settle transactions executed by means of bilateral operations, or to collateralise a bilateral operation outstanding at any time until its maturity by means of corresponding margin calls.[7]

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3. See «Financial regulation: fourth quarter 1998», *Economic Bulletin*, January 1999, Banco de España, pp. 78-82. **4.** See «Financial regulation: 2010 Q4», *Economic Bulletin*, January 2011, Banco de España, pp. 133-136. **5.** Structural operations are carried out through the issuance of ECB debt certificates, reverse transactions and outright transactions. **6.** Transaction through which the ECB buys or sells, spot or forward, outright holdings of assets on the market. **7.** Previously, the only obligations envisaged were to cover the amount allotted to them in tender operations with a sufficient amount of eligible assets, and to deliver the amount of underlying assets agreed to settle transactions carried out by means of bilateral operations.

In general clause V, entitled "procedures applicable to monetary policy operations", certain technical amendments are made in the tender procedures, relating to the delivery of a sufficient amount of eligible assets, or cash, to settle the operations.

In general clause VI, entitled "eligible assets", a new exception is added to the rules for the use by a counterparty of eligible assets issued by another entity with which it has close links: for residential real estate loan-backed structured covered bonds (i.e. certain covered bonds not declared UCITS compliant by the European Commission) that fulfil all the criteria applied by the Eurosystem to asset-backed bonds as regards asset selection and the credit evaluation system and that comply with certain additional criteria specified by the Banco de España.

In general clause VII, entitled "cases of default", certain cases are updated in which the counterparty is considered to have failed to comply with rules established by the Banco de España; specifically in relation to tenders, bilateral operations and on the use of eligible assets.

In relation to tenders, the counterparty is considered in breach of its obligations when it fails to transfer a sufficient amount of underlying assets or cash (when applicable, as regards margin calls) to settle at the settlement day, or to collateralise, until the maturity of the operation by means of corresponding margin calls, the amount allotted in a liquidity-providing, or if it fails to transfer a sufficient amount of cash to settle the amount allotted in a liquidity-absorbing operation.[8]

With regard to bilateral operations, a counterparty is deemed to be in breach of its obligations when it fails to transfer a sufficient amount of underlying assets or a sufficient amount of cash to settle the amount agreed in the transaction, or if it fails to collateralise an outstanding bilateral transaction at any time until its maturity by means of corresponding margin calls.[9]

Finally, as regards the use of the assets, the counterparty is deemed to be in breach of its obligations when it has provided information affecting the collateral value negatively, for example on the outstanding amount of a used credit claim, which is false or out of date.

This Resolution has been applicable since 10 October 2010.

CHANGES MADE BY THE RESOLUTION OF 29 DECEMBER 2010

The only change is to general clause VI, entitled "eligible assets", and was established by Guideline ECB/2010/30. A new exception is added to when counterparties present eligible assets issued by another entity with which they have close links, specifically for *commercial mortgage-backed covered bonds.* In parallel with the previous section, these are certain covered bonds that have not been declared UCITS compliant by the European Commission, but which fulfil all the criteria applicable to asset-backed securities regarding asset selection and the credit evaluation system and that comply with certain additional criteria specified by the Banco de España.

This Resolution has been applicable since 1 February 2011.

Sustainable Economy Law

Sustainable Economy Law 2/2011 of 4 March 2011 (BOE of 5 March 2011) was published. From the viewpoint of financial regulation the following aspects are notable:

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8. The counterparty will be deemed to have failed to comply with rules established by the Banco de España in relation to tenders when such counterparty does not have sufficient eligible assets to settle its allotted bids, or when it has not deposited sufficient cash in the case of liquidity-absorbing operations. **9.** Also, the counterparty will be deemed to have failed to comply with the rules established by the Banco de España in relation to bilateral operations, in particular, when such counterparty is unable to provide sufficient eligible assets or does not have a sufficient cash balance to settle the amount agreed in the transaction.

TRANSPARENCY IN RELATION TO THE REMUNERATION OF DIRECTORS AND SENIOR MANAGERS, AND CORPORATE GOVERNANCE

Transposing Directive 2010/76/EU of the European Parliament and of the Council of 24 November 2001,[10] credit institutions, investment firms and listed public limited companies are required to enhance transparency as regards the remuneration of their directors and senior management, as well as their compensation policies, so that they are consistent with prudent and effective risk management.

Credit institutions and investment firms must include in their rules of governance remuneration policies and practices consistent with the promotion of sound and effective risk management. Likewise, the respective supervisory authorities (Banco de España and CNMV) are authorised to request entities to limit variable remuneration when it is inconsistent with the maintenance of a sound capital base.

In addition, the Banco de España is authorised to publish guidelines indicating the criteria or procedures that it considers appropriate to ensure that remuneration practices result in incentives to take risks that are compatible with appropriate risk management. Such guidelines may include the criteria to be used by the Banco de España itself when carrying out its supervision activities.

Finally, along with the annual report on corporate governance, public limited companies must prepare an *annual report on the remuneration of their directors*, containing a summary of the remuneration policy during the year, as well as the details of the individual remuneration received by each director. This obligation is also established for savings banks, with the details on individual remuneration being required for members of the Board of Directors and the Control Committee.

ENHANCEMENT OF FINANCIAL SUPERVISION

The powers and supervisory regime of the supervisory authorities are expanded.[11] Thus, insofar as it is necessary for the effective performance of their functions, persons or entities who provide any type of professional service to supervised entities will be obliged to supply all such data and information as they may be requested to provide in accordance with the provisions, where applicable, of the specific legislation regulating their profession or activity.

In addition, the law makes clear that there exists a duty on the part of general government bodies; chambers and corporations, schools, school boards and professional associations; other public entities and those who, in general, exercise public functions, which will be obliged to collaborate and supply to the supervisory authorities all such data, documents, records, reports and background information that they may be necessary for the exercise of their supervisory task.

Also, communication between the supervisor and entities by electronic means is promoted, for which purpose the latter are obliged to have the technical means required.

The definition of infringements is widened to include the failure to comply with the new obligations in the law. Notable here is the failure to adopt the measures required to strengthen or modify their internal control, accounting or valuation procedures; the non-existence of mechanisms or strategies to have an organisational structure or resources that are adequate, when this would put their solvency or viability at risk, and the absence or poor functioning of customer service departments. In addition, the financial sanctions are increased, especially for serious and very serious infringements.

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10. See "Financial regulation: 2010 Q4", Economic Bulletin, January 2011, Banco de España, pp. 153-155. **11.** The Banco de España, the CNMV and the Directorate General of Insurance and Pension Funds.

PROTECTION OF FINANCIAL SERVICE USERS

On one hand, the Law contains various requirements relating to credit-granting policies and the information that must be supplied to consumers of banking products (deposits and/or loans), in a shift towards the philosophy that was introduced into Spanish law for investment services with the transposition of the "MiFID Directive".[12]

In this respect, credit institutions must supply to consumers, in an accessible manner and, in particular, through the appropriate pre-contractual information, adequate explanations enabling them to assess whether the banking products they are being offered (in particular, time deposits and mortgage or personal loans) are in line with their interests, needs and financial situation, with special reference to the essential characteristics of such products and to the specific effects they may have on the consumer, in particular, the consequences of default.

In relation to loan agreements, credit institutions must assess the solvency of the potential borrower, on the basis of sufficient information. To assess such solvency they must take into account the specific rules on risk management and internal control applicable to them under their particular legislation. In addition, credit institutions must follow practices for the responsible granting of loans to consumers. Such practices must be reflected in a document to be mentioned in a note to the annual report on the institution's activities.

The Minister for Economic Affairs and Finance is authorised, within six months from the entry into force of this Law, to approve the rules necessary to ensure that financial service users are adequately protected in their relations with credit institutions, including, in any event, measures relating to the transparency of the financial conditions of mortgage loans and consumer credit.

These rules may have the following content:

a) Practices for the responsible granting of loans, including those that help to ensure that adequate attention is given to the income of consumers relative to the commitments acquired when they receive a loan; an appropriate independent valuation of the mortgage security for the loans, with mechanisms to avoid undue influence on the part of the institution itself or its subsidiaries; the consideration of different scenarios for the evolution of the interest rates on variable-rate loans, the possibilities for hedging such changes, taking into account moreover the use or non-use of official reference indices; obtaining and appropriately documenting relevant data on the applicant; pre-contractual information and appropriate assistance for the consumer, and compliance with data protection rules.

b) Rules on the provision to consumers of other banking services – besides investment services – in particular in relation to deposit agreements and the communications that enable monitoring of the operations carried out by customers.

c) Pre-contractual information that should be supplied to consumers before they formalise their contractual relations with institutions, including the information that should appear on the institution's website when services are offered through this channel or others involving remote marketing, all this being to ensure that it reflects, explicitly and with the necessary clarity, the most important elements of the products purchased.

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12. Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004. See "Financial regulation: 2004 Q2", Economic Bulletin, July 2004, Banco de España, pp. 110-114.

It should be pointed out that Law 44/2002 of 22 November 2002 on financial system reform measures established a procedure for the resolution of claims based on the existence of commissioners for the protection of customers for financial services (banking, securities and insurance), whose remit was regulated by RD 303/2004 of 20 February 2004 ("Commissioners' regulations").

However, this design has not been fully applied, since the commissioners were never appointed, although the claims services (included in the respective organisations of the sectoral supervisors) have continued to function, applying the rules of procedure of these regulations, except as regards the presence of the non-appointed commissioners.

In order to address the situation and adjust it to practical reality, the rules on the non-existent commissioners have been repealed and it is envisaged that the Minister for Economic Affairs and Finance will regulate, where still appropriate, the procedure for submitting claims.

Giving continuity to current practice, the claims services of the Banco de España, of the CNMV and of the Directorate General for Insurance and Pension Funds will continue to function on the one-stop shop principle and are required to forward claims that fall outside their remit to the correct claims service. In addition to the functions established (attending to the complaints and claims submitted by financial services users), they must resolve the consultations received by them on the rules applicable in relation to transparency and customer protection, and on the legal channels that exist for the exercise of their rights.

INSURANCE MARKETS AND PENSION FUNDS

The Law includes measures to reform insurance markets and pension funds in order to enhance the protection of the rights of insureds, and also to streamline procedures and increase the protection of savers and insurance policyholders. Specifically, the law seeks to ensure that the following objectives are achieved:

a) Greater transparency and efficiency in the management of insurance companies.

b) The streamlining of administrative formalities and procedures for pension fund authorisation and registration.

c) Rationalising the assignment of the capital that pension fund management companies are required to hold, making it more efficient and maintaining a level that is sufficient and appropriate for their activity.

d) Protecting savers and insurance policyholders and other users of the services provided by insurance companies, as well as strengthening legal certainty in relation to the marketing of pension schemes.

e) Greater development of and transparency in insurance and reinsurance intermediation.

As regards the impact of the changes on credit institutions, the following should be noted: i) express indication of the possibility of ordering the inspection of pension fund custodians (which, under existing law, will always be credit institutions located in Spain), informing the supervisor (Banco de España) of the inspection order, and ii) the regulation of the activity of marketing individual pension schemes (an activity of the manager), which may be delegated to credit institutions and other financial institutions, although, inter alia, the minimum requirements for such delegation have been left for the implementing regulations.

In addition, insofar as the regulation of pension schemes and funds may, from the disciplinary viewpoint, also affect credit institutions (in their capacity as custodians, and now also as retailers), it is established that, if the offender is a credit institution, or the board of directors or management of the same, a report of the Banco de España will be required before a sanction can be imposed.

OTHER PROVISIONS

The balances of the compulsory reserve fund of credit cooperatives that have changed their status to a credit institution can be integrated into the share capital of the resulting institution during 2011.

With regard to the relations between the National Competition Commission and the sector regulatory bodies,[13] the compulsory application reports between these authorities (in accordance with the provisions of the competition law in force) will be "definitive" for the authority that requests them, so that they may only dissent from their content by giving specific reasons (previously they were non-binding).

In relation to the scope of data protection, the information and data requested by financial supervisors are specified as being protected by Law 15/1999 of 13 December 1999 on the protection of personal data. This means that the general rule that personal data can only be transferred with the prior consent of the person concerned does not apply to such data, which have to be collected in the performance of the functions of such supervisors.

The Law came into force on 6 March 2011, except for certain provisions on private insurance, which will be applicable from 1 January 2013.

Measures to strengthen the financial system

Royal Decree Law 2/2011 of 18 February 2011 (BOE of 19 February 2011) to strengthen the financial system was published. It has a twofold purpose: first, to reinforce the level of solvency of credit institutions, through requiring more top quality capital; and second, to accelerate the final phase of the restructuring of institutions, especially savings banks, through the framework created by Royal Decree Law 11/2010 of 9 July 2010 on governing bodies and other aspects of the legal regime for savings banks.

The measures envisaged form two large blocks: the strengthening of the solvency of institutions; and the adaptation of the FROB as a public instrument to facilitate the required new capitalisation.

STRENGTHENING THE SOLVENCY OF CREDIT INSTITUTIONS

In relation to the current law on solvency, the capital requirements for credit institutions have been tightened, in line with the new international capital standards set in the so-called "Basel III accords",[14] which will begin to apply in the European Union from 2013.

Core capital

The definition of core capital is introduced, reflecting "common equity tier 1" in Basel III with certain differences, and a minimum level for such capital is established in relation to risk weighted assets.

The core capital of credit institutions is made up of the following elements:

a) Share capital, excluding non-voting redeemable shares; the initial capital and non-voting equity units of savings banks; the capital contributions of credit coop-

13. The financial ones are the Banco de España, the CNMV and the Directorate General for Insurance and Pension Funds. **14.** The accords adopted by the Basel Committee on Banking Supervision on the general design of the reform of the capital and liquidity regulations.

eratives. Eligible shares or securities held by the institution itself or any consolidatable institution are excluded.

b) Share premium that is paid in when ordinary shares or other instruments listed in paragraph a) above are subscribed for.

c) Disclosed reserves, as well as those elements classified as reserves in accordance with the legislation on own funds of credit institutions and the retained earnings for the period.

d) Revaluation surpluses on available-for-sale financial assets that form part of equity, net of tax effects.

e) Holdings representing minority interests that correspond to ordinary shares of consolidatable group companies.

f) The eligible instruments subscribed for by the FROB within the framework of its regulations.

g) Temporarily, instruments that are mandatorily convertible into shares can also be included until 31 December 2014, as long as they comply with certain requirements that guarantee a high loss-absorbing capacity, and insofar as they do not account for more than 25% of core capital.

From the sum of the above items the following are deducted:

1) losses from previous years recorded as a debit balance in the reserves (accumulated losses), and current year losses, including the amount of the loss for the period attributed to minority interest, as well as the debit balances on the equity account that are considered to be losses. For such purposes, the revaluation deficits on available-for-sale financial assets will be considered net of tax effects, and

2) intangible assets, including goodwill arising from business combinations, consolidation or application of the equity method. The value of these assets will be calculated as provided by the Banco de España.

Core capital ratio

Credit institutions must have core capital that is equal to at least 8% of their total risk-weighted exposures.[15] This requirement will be 10% for those institutions that do not have securities representing at least 20% of their capital held by third parties, and that also have a wholesale funding ratio of over 20% (this ratio is discussed in the following section).

In addition, the Banco de España may require compliance with a higher level of core capital if the institution fails in the most adverse scenario of a stress test of the whole system to reach the level of minimum capital required in that test.

Wholesale funding ratio

CBE 2/2011 of 4 March 2011 (BOE of 5 March 2011) has defined what is understood by the wholesale funding ratio (for the purposes of the provisions of Royal Decree Law 2/2011), which

15. Calculated in accordance with the provisions of Law 13/1985 of 25 May 1985 on investment ratios, own funds and reporting obligations of financial intermediaries, and of its implementing regulations.

is the ratio between the net wholesale funding of available liquid assets and loans and advances to other debtors.

Wholesale funding consists basically of the sum of the following items:

- Central bank deposits, including the funding granted by ESCB central banks.
- The deposits of credit institutions with certain exceptions.
- Wholesale deposits, provided that they are not operational balances, made by general government, large non-financial corporations and other financial institutions that do not belong to the institution's economic group.
- Debits represented by wholesale negotiable securities, for which the issuance of securities (including subordinated) carried out by the institution, excluding own shares, those placed with retail customers through the internet, those associated with securitised assets or those that appear in the possession of group entities.
- Subordinated deposits, unless the lender is an entity in the same group as the institution.

From the foregoing sum must be deducted the available liquid assets, made up of cash and balances with central banks, deposits with credit institutions, liquid debt securities and listed equity instruments.

Loans and advances to other debtors comprise all lending, in whatever form, to third parties other than central banks and credit institutions, with the exception of assets purchased under resale agreements that are debt securities or equity instruments eligible as liquid assets and the balances of loans that are securitised and not retained by the institution.

With certain exceptions, individual credit institutions and consolidatable groups of credit institutions will be obliged to send on a half yearly basis to the Banco de España the statement annexed to the Circular. However, certain institutions, to which the specific circumstances set out in the Circular apply, may be exempted from this obligation.

The first statement must be sent before 31 March 2011 with the data for the situation as at 31 December 2010.

Progressive deadlines for the entry into force of the solvency requirements

The new requirements came into force on 10 March 2011. However, for those institutions that fail to comply with the core capital requirements on that date a progressive compliance strategy has been designed. Thus, they will have 15 business days to notify the Banco de España of the strategy and timetable for adaptation to the new capital requirements, specifying the measures that the institutions plan to use to comply with such requirements before 30 September 2011.

This strategy may envisage the raising of funds from third parties and IPOs, and must be approved by the Banco de España, which may require amendments or additional measures. Considering how long it may take to carry out the formalities required for these strategies, the Banco de España may authorise an extension of up to three months beyond the previous date (to 31 December 2011) and, if the strategy envisages the raising of funds from third parties and IPOs, the Banco de España may, exceptionally, extend the deadline for compliance to 31 March 2012.

In the event that the institution, to comply with the required level of core capital, has no other option but to request financial support from the FROB, it will indicate this in the compliance strategy, in which case it will have a period of one month to present a recapitalisation plan. The procedure for doing this will be discussed in the next section.

When the transitional period has expired and the institutions have complied with the new core capital requirements, a capital conservation buffer will be applied. If at any time an institution fails to comply with 20% of the required core capital ratio the Banco de España will impose restrictions that may affect the distribution of dividends, transfers to the welfare fund, the remuneration of preference shares, the variable remuneration of directors and managers and share repurchases.

Verification of the compliance with core capital requirements on 10 March will be based on the figure for risk-weighted assets as at 31 December 2010. Subsequent verifications during 2011 may not be based on a figure for risk-weighted assets that is less than that as at 31 December 2010.

However, this figure may be adjusted through extraordinary operations consisting of outright sales of branch networks, strategic stakes or a portfolio of loans or real assets, as well as by any effect that methodological changes to the calculation of the capital requirements that have been authorised by the Banco de España may have.

From 31 December 2011 onwards, the figures for risk-weighted assets considered at any particular moment will be those calculated in accordance with the rules on capital applicable to credit institutions.

AMENDMENT OF THE LEGAL REGIME OF THE FROB

The FROB's functions are extended in order to strengthen institutions' own funds without the need for this to automatically involve a merger and concentration process as envisaged by Royal Decree-Law 9/2009. Thus, it may adopt financial support measures such as acquiring ordinary shares or contributing to the capital stock of institutions which need to strengthen their own funds and make the related request.

The acquisition of securities by the FROB will be conditional upon the preparation by the institution of the above-mentioned recapitalisation plan, which must be approved by the Banco de España. The recapitalisation plan has to include a business plan in which targets are set for efficiency, profitability, leverage and liquidity levels, and certain commitments are made, for example, relating to the reduction of its overheads, the improvement of its corporate governance and undertakings to increase lending to SMEs in terms which are compatible with the targets established in its business plan. Institutions may also be required to make further commitments in order to ensure the efficient use of public funds.

The acquisition price of the shares or the capital contributions will be set in accordance with the institution's economic value, which will be determined by one or several independent experts who will be appointed by the FROB, through a procedure that it will perform following commonly accepted practices and on the basis of market value.

The acquisition of securities by the FROB will determine, in turn, its representation on the board or similar body of the issuer institution of the securities in proportion to its percentage of ownership, in order to ensure that the recapitalisation plan is complied with appropriately.

The FROB's ownership interest in institutions is temporary since under the Royal Decree-Law its holding will be divested through procedures ensuring competition within a period of no more than five years from the subscription date.

Without prejudice to the foregoing, it is envisaged that the FROB may participate, together with one or several of the partners or shareholders of the credit institution in question, in the possible sales of securities, under the conditions that may be agreed upon. Thus, within a period of one year at most from the purchase date, the FROB may resell the securities subscribed to the issuer institutions or to third-party investors proposed by them, under market conditions, and provided that the selling price provides a market return which is appropriate for the investment made. This period may be two years, in which case the applicant institutions may be required to make commitments in addition to those envisaged in their recapitalisation plans.

For the specific case of credit cooperatives, the regime envisaged in Royal Decree-Law 9/2009 of 26 June 2009 is applied for integration processes. This involves the acquisition by the FROB of preferential holdings which can be converted into contributions to the share capital of these cooperatives that need to strengthen their own funds exclusively to undertake the aforementioned integration processes, and that have made the related requests.

If the institution requesting the financial support is a savings bank, it will have a maximum of three months from the notification date of the approval of its recapitalisation plan to transfer its entire financial activity to a bank. It may either engage indirectly in its financial activity retaining its legal form of a savings banks,[16] or transfer all of the assets involved in its financial activity to another credit institution in exchange for shares of the latter and become a special foundation thereby losing its status of credit institution.[17]

If the applicant institution is a bank which is jointly owned by savings banks (the IPS model), the latter must transfer in the same maximum period of three months all their financial activity to the bank and engage in their activity indirectly or become a special foundation.

Finally, a series of changes is made to the legal regime of the FROB. The main change in its governance is in relation to the composition of the Governing Committee which from now onwards will comprise nine members appointed by the Minister for Economic Affairs and Finance, two of whom will represent the Ministry for Economic Affairs and Finance (one will be from the Secretariat of State for Finance and the Budget and the other will be from the Secretariat of State for Economic Affairs) four will be proposed by the Banco de España and three will represent the Deposit Guarantee Funds (DGFs).

DEROGATIONS AND SPECIFIC FEATURES OF THE ROYAL DECREE-LAW

The newly-created banks and credit cooperatives which have arisen as a result of the transfer of the financial activity of one or several credit institutions will not be subject to the time restrictions established for the activity of new banks.[18]

On the other hand, as provided for in Royal Decree-Law 9/2009, if as a result of the restructuring or integration processes of institutions undertaken with the financial support of the FROB or the DGF, control of a listed company were achieved, there would be no obligation to submit a takeover bid in the terms envisaged by Securities Market Law 24/1988 of 28 July 1988 and its implementing regulations.

The credit institutions which are majority-owned by another credit institution with a different legal form will join the DGF to which the latter belongs. The Ministry of Economic Affairs and

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16. See Article 5 of Royal Decree-Law 11/2010 of 9 July 2010 on governing bodies and other aspects of the legal regime for savings banks. **17.** See Article 6 of Royal Decree-Law 11/2010 of 9 July 2010 on governing bodies and other aspects of the legal regime for savings banks. **18.** These limitations are included in Royal Decree 1245/1995 of 14 July 1995 on the creation of banks, cross-border activity and other matters relating to the legal regime of credit institutions.

Finance may establish other cases in which, due to reasons of specific characteristics or economic dependence, a credit institution may join a deposit guarantee fund other than the one which corresponds to it on account of its legal form.

FISCAL MEASURES

Several fiscal measures are envisaged which are aimed at ensuring neutrality in the restructuring processes of the financial system.

The main fiscal issues addressed are the inclusion of credit institutions belonging to an IPS in the tax consolidation group of the core institution, the taking of tax credits prior to the creation of the tax group, the spin-off of the entire financial business by the savings banks to a bank and, finally, intra-group operations where the bank no longer belongs to the tax group.

The purpose of these specific modifications is to ensure that the financial sector restructuring process is undertaken without incurring tax costs associated with the process itself. These tax costs arise because the credit institutions involved in the process cannot take actual or potential tax credits which would be fully deductible in a traditional merger process or because of the inclusion in the tax base of the intra-group profit not yet taxed when the banks leave the tax groups.

The Royal Decree-Law came into force on 20 February 2011 and the Circular came into force on 6 March 2011.

State debt: terms of issuance for 2011 and January 2012

Law 39/2010 on the State Budget for 2011[19] authorised the Minister for Economic Affairs and Finance to increase State debt in 2011, with the limitation that the outstanding balance thereof at end-2011 should not exceed the balance as at 1 January 2011 by more than €43,626 million.

In line with usual practice at this time of year, *Ministerial Order EHA/1/2011 of 10 January 2011* (BOE of 12 January 2011) providing for the creation of State debt during 2011 and January 2012, the *Resolutions of 20 and 24 January 2011* of the Directorate-General of the Treasury and Financial Policy (BOE of 28 and 29 January 2011), providing for certain issues of Treasury bills and of medium- and long-term government bonds, and the schedule of tenders for 2012 and for January 2011, were published.

Broadly, the existing instruments and issuance techniques remain in place. Thus issuance continues to be through tenders (competitive and non-competitive bids),[20] and by other procedures. In particular, a portion or the full amount of an issue could be transferred at an agreed price to one or several financial institutions which underwrite its placement. Similarly, outright sales or the sale under repos of newly issued securities or expanded existing issues that the Treasury might have in its securities account may be performed.

Provision is again made to exclude, for the purpose of calculating weighted average price and interest rate, any competitive bids for Treasury bills and medium- and long-term government bonds not considered to be representative of the market situation, so as not distort the result of the tenders.

TREASURY BILLS

As in previous years, the Resolution sets out the schedule of tenders to be held in 2011 and January 2012. The schedule states the dates of ordinary tenders and the maturity of Treasury

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19. See "Financial Regulation: 2010 Q4", *Economic Bulletin*, January 2011, Banco de España, pp 149-159. **20.** Competitive tenders are those indicating the price, expressed as a percentage of the nominal value, that the bidder is willing to pay for the debt, or the percentage interest rate desired by the bidder; non-competitive tenders are those indicating neither price nor interest rate.

bills, setting the issues and the calls-for-tender simultaneously with the publication of the schedule. However, for reasons of demand or issuance policy, the Treasury may hold additional tenders to those announced.

As in 2010, three-, six-, twelve- and 18-month Treasury bills will be auctioned regularly every month, and the grouping of issues in monthly maturities has been retained to improve their liquidity.[21] The 18-month Treasury bills offered for sale in odd months will have the same maturity as those issued in the previous month, so as to allow a sufficient degree of liquidity from the moment they are issued.

Tenders will continue to be held on the third Tuesday of each month for 12-month and 18-month bills, and on the following Tuesday for 3- and 6-month bills. Original maturities may differ from the stated periods by the number of days necessary to allow the grouping of bills in a single monthly maturity, coinciding with the issue date of 12-month and 18-month bills to make for more convenient reinvestment.

As regards other features, the procedure and allotment of tenders will be the same as in 2010, including the submission of bids in terms of the interest rate quoted on secondary markets, so as to simplify bidding for subscribers.

In competitive tenders, bidders shall state the nominal amount and the interest rate requested by them. The minimum nominal amount continues to be €1,000 and bids above that amount shall be expressed in whole-number multiples thereof. and the bids accepted shall be allotted in each case at the price equivalent to the requested interest rate or at the weighted average interest rate, as applicable on the basis of the result of the tender.[22]

In non-competitive tenders, the minimum nominal amount also remains at €1,000 and bids for higher amounts must be whole-number multiples of this, with the provison that the total nominal amount of the non-competitive bids submitted by a single bidder in each tender may not exceed €1 million, although this limit is raised to €300 million in the case of certain institutions.[23] The bids accepted shall in all cases be allotted at the price equivalent to the weighted average interest rate.

Lastly, as in previous years, tenders will be followed by a second round reserved for those financial institutions that have acquired market-maker status in respect of Treasury bills. The second round will be conducted in accordance with the regulations governing market makers.

MEDIUM- AND LONG-TERM GOVERNMENT BONDS

The Resolution sets out the schedule of tenders to be held in 2011 and January 2012, indicating the dates of the ordinary tenders and the maturity, setting the issues and the call for bids simultaneously with the publication of the schedule. The issuance criteria and procedures are essentially the same as in 2010.

As a new feature, the announcement of the securities to be offered will be changed from a quarterly to a monthly frequency so as to adapt issues more closely to market preferences. The announcement will be made, save exceptions, on the first Thursday of each month, after consultation with market-makers and coinciding with the allotment date of the bond tender,

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21. In shorter-term bill issues (three or six months), the Treasury uses the same classes of securities as it used in the past for longer-term (generally eighteen-month) bills in order to keep the same range of securities on the market but with a higher volume, and thus improve their liquidity.

and will consist of communication of the classes of bonds to be issued in that month and those of the following month's bonds. Also, as is usual practice, issue targets will continue to be announced on the Monday before each tender.

The Treasury may add new bond classes to tenders or decide not to issue at any of the maturities which may have been set in the aforementioned monthly communication. Further, special tenders additional to the scheduled ordinary ones may be held.

As in previous years, the initial maturities will be three and five years for medium-term bonds, and ten, fifteen and thirty years for long-term bonds. Also, bond classes issued in the past will be re-opened with new tranches in order to ensure their liquidity and meet investor demand in the relevant segments by increasing the average volume of outstanding issues. The new issues will bear the nominal interest rate specified in the related Resolution. Provision is also made for the issuance of medium- and long-term bonds tied to some index.

As in the previous year, tenders will, save exceptions, take place on the first Thursday of each month for medium-term bonds and on the third Thursday for long-term bonds. The procedure and allotment of tenders will be unchanged.

The conditions applicable to competitive and non-competitive bids are the same as for Treasury bills. Lastly, as in previous years, tenders will be followed by a second round reserved for those financial institutions that have acquired market-maker status in respect of medium- and long-term bonds.

The Ministerial Order came into force on 13 January 2011 and the Resolutions on 29 and 30 January 2011.

Investment firms: amendment of solvency rules

CNMV Circular 1/2011 of 21 January 2011 (BOE of 25 January 2011) amended Circular 12/2008 of 30 December 2008[24] on the solvency of investment firms and their consolidatable groups, in order to transpose two EU directives: Commission Directive 2009/27/EC of 7 April 2009 amending certain annexes to Directive 2006/49/EC of the European Parliament and of the Council as regards technical provisions concerning risk management, and Commission Directive 2009/83/EC of 27 July 2009 amending certain annexes to Directive 2006/48/EC of the European Parliament and of the Council as regards technical provisions concerning risk management.

As required by Directive 2009/27/EC, the Circular defines and clarifies concepts relating to position risk and counterparty credit risk on certain credit derivatives which were regulated in the annexes to Directive 2006/49/EC and included in Circular 12/2008.

So far, positions in credit derivatives in which the institution had purchased protection have been determined as the mirror principle of the protection seller, with the exception of a credit-linked note (which entails no short position in the issuer). Now it is added that, in the case of

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22. The competitive bids accepted are used to calculate the weighted average price of the tender, expressed as a percentage of the nominal value and rounded up to three decimal places. The allotment price is determined as follows: bids made at the minimum price are allotted at that price; bids between the minimum price and the weighted average price are allotted at the bid price; and bids above the weighted average price, along with non-competitive bids, shall pay the weighted average price. **23.** The Wage Guarantee Fund, the Commercial Bank Deposit Guarantee Fund, the Savings Bank Deposit Guarantee Fund, the Credit Cooperative Deposit Guarantee Fund, the Social Security Reserve Fund, the Investment Guarantee Fund, Sociedad Estatal de Correos y Telégrafos and Sociedad Estatal de Participaciones Industriales (SEPI), or any other public-sector entity or government-owned firm designated by the Treasury. **24.** See "Financial Regulation: 2009 Q1", *Economic Bulletin*, April 2009, Banco de España, pp 188-193.

first-to-default and nth-to-default credit derivatives, a specific treatment described in the Circular applies instead of the mirror principle.

Further, investment firms may consistently include, for the purposes of calculating capital requirements for counterparty credit risk, all credit derivatives included in the trading book forming part of internal hedges or purchased as protection against a counterparty credit risk exposure where the credit protection is recognised under Circular 12/2008.

The capital alleviation from the recognition of insurances and other risk transfer mechanisms shall not exceed 20% of the capital requirement for operational risk before the recognition of risk mitigation techniques.

As regards market disclosure obligations, and, more specifically, those applying to the solvency report, certain clarifications are made in respect of trading book risk and operational risk.

Regarding trading book risk, in addition to the information specified in Circular 12/2008, institutions have to disclose the highest, the lowest and the mean of the daily value-at-risk measures over the reporting period and the value-at-risk measure as per the end of the period. They must also make public a comparison of the daily end-of-day value-at-risk measures to the one-day changes of the portfolio's value by the end of the subsequent business day together with an analysis of any important overshootings during the reporting period.

The institutions using the advanced approach for the calculation of their own funds requirements for operational risk shall disclose a description of the use of insurances and other risk transfer mechanisms for the purpose of mitigation of this risk.

Furthermore, it is made compulsory to publish the solvency report on the website of the investment firm itself or, where applicable, on the website of the consolidatable group to which it belongs.

The Circular partially transposes the content of Commission Directive 2009/83/EC, in what can be classed as clarifications and qualifications of various matters relating to credit risk mitigation techniques. It also introduces changes relating to operational risk and to disclosure obligations, the latter in amendments and additions.

The Circular does not include the changes made by the Directives on the determination of capital requirements for credit risk based on IRB approaches and on the credit risk of securitisations, since these risks are regulated for investment firms and their groups by CBE 3/2008 of 22 May 2008 to credit institutions on determination and control of minimum own funds.[25]

Also, the Circular makes certain changes stemming from the experience gained in the practical application of Circular 12/2008.

The deductions from own funds include tax credits capitalised by institutions as a result of losses incurred in the period whenever, in the judgement of the CNMV, those institutions show a significant deterioration in their own funds for solvency purposes or experience difficulty in replenishing them.

In the calculation of the own funds needed depending on the level of activity, certain qualifications are made regarding overhead costs. Within these costs, it is established that personnel

costs may be reduced by the amount of variable compensation to personnel,[26] under certain conditions and subject to prior approval by the CNMV.

The own funds requirements for counterparty credit risk shall include those for contracts of a nature similar to that of derivatives, such as options, futures and swap contracts, and financial contracts settled net in cash, among others.

Lastly, two new exclusions are added in the limits on large risks: 1) the positions held in collective investment funds and companies of a financial nature[27] and in other non-harmonised investment funds and companies which, in view of their diversification characteristics, can be considered equivalent to them, and 2) the accounts receivable, net of tax, derived from the billing of investment firms' ordinary activities in the 6-month period since they were recorded in the accounts.

The Circular came into force on 26 January 2011.

Collective investment institutions: transactions in derivatives

CNMV Circular 6/2010 of 21 December 2010 (BOE of 11 January 2011) on transactions in derivatives of collective investment institutions (CIIs) implemented Ministerial Order EHA/888/2008 of 27 March[28] on financial transactions of IICs in derivatives clarifying certain concepts of the regulations of Law 35/2003 of 4 November 2003 on CIIs.[29]

The Circular incorporates the provisions of Commission Directive 2010/43/EU of 1 July 2010[30] implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company.

The Circular is structured in four chapters and a series of additional, transitional and final provisions. Chapter I contains the definitions of certain concepts, the general rules for determining the limits on operations in derivatives and specific requirements to be met by some financial instruments to determine whether they are eligible or whether or not they include an embedded derivative.

Chapter II has two sections setting out the content of the methodologies CIIs can apply to measure the market risk limit, specifically, that for calculating the commitment and that for calculating the value at risk (or "VaR"). CIIs should ensure that the methodology they apply is the most appropriate for the investment and risk policy set out in their prospectus and for measuring risk on the basis of investment complexity and of management strategies.

The first section describes the commitment approach, which is similar to that established in CNMV Circular 3/1998 (previously called the "standardised" approach). Certain changes are

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25. CBE 3/2008 was amended recently by CBE 9/2010 of 22 December 2010 in order to transpose the same two EU directives now also transposed by Circular 1/2011. CBE 9/2010 qualified, inter alia, the conditions under which a significant transfer of risk to third parties is deemed to exist, and made certain changes for the calculation of the exposure value of liquidity lines. **26.** This reduction may be made only if this compensation, as assessed in accordance with its true nature, is deemed not to include, either in part or in full, a fixed component of expenses or commitments incurred in respect of personnel. **27.** They have to be authorised in accordance with Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities. **28.** See "Financial Regulation: 2008 Q2", Economic Bulletin, July 2008, Banco de España, pp 153-155. **29.** Enacted by Royal Decree 1309/2005 of 4 November 2005. **30.** See "Financial Regulation: 2010 Q3", *Economic Bulletin*, October 2010, Banco de España, pp 152-155.

introduced in line with the Level 3 work carried out by the Committee of European Securities Regulators (CESR)[31].

The second section develops the VaR methodology, admitting two alternative methodologies: one based on limiting the CII's leverage through the calculation of a VaR relating to a reference (or benchmark) portfolio, and another based on determining a VaR limit in absolute terms.

Additionally, the qualitative and quantitative conditions required for applying the VaR methodology, as well as other risk tests and measures to be implemented to supplement this methodology, are established.

Chapters III and IV establish another series of rules relating to the calculation of counterparty and diversification limits, the framework applicable to CIIs with the specific objective of yield and a list of the criteria for valuing derivative instruments and their underlyings.

Regarding counterparty limits, the solvency requirements provided for in Ministerial Order EHA 888/2008 are specified, along with the balances to be taken into account in calculating them. Also, an explanation is given of how the collateral received for these operations will function, including most notably the broadening of the range of eligible assets (as opposed to the cash, deposits and government debt securities permitted by CNMV Circular 3/1998 of 22 September 1998) and the possibility of reinvestment of these assets to generate an additional return for the CII.

As regards diversification limits, it is explained in more detail how positions have to be calculated under the commitment approach and some specific rules are laid down for calculating certain financial instruments.

Also, the regime applicable to CIIs with the specific objective of optimum returns is developed, a detailed definition of the characteristics to be met by these institutions is established and the regime applicable to them is specified as regards the temporary non-valuation of positions and the overshooting of the limits set in current legislation, both for those secured by collateral provided by third parties to a CII and those that are not.

Furthermore, specific rules and criteria are given which must be taken into account in valuing derivative instruments both in possible generally accepted models and in the procedures and controls to be established by institutions for appropriately valuing those investments.

The addition provisions introduce the following: 1) changes are made to certain confidential returns which CIIs and management companies have to submit to the CNMV, and three new returns are included, two for CIIs that apply any of the VaR approaches for calculating the global exposure and another additional one for ancillary information; 2) a new return is established for listed index open-end investment companies in CNMV Circular 4/2008 of 11 September 2008 on the content of quarterly, half-yearly and yearly reports of CIIs; 3) changes were made to the calculation of the debt limit set out in CNMV Circular 6/2008 of 26 November 2008 on determination of the net asset value and operational aspects of financial and real estate CIIs; 4) CNMV Circular 6/2009 of 9 December 2009 on internal control of CII management companies and investment firms is amended to include procedures for selecting inter-

31. This body's objective is to give concrete form to the initiatives to harmonise methodologies for calculating market risk undertaken due to the European Commission Recommendation on the use of financial derivative instruments by UCITS (2004/383/EC).

mediaries when these provide analysis services; and 5) CNMV Circular 1/2006 of 3 May 2006 on hedge funds is amended so that the calculation of CII management companies' own funds for solvency purposes takes into account the fees received for managing foreign CIIs deemed to be equivalent to Spanish hedge funds.

The Circular came into force on 12 January 2011.

Official secondary markets for futures, options and other derivative financial instruments: new regulations

The *CNMV Resolution of 21 December 2010 (BOE of 5 January 2010)* promulgated the new Official Secondary Futures and Options Market ("MEFF" by its Spanish abbreviation) Regulations, under the powers granted by Royal Decree 1282/2010 of 15 October 2010[32] on official secondary markets for futures, options and other derivative financial instruments.

The new Regulations consist of nine chapters and implement the provisions contained in Royal Decree 1282/2010.

Chapter I sets out the scope of application, in which it is established that the market will be governed and managed by MEFF, Sociedad Rectora de Productos Derivados, SAU (MEFF), the functions of which are specified.

Chapter II regulates the conditions of MEFF membership:[33] admission of members, their rights and obligations, the types of members, and the requirements to be met in each case in order to become a member.

Chapter III is devoted to clients, regulating the requirements for acquiring client status, clients' rights and obligations, and the minimum content of contracts between market members and clients.

Chapters IV and V address contracts and the trading thereof, general trading criteria, dissemination of information on trading and the cases in which such trading can be suspended. The general conditions of contracts are set out in the annex to the Regulations.

Chapter VI sets out the various registers: the accounting register, the central register and the detail register. The MEFF will keep the accounting register and the central register, the latter, where applicable, in conjunction with the Recording Members, who will keep the detail register.

Chapter VII describes the MEFF's functions as counterparty in all contracts traded in the market trading system, with certain exceptions. It also specifies the collateral that can be required by MEFF to secure different risks.

Chapter VIII sets out the default events applicable to both market members and clients and the measures to be taken in such cases, which may lead to loss of market member or client status.

Chapter IX focuses on supervisory bodies and claims or complaints. The Supervisory and Oversight Committee, General Market Supervisor and Market Supervisors are created to ensure that the market functions properly. Finally, a procedure is established to resolve incidents

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32. See "Financial Regulation: 2010 Q4", *Economic Bulletin*, January 2011, Banco de España, pp 145-147. **33.** The following institutions, among others, may become members: investment firms, including securities firms, portfolio management companies and financial advice firms, and credit institutions, including both Spanish ones and those authorised in other Member States; Spanish central government, through the Directorate General of the Treasury and Financial Policy; the Social Security System General Treasury; the Banco de España; and others that the market operator considers to be suitable.

between members, members' claims vis-à-vis MEFF and clients' claims vis-à-vis members and MEFF.

The Regulations came into force on 24 January 2011.

Securitisation special purpose entity (SPE) promotion agreements

Ministerial Order PRE/627/2011 of 22 March 2011 (BOE of 25 March 2011) replaced and repealed Ministerial Order PRE/3/2007 of 10 January 2007[34] on securitisation special purpose entity promotion agreements to foster business financing.

The new legislation introduced the following new features:

The Treasury is empowered to require that the State receive a fee for granting guarantees, the amount of which will be based on the nominal amount of the fixed-income securities guaranteed and their credit rating before taking into account the granting of the guarantee. The fee must be satisfied by the manager of the securitisation SPE with a charge to or for the account of that SPE. The fee which, where applicable, is applied for each securities issue, will be made public, prior to commencement of the period for submission of applications, by means of a resolution of the Directorate General of SME Policy, at the proposal of the Treasury.

The deadline for sumitting applications is set at one fortnight later to make it easier to comply with the new requirement of previously making public the fee, if any, applicable to each securities issue.

Lastly, the Chair of the Evaluation Committee is held by the Directorate General of SME Policy, which is also empowered to modify the forms of agreement.

The Ministerial Order came into force on 26 March 2011.

Measures to combat late payment in commercial transactions: changes to EU legislation

Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 (OJ L of 23 February 2011) replaced and repealed Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2011 on combating late payment in commercial transactions.

Table 1 briefly compares these two directives.

The Directive updates the definition of statutory interest for late payment which the ceditor is entitled to receive for late payment in commercial transactions. This interest is equal to the reference rate plus at least eight percentage points. The reference rate for the Member States of the euro area is either of the following: a) the interest rate applied by the European Central Bank to its most recent main refinancing operations, or b) the marginal interest rate resulting from variable-rate tender procedures for the most recent main refinancing operations of the European Central Bank. The reference rate for the other Member States is the equivalent rate set by their national central banks.[35]

Unlike Directive 2000/35/EC, the new Directive specifically distinguishes commercial transactions between private-sector firms from those in which the debtor is a public authority.

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34. See "Financial Regulation: 2007 Q1", *Economic Bulletin*, April 2007, Banco de España, pp 140 and 141. **35.** Previously, the rate of interest for late payment which the debtor had to pay was the sum of the interest rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question ('the reference rate') plus at least seven percentage points ('the margin'), unless otherwise specified in the contract.

MEASURES TO COMBAT LATE PAYMENT IN COMMERCIAL TRANSACTIONS

TABLE 1

Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000	Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011
TRANSACTIONS BETWEEN FIRMS	
The creditor is entitled to interest for late payment from the day following the date or the end of the period for payment fixed in the contract.	No significant change.
Where the date or period for payment is not fixed in the contract, the creditor is entitled to interest for late payment upon the expiry of any of the time limits specified by the Directive (receipt of invoice, receipt of the goods or services or verification of conformity of the goods or services).	No significant change.
TRANSCTIONS BETWEEN PRIVATE FIRMS AND PUBLIC AUTHORITIES	
Not specifically provided for.	The time periods are the same as those for transactions between private firms.
	Excepcionally, the time limit may be extended up to a maximum of 60 calendar days for: (a) any public authority which carries out economic activities of an industrial or commercial nature by offering goods or services on the market and which is subject, as a public undertaking, to EU transparency requirements; or (b) public entities providing healthcare which are duly recognised for that purpose.
OTHER NEW FEATURES	
The rate of interest for late payment is the sum of the interest rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question ('the reference rate') plus at least seven percentage points, unless otherwise specified in the contract.	The statutory interest for late payment is equal to the reference rate plus at least eight percentage points. The reference rate for the Member States of the euro area is either of the following: a) the interest rate applied by the European Central Bank to its most recent main refinancing operations, or b) the marginal interest rate resulting from variable-rate tender procedures for the most recent main refinancing operations of the European Central Bank.
Not envisaged.	Where interest for late payment becomes payable, the creditor is entitled to obtain from the debtor, as a minimum, a fixed sum of €40.
Not envisaged.	The creditor shall be entitled to obtain reasonable compensation from the debtor for any recovery costs exceeding the aforementioned amount and incurred due to the debtor's late payment.
Not envisaged.	Contractual terms and practices which may be unfair to the creditor are regulated.

SOURCES: Spanish Official State Gazette and Banco de España.

TRANSACTIONS BETWEEN FIRMS

The creditor continues to be entitled to interest for late payment from the day following the date or the end of the period for payment fixed in the contract. Where the date or period for payment is not fixed in the contract, the creditor is (indistinctly) entitled to interest for late payment upon the expiry of any of the following time limits:

a) 30 calendar days following the date of receipt by the debtor of the invoice or an equivalent request for payment or, where the date of the receipt of the invoice or the equivalent request for payment is uncertain, 30 calendar days after the date of receipt of the goods or services;

b) where the debtor receives the invoice or the equivalent request for payment earlier than the goods or the services, 30 calendar days after the date of the receipt of the goods or services;

c) Where there is a procedure of acceptance or verification, by which the conformity of the goods or services with the contract is to be ascertained, 30 calendar days after that date, unless otherwise expressly agreed in the contract and provided it is not grossly unfair to the creditor.

Member States shall ensure that the period for payment fixed in the contract does not exceed 60 calendar days, unless otherwise expressly agreed in the contract and provided it is not grossly unfair to the creditor.

TRANSACTIONS BETWEEN FIRMS AND PUBLIC AUTHORITIES

Member States shall ensure that in commercial transactions where the debtor is a public authority the period for payment does not exceed any of the time limits specified above for transactions between firms in those cases in which the period for payment is not specified (30 calendar days).

However, Member States may extend the time limit up to a maximum of 60 calendar days for: (a) any public authority which carries out economic activities of an industrial or commercial nature by offering goods or services on the market and which is subject, as a public undertaking, to EU transparency requirements;[36] or (b) public entities providing healthcare which are duly recognised for that purpose.

Member States shall ensure that the contract does not specify a longer period for payment, unless otherwise expressly agreed in the contract and provided it is objectively justified in the light of the particular nature or features of the contract, and that it in any event does not exceed 60 calendar days.

OTHER NEW FEATURES IN THE DIRECTIVE

Certain creditor compensation is established for possible costs of collection from the debtor. Thus Member States shall ensure that, where interest for late payment becomes payable, the creditor is entitled to obtain from the debtor, as a minimum, a fixed sum of €40. This amount will be payable without the necessity of a reminder and as compensation for the creditor's own recovery costs.

In addition, the creditor shall be entitled to obtain reasonable compensation from the debtor for any recovery costs exceeding the aforementioned amount and incurred due to the debtor's late payment. This could include expenses incurred, inter alia, in instructing a lawyer or employing a debt collection agency.

Contractual terms and practices which may be unfair to the creditor are regulated. In these cases, Member States shall provide that such terms or practicesare either unenforceable or give rise to a claim for damages.

Member States shall transpose the Directive to their national law by 16 March 2013.[37] In transposing the Directive, Member States shall decide whether to exclude contracts concluded before 16 March 2013.

The Directive came into force on 15 March 2011.

5.4.2011.

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37. In Spain, the Directive was partially transposed by Law 15/2010 of 5 July 2010 amending Law 3/2004 of 29 December 2004 on combating late payment in commercial transactions. **36.** These requirements are laid down in Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings.