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## Introduction

In 2011 Q4 numerous financial provisions were promulgated, as is usual in the last part of the year.

The European Central Bank (ECB) has instituted three new measures: 1) it has updated the Eurosystem's monetary policy instruments and procedures, which were promptly incorporated by the Banco de España in its general clauses; 2) it has changed the minimum reserve requirements; 3) it has made certain changes to the TARGET2 rules, which the Banco de España promptly included in its TARGET2-BE.

Various legal provisions were promulgated in the area of credit institutions: 1) several new features were introduced in solvency legislation, thereby completing the transposition of EU legislation in this area; 2) the public and confidential financial reporting rules and formats were updated; 3) the three deposit guarantee funds were merged; and 4) legal changes were approved in the areas of bank transparency and customer protection.

The calculation of market makers' participation in the second round of government bond auctions has been made more flexible and the law on cross-border economic transactions has been updated.

In the stock market, a considerable number of measures have been promulgated: 1) the Securities Market Law was amended to update, among other things, the securities clearing, settlement and registration system, introducing the central counterparty, for which purpose the legal regime applicable to Iberclear was amended and a regulatory regime for central counterparties was set in place; 2) significant changes were made to the law on investment firms, affecting their solvency regime, their accounting rules and brochures of fee and commission charges; 3) substantial changes were made to the legal regime governing collective investment institutions (CIIs) to adapt it to EU legislation; and 4) the accounting rules for CIIs, official secondary market operators (except the Banco de España), multilateral trading facility operators and the System Operator were updated.

In the EU area, new cases in the calculation of the annual percentage rate (APR) in consumer credit contracts were defined.

Finally, the article summarises the financial aspects of three pieces of legislation enacted in the fourth quarter of the year: 1) urgent budgetary, tax and financial measures for remedying the budget deficit; 2) new legislation to expedite legal proceedings; and 3) the reform of the Insolvency Law.

## European Central Bank: amendment of legislation on monetary policy instruments and procedures of the Eurosystem

*Guideline ECB/2011/14 of 20 September 2011* (OJ L of 14 December 2011), in addition to introducing certain changes into *Guideline ECB/2000/7 of 31 August 2000* on monetary policy instruments and procedures of the Eurosystem, recasts and repeals it.

Also, the *Resolution of 18 October 2011* (BOE of 27 December 2011) of the Executive Commission of the Banco de España amends the resolution of 11 December 1998<sup>1</sup> ap-

<sup>1</sup> See "Financial Regulation: 1998 Q4", *Economic Bulletin*, January 1999, Banco de España, pp. 78-82.

proving the general clauses applicable to monetary policy operations in order to adopt the amendments set out in the aforementioned Guideline.

The main new developments are described below.

General clause II “Monetary policy operations” add to the requirements which institutions have to meet to carry out monetary policy operations the obligation that they be aware of and comply with all the obligations imposed on them by legislation on the prevention of money laundering and terrorist financing.

General clause VI “Collateral” specifies that all the discretionary measures applied by the Banco de España to the issuer, debtor, guarantor or counterparty solvency level to ensure prudent risk management shall be applied and calibrated in a proportionate and non-discriminatory manner. Those taken vis-à-vis an individual counterparty shall be duly justified.

Finally, general clause VIII “Effects of default events” also requires that the principles of proportionality and non-discrimination be applied if the Banco de España suspends, limits or excludes a counterparty’s access to monetary policy operations (open market operations and standing facilities), whether it be on the grounds of prudence or following an event of default.

The Guideline and the Resolution became applicable on 1 January 2012.

#### European Central Bank: amendment of minimum reserve requirement

*Regulation 1348/2011 of the ECB (ECB/2011/26) of 14 December 2011* (OJ L of 21 December 2011) amended Regulation 1745/2003 (ECB/2003/9) of 12 September 2003 on the application of minimum reserves.<sup>2</sup>

A reserve ratio of 0% shall apply to the following liabilities: 1) deposits with agreed maturity over two years; 2) deposits redeemable at notice over two years; 3) repos; 4) debt securities issued with an agreed maturity over two years. A reserve ratio of 1 % shall apply to all other liabilities included in the reserve base. Also, the reserve ratio of 2% is reduced to 1% for all other liabilities included in the reserve base.

The Regulation came into force on 24 December 2011 and will apply from the maintenance period<sup>3</sup> beginning on 18 January 2012.

#### Update of TARGET2 rules

*Guideline ECB/2011/15 of 15 October 2011* (OJ L of 26 October 2011) amended Guideline ECB/2007/2 of 26 April 2007<sup>4</sup> on a Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET2), and the *Resolution of 15 November 2011* of the Executive Commission of the Banco de España amended the resolution of 20 July 2007<sup>5</sup> approving

<sup>2</sup> According to the ECB Statute, each credit institution must hold its minimum reserves in one or more reserve accounts with the national central bank in the Member State in which it is established, in relation to its reserve base in the corresponding Member State, in line with Eurosystem monetary policy targets. The following are subject to minimum reserve requirements: 1) credit institutions; 2) branches that have their registered or head office located in a participating Member State; and 3) branches of credit institutions established in the participating Member States that are located outside the participating Member States shall not be subject to minimum reserves. The ECB may exempt from reserve requirements, on a non-discriminatory basis, certain credit institutions, such as those subject to restructuring measures or those subject to the freezing of funds or other measures imposed by the Community or a Member State restricting the use of their funds or a decision of the ECB’s Governing Council suspending or excluding their access to open market operations or the Eurosystem’s standing facilities.

<sup>3</sup> The schedule of maintenance periods is adapted to the schedule of the ECB Governing Council meetings in which the monthly assessment of monetary policy stance is to be carried out.

<sup>4</sup> See “Financial Regulation: 2007 Q3”, *Economic Bulletin*, October 2007, Banco de España, pp. 151-152.

<sup>5</sup> See “Financial Regulation: 2007 Q3”, *Economic Bulletin*, October 2007, Banco de España, pp. 152-153.

the general clauses relating to the uniform conditions of participation in TARGET2-BE, for the purpose of adapting it to the aforementioned Guideline.

The basic purpose of the Guideline is to include the “grounds of prudence” among the criteria on the basis of which a national central bank (NCB) may reject an application for participation in TARGET2 and among the reasons why a participant’s participation in TARGET2 may be suspended or terminated without notice.

“Grounds of prudence” are also added to the reasons for suspending, limiting or terminating a participant’s access to intraday credit, in which case the participating NCB shall immediately notify the ECB and other participating NCBs.

Also added are new requirements for TARGET2 participants related to administrative and restrictive measures and to other similar matters.

Specifically, participants, when acting as the payment service provider of a payer or payee, shall comply with all requirements resulting from administrative or restrictive measures imposed pursuant to the Treaty on the Functioning of the European Union (EU), including with respect to notification and/or the obtaining of consent from a competent national authority in relation to the processing of transactions.

When the NCB is the payment service provider of a participant that is a payer or payee, the participant shall make the required notification or obtain consent on behalf of the NCB that is primarily required to make notification or obtain consent, and shall provide evidence of having done so. Also, the participant shall not enter any credit transfer order into TARGET2 until it has obtained confirmation from the NCB that the required notification has been made or the consent has been obtained by or on behalf of the payment service provider of the payee.

The Guideline and the Resolution were applied from 21 November 2011.

**Credit institutions:  
amendment of regulations  
on the determination and  
control of minimum own  
funds**

*Circular CBE 4/2011 of 30 November 2011* (BOE of 9 December 2011) amended CBE 3/2008 of 22 May 2008<sup>6</sup> on determination and control of minimum own funds.

The Circular completes the transposition of current EU legislation on own funds.<sup>7</sup> This transposition was initiated with Sustainable Economy Law 2/2011 of 4 March 2011<sup>8</sup> and followed up by Law 6/2011 of 11 April 2011,<sup>9</sup> which amended Law 13/1985 of 25 May 1985<sup>10</sup> on investment ratios, own funds and reporting requirements for financial intermediaries, Law 24/1988 of 28 July 1988<sup>11</sup> on the securities market and Legislative Royal Decree 1298/1986 of 28 June 1986 on the adaptation of current credit institution law to EU legislation, and, finally, by Royal Decree 771/2011 of 3 June 2011 amending Royal Decree 216/2008 of 15 February 2008 on the own funds of financial institutions.

6 See “Financial Regulation: 2008 Q2”, *Economic Bulletin*, July 2008, Banco de España, pp. 133-143.

7 Contained in Directive 2009/111/EC of the European Parliament and of the Council and in Directive 2010/76/EU, also of the European Parliament and of the Council.

8 See “Financial Regulation: 2011 Q1”, *Economic Bulletin*, April 2011, Banco de España, pp. 159-163.

9 See “Financial Regulation: 2011 Q2”, *Economic Bulletin*, July 2011, Banco de España, pp. 135-143.

10 See “Regulación financiera: segundo trimestre de 1985”, *Boletín Económico*, July-August 1985, Banco de España, pp. 51 and 52.

11 See “Regulación financiera: tercer trimestre de 1988”, *Boletín Económico*, October 1988, Banco de España, pp. 61 and 62.

Also, headway was made in adapting Spanish prudential regulation to the new criteria set by the Basel Committee on Banking Supervision in the so-called “Basel III” rules.<sup>12</sup>

Table 1 sets out the main new developments in the Circular.

#### CHANGES IN THE CALCULATION OF OWN FUNDS

Original own funds (tier 1 capital), additional own funds (tier 2 capital) and ancillary own funds (tier 3 capital)

As regulatorily specified, original own funds (tier 1 capital) consist of eligible capital and reserves, net of losses, intangible assets and other deductions directly affecting this capital (prior year losses and own shares, among others), plus preference shares and non-voting shares or similar equity meeting the requirements of the Circular, as discussed below.

The previously established limitations remain in place: 1) original own funds (tier 1 capital) shall exclude preference shares and non-voting shares exceeding 30% of tier 1 capital, and 2) eligible capital and reserves, net of losses, intangible assets and the other deductions mentioned above must exceed 50% of tier 1 capital.

The composition of additional own funds (tier 2 capital) and ancillary capital (tier 3 capital – outstanding short-term subordinated debt) undergoes no substantial change.

Share capital

It is specified that credit institutions may not, at the time of share issuance, create any expectation that the share capital will be bought back, rescued or redeemed. In this respect, the contribution of share capital to the absorption of losses of the issuer shall be deemed to be less if it carries some kind of preferential right in the distribution of corporate earnings or in liquidation, and particularly if the dividend or coupon fails to meet one or more of the following conditions: it must be paid out of positive net profit for the year or out of distributable reserves that are sufficient in amount to meet such payment; 2) it may not exceed the distributable amount formed by the positive net profit for the year and the distributable reserves; 3) it may not in any way be linked or tied to the amount paid in at issuance; and 4) it is not subject to a stipulated limit, except as legally envisaged for credit cooperatives.

Furthermore, neither the issuer nor any firm in its economic group may secure or guarantee the amount paid in or the dividend/coupon, which, moreover, may not be the subject of guarantees, commitments or agreements of any kind that legally or economically improve the seniority of the claim.

Preference shares

A new legal regime for preference shares is set in place in conformity with the changes introduced by Royal Decree 771/2011, the most notable of which are set forth below.

The payment of remuneration shall be cancelled if the issuing or parent credit institution, or its consolidable group or sub-group, does not meet the minimum capital requirements, and, in any event, shall be conditional on the existence of distributable profit or reserves at the issuing or controlling credit institution. Also, the Banco de España may order its cancellation based on the financial and solvency situation of the issuing or parent credit institution or of its consolidable group or sub-group. Nevertheless, payment of the remuneration may (if so permitted by the terms of issue) be replaced by the delivery of ordinary shares, non-voting equity

<sup>12</sup> Specifically, firstly, regulatory capital instruments, particularly those eligible to form part of tier 1 capital, to strengthen banks' loss absorbing capacity in stress situations and their stability, and, secondly, progress in improving, inter alia, the provisioning of exposures to trading book risk, securitisation risk, liquidity risk, off-balance-sheet risk and counterparty risk derived from exposures in derivatives, among other.

CBE 3/2008 of 22 May 2008

CBE 4/2011 of 30 November 2011

<b>Determination of own funds</b>	
The share capital dividend/coupon shall be conditional on the existence of positive net profit for the year or, upon prior authorisation from the Banco de España, of distributable reserves of sufficient amount to meet such payment.	Dividend/coupon requirements are broadened. Also, it is specified that credit institutions may not, at the time of share issuance, create any expectation that the share capital will be bought back, rescued or redeemed.
Not envisaged.	The related legal regime is developed and broadened in accordance with the changes introduced by Royal Decree 771/2011. Notable among the new developments are that it is prohibited to offer early redemption incentives and that the payment of remuneration may be replaced by the delivery of ordinary shares or similar instruments.
Preference shares may not contain clauses providing for rescue, buy-back or early redemption at the option of the holder, although the debtor may redeem them early at any time upon prior authorisation from the Banco de España if the institution's solvency is unaffected.	Early redemption is only permitted once the first five years have elapsed from payment of the issue, provided that the institution's financial situation or solvency is unaffected, subject to prior authorisation by the Banco de España.
Not envisaged.	The conditions applying to subordinated debt are stipulated. Specifically, it cannot be secured or covered by a guarantee of the issuer or other agreement of any kind that legally or economically enhances the seniority of the claim vis-à-vis general creditors.
The calculation of own funds involves the deduction of certain items, such as prior year losses and own shares, among others.	Those established in CBE 3/2008 are retained and new items added.
<b>Securitisation</b>	
It is stipulated when a credit institution other than the originator, sponsor or original lender may assume an exposure to the credit risk of a securitisation position in its trading book or non-trading book.	It is stipulated when a credit institution other than the originator, sponsor or original lender may assume an exposure to the credit risk of a securitisation position in its trading book or non-trading book, if the originator, sponsor or original lender has explicitly disclosed to the credit institution that it will retain, on an ongoing basis, a material net economic interest, which in no case may be less than 5%.
Credit institutions must know totally and in detail each and every one of their securitisation positions.	Credit institutions must be able to demonstrate to the Banco de España that they know totally and in detail each and every one of their securitisation positions and that they have applied the appropriate formal policies and procedures in proportion to the risk profile of their investors in securitised positions.
Not envisaged.	Originator and sponsor credit institutions must apply to securitised exposures the same credit extension criteria set in the Circular for credit and counterparty risk.
Not envisaged.	The concept of re-securitisation is introduced. Re-securitisation positions shall receive the same risk weight as that assigned to the securitisation positions, and the same credit quality shall be applied to them.
Not envisaged.	Additional capital requirements are imposed for negligence or lack of due diligence of the credit institution exposed to the securitisation position risk.
<b>Liquidity risk management</b>	
Not specifically envisaged.	Institutions have to adjust their internal strategies and policies and to prepare effective emergency plans addressing an adequate range of time horizons, including intraday, to ensure that they hold an appropriate level of liquidity.
<b>Credit institutions' remuneration policies</b>	
Credit institutions shall have sound internal governance procedures commensurate with the nature, scale and complexity of their activities.	Among other things, credit institutions must considerably reduce variable remuneration when their financial performance is mediocre or negative.
Not envisaged.	Those institutions which have, for restructuring or write-down purposes, received government financial support that has not yet been fully paid back may not pay variable remuneration to their directors and managers, unless adequately justified to the Banco de España.
<b>Other new developments</b>	
Calculation techniques are laid down for trading book positions, counterparty credit risk, market risk and external credit assessments.	Certain technical changes are made in relation to trading book positions, counterparty credit risk, market risk and external credit assessments.
Rules are laid down for ECAIs.	The rules for ECAIs are updated to adapt them to European legislation.

SOURCES: Official State Gazette and Banco de España.

units or contributions to the capital of credit cooperatives by the issuing or parent credit institution, provided that this allows its financial resources to be preserved. Such delivery of equity instruments shall only be admissible if certain conditions set out in the Circular are met:

- 1) The board of directors or equivalent body of the issuing or parent credit institution has full discretion to cancel, whenever considered necessary, payment of the remuneration for an unlimited period.
- 2) If the issuing or parent credit institution, or its consolidable group or sub-group, suffers material losses or a significant fall in the indicators of compliance with capital requirements, the terms of issue of the preference shares must set in place sufficiently clear mechanisms<sup>13</sup> that ensure preference shareholders will share in the absorption of current or future losses and that do not hinder any recapitalisation processes, whether they be through the conversion of preference shares into ordinary shares, non-voting equity units or capital contributions to credit cooperatives, of the issuing or parent credit institution, or through the reduction of the nominal value.
- 3) In the event of early redemption of preference shares on the issuer's initiative, the issuer may only redeem them early from the fifth year after they were paid in, following prior authorisation from the Banco de España and provided the institution's financial situation and solvency are unaffected. As a new feature, the Circular signals the cases in which an institution's solvency is not altered:
  - 1) when the institution replaces the redeemed instrument with eligible capital items of the same or higher quality and such replacement is done at conditions which are sustainable for the income capacity of the institution, or
  - 2) the institution demonstrates that its regulatory capital suitably exceeds the minimum requirements after the transaction.

The contractual clauses governing preference shares may not include early redemption incentives, whether direct, such as step-ups in the associated interest rate, or indirect, such as remuneration which rises if the credit quality of the issuer or firms in its group decreases; nor may the issuer create any expectation whatsoever that the call option will be exercised or that the preference shares will be redeemed in any other way. Also, they must stipulate that failure to pay remuneration or repay principal will not empower the investor to call for declaration of bankruptcy or demand that maturity of the issue be brought forward. Finally, the institution may not create any expectation whatsoever that the call option will be exercised or that the preference shares will be redeemed in any other way.

Subordinated debt

The conditions are stipulated under which subordinated debt financing<sup>14</sup> received by a credit institution will form part of own funds. Thus the issue agreements and prospectuses

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<sup>13</sup> These mechanisms shall apply in either of the following circumstances: 1) the issuing or parent credit institution, or its consolidable group or sub-group, has a predominant capital ratio below 5.125%. For this purpose, predominant capital is defined as tier 1 capital, having regard to the recommendations of the Basel Committee on Banking Supervision on certain deductions (such as, for example, deferred tax assets, the realisation of which depends on the future profitability of the institution) which detract from the loss-absorbing capacity of that capital in situations of stress, or 2) the tier 1 capital ratio, calculated taking the same base as for the solvency ratio, is below 6% and the issuing or parent credit institution, or its consolidable group or sub-group, incurs material accounting losses. Material losses are deemed to be incurred when the cumulative loss in the past four quarters has reduced the previous capital and reserves of the institution by one-third.

<sup>14</sup> Subordinated debt financing is defined as that which, for debt seniority purposes, ranks below all general creditors.

shall clearly state its nature of subordinated debt for creditors, meaning it cannot be secured or covered by a guarantee of the issuer or of any firm in its economic group or other agreement of any kind that legally or economically enhances the seniority of the claim vis-à-vis said general creditors.

The Circular provides that standard subordinated debt (that with an original maturity of not less than five years) may be redeemed early by the debtor, but only once the first five years have elapsed from disbursement of the financing, provided that the institution's solvency is unaffected, subject to prior authorisation by the Banco de España.<sup>15</sup>

Regarding perpetual subordinated debt, i.e. that which does not have a maturity date, the Circular retains the possibility of early redemption from the fifth year after the financing was paid in, provided the institution's solvency is unaffected, subject to prior authorisation by the Banco de España.

In both cases, the conditions under which the institution's solvency is unaffected are spelled out: 1) when the redeemed instrument is replaced with own funds of the same quality or with elements qualifying as tier 1 capital, and that replacement is done at conditions which are sustainable for the income capacity of the institution, or 2) when the institution demonstrates that its regulatory capital amply exceeds the minimum requirements after the transaction.

Further, unlike previously, the contractual clauses permitting early redemption at the issuer's option may not include redemption incentives, such as, for example, interest rate step-ups if the call option is not exercised. Moreover, expectations may not be created that the call option will be exercised and it is not allowed to include clauses containing indirect redemption incentives, such as remuneration which rises if the credit quality of the issuer or firms in its group decreases.

Non-voting shares and other instruments

To qualify as tier 1 capital, the non-voting shares issued by Spanish firms have to meet the requirements imposed on preference shares and must be available to cover the risks and losses of the issuer in the event of write-offs or winding-up. The securities analogous to non-voting shares issued by foreign firms must meet these requirements, taking into account their corporate law.

Lastly, own funds include mandatory convertible debt instruments and those issued in accordance with the third transitional provision of Royal Decree 2/2011 of 18 February 2011 on the strengthening of the Spanish financial system, provided that they meet the requirements for preference shares to qualify as capital.<sup>16</sup>

Deductions from own funds

In addition to the elements specified in the previous rules, the following shall be deducted from own funds: 1) indirect positions in shares, contributions or other securities qualifying as own funds of the institution held through net positions in indices which include them, and 2) financing to third parties for the purpose of acquiring shares, contributions or other securities qualifying as own funds of the institution included in the previous legal rules. The Circular stipulates that the deduction will apply whatever the purpose of the acquisition

<sup>15</sup> Previously, early redemption was allowed at any time provided it did not affect the institution's solvency, subject to prior authorisation by the Banco de España.

<sup>16</sup> See Article 7.1 and the additional provision of Law 13/1985 on investment ratios, own funds and reporting requirements for financial intermediaries.

and although the purchased securities are included in the trading portfolio or the purchase is made as a result of market-making activity.

Securitisations which receive a 1250% risk weight continue to be deducted, except when this amount has been included in the calculation of risks weighted for the calculation of capital requirements for securitised assets. The Circular stipulates that this applies regardless of whether or not they are included in the trading portfolio.

#### RISK WEIGHTS

Certain changes are made to the risk weights of covered bonds,<sup>17</sup> which in general will continue to receive a risk weight based on that assigned to the risk assets or exposures serving as security for those bonds. Thus, if the collateral is unsubordinated securities which are issued by securitisation vehicles regulated by the legislation of a Member State and which securitises loans secured by residential or commercial mortgages, and complies with the former legal rules, those unsubordinated securities may not exceed 10% (previously 20%) of the nominal value of the assets assigned to the secured bonds.

As regards risk exposures to regional governments and local authorities, which have so far had a weight of 0%, they will be assigned a weight of 20% if the exposures are denominated in their national currency, although this will not apply until 1 January 2016.

#### CONSOLIDABLE GROUPS OF CREDIT INSTITUTIONS

Institutional protection schemes are added to the list of consolidable groups of credit institutions in accordance with Law 13/1985.<sup>18</sup>

In these cases the central institution of an IPS is considered to be the parent entity for all the purposes of this Circular. Also, when the institutions forming part of an IPS assign to the central institution all their financial business,<sup>19</sup> or pool all their profits, they shall deem certain individual solvency requirements stipulated in the Circular to have been met.

Savings banks which have assigned the direct pursuit of their financial activity, and are excluded from the consolidable group to which they belong, must continue complying with solvency requirements individually. However, they shall be exempt from complying with the financial statement submission obligation set in the Circular, without prejudice to the disclosures which may be requested by the Banco de España in the framework of its supervisory actions.

#### SECURITISATION

As set out in Law 6/2011, implemented by Royal Decree 771/2011, a credit institution other than the originator, sponsor or original lender may only be exposed to the credit risk of a securitisation position in its trading book or non-trading book if the originator, sponsor or original lender has explicitly disclosed to the credit institution that it will

<sup>17</sup> "Covered bonds" are defined as the mortgage-backed securities referred to in Law 2/1981 of 25 March 1981 on mortgage market regulation, the territorial covered bonds regulated by Law 44/2002 of 22 November 2002 on financial system reform measures and the others listed in Royal Decree 1309/2005 of 4 November 2005 enacting the implementing regulations of the collective investment institutions law and Directive 85/611/EEC that are backed by certain assets ear-marked exclusively for protecting the bond-holders against losses.

<sup>18</sup> In conformity with the amendments made by Law 36/2007 of 16 November 2007.

<sup>19</sup> In accordance with the third additional provision of Royal Decree-Law 2/2011 of 18 February 2011 on the strengthening of the Spanish financial system.



retain, on an ongoing basis, a material net economic interest,<sup>20</sup> which in no case may be less than 5%. This interest shall be measured at source and must be ongoing and not subject to any credit risk reduction, to any short position or to any hedging. As an exception, the Circular specifies certain cases in which this rule will not apply, such as, for example, when the securitised exposures are loans unconditionally and irrevocably guaranteed by general government of Member States, the institutions to which a risk weight of 50% or less has been assigned or the securitisation originators or sponsors, except in the case of own liabilities which transfer credit risk vis-à-vis third parties (credit-linked notes).

Before investing, credit institutions must be able to demonstrate to the Banco de España that they know totally and in detail each and every one of their securitisation positions and that they have applied the appropriate formal policies and procedures in proportion to the risk profile of their investors in securitised positions.

Credit institutions shall regularly conduct stress tests appropriate for their securitisation positions. For this purpose, the financial models developed by an external credit rating agency (ECAI<sup>21</sup>) may be used, provided they can demonstrate, when so required, that prior to the investment they checked the methodology, pertinent assumptions and results.

Originator and sponsor credit institutions must apply to the exposures to be securitised by them the same sound and well defined credit extension criteria which, under the rules set in the Circular for credit and counterparty risk, they apply to the exposures to be retained by them. For each securitisation, the information must be available or cited on the website of at least one of the following institutions and, whenever possible, in the following order: originator, sponsor and original lender. This does not mean that they are necessarily the ones that provide the information, since they may just refer the interested party to the place where that information can be found. Thus the provider of the information may be, for example, the manager of the securitisation.

Finally, the Circular introduces two new developments: first, “re-securitisation”,<sup>22</sup> which means a securitisation where the risk associated with an underlying pool of exposures is tranching and at least one of the underlying exposures is a securitisation position. Re-securitisation positions shall receive the same risk weight as that assigned to the securitisation positions, and the same credit quality shall be applied to them.

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20 “Retention of net economic interest” means: a) retention of no less than 5% of the nominal value of each of the tranches sold or transferred to the investors, or, equivalently, retention of at least 5% of the nominal amount of each of the securitised exposures. In the case of ABCP (asset-backed commercial paper) programmes, the retention requirement may be met by the provision of liquidity facilities provided they fulfil certain conditions set in the Circular; b) in the case of securitisations of revolving exposures, retention of the originator’s interest of no less than 5% of the nominal value of the securitised exposures; c) retention of randomly selected exposures, equivalent to no less than 5% of the nominal amount of the securitised exposures, provided that the number of potentially securitised exposures is no less than 100 at origination; or d) retention of the first loss tranche and, if necessary, other tranches having the same or a more severe risk profile than those transferred or sold to investors and not maturing any earlier than those transferred or sold to investors, so that the retention equals in total no less than 5% of the nominal value of the securitised exposures. For this purpose, the retention may consist of the provision of a guarantee (through a letter of credit or other similar type of credit backing), provided that it meets certain requirements set in the Circular.

21 External Credit Assessment Institution.

22 Transposing the related provisions in Directive 2010/76/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2006/48/EC and 2006/49/EC as regards capital requirements for the trading book and for re-securitisations, and the supervisory review of remuneration policies.

Further, additional capital requirements are imposed for negligence or lack of due diligence of the credit institution exposed to the securitisation position risk. In this case, the institution must, for so long as this circumstance persists, apply a proportionate additional risk weight of not less than 250% of the risk weight, and progressively raise it, subject to an upper limit of 1250%, for each subsequent non-compliance detected by the Banco de España.

#### LIQUIDITY RISK MANAGEMENT

In accordance with Royal Decree 771/2011, substantial changes have been made in liquidity risk management policy.<sup>23</sup> In this respect, institutions have to adjust their internal strategies and policies regarding this risk and to prepare effective emergency plans addressing an adequate range of time horizons, including intraday, to ensure that credit institutions hold an appropriate level of liquidity. Also, they have to adopt liquidity risk mitigation tools, particularly a system of liquidity limits and buffers to cope with diverse scenarios of tension, and an appropriately diversified financing structure and access to funding sources. These measures will be reviewed regularly.

To deal with liquidity crises, institutions must have emergency plans establishing suitable strategies along with appropriate measures for applying them. These plans will have to be regularly tested, updated on the basis of the results of the alternative scenarios considered, and submitted to senior management for approval, so that the internal policies and procedures can be adapted as required.

The internal risk-measurement models, as well as meeting the requirements set in the previous legal provisions, must assess the risk arising from less liquid positions. The approximations shall be duly conservative and may be used only where available data is insufficient or is not reflective of the true volatility of a position or portfolio.

An assessment should also be made of the impact that the alternative scenarios have on liquidity needs, including, among other things, the effect that the downgrading of an institution's credit rating has on the additional margin requirements or collateral to cover certain positions.

The Banco de España will regularly assess overall liquidity risk management by credit institutions and promote the development of sound internal methodologies. In conducting these examinations, the Banco de España will take into consideration the role played by credit institutions in financial markets and the possible impact of their decisions on the stability of the financial system of all the other Member States affected.

Finally, credit institutions must submit monthly to the Banco de España new statements relating to their liquidity situation (projected cash inflows and outflows, liquid assets, undrawn credit facilities, etc.), which are set out in the annexes to the Circular.<sup>24</sup>

#### CREDIT INSTITUTIONS' REMUNERATION POLICIES

The new rules introduced by Royal Decree 771/2011 were developed in detail and others were added to complete the transposition of Directive 2010/76/EU of the European Parliament and of the Council of 24 November 2010.

<sup>23</sup> The Circular retains as major rules the "supplementary guidelines" on liquidity risk management included in Circular 9/2010 of 22 December 2010 amending CBE 3/2008, which also included certain provisions to strengthen internal organisation, risk management and internal control, as well as other significant matters.

<sup>24</sup> However, individual institutions may be granted a longer submission deadline or exempted from submitting some statements upon a request substantiating the scant complexity of their operations.

Credit institutions must develop remuneration policies and practices consistent with the promotion of sound and effective risk management. Specifically, they must considerably reduce variable remuneration when the institution's financial performance is mediocre<sup>25</sup> or negative, taking into account both current remuneration and reductions in payouts of amounts previously earned. For this purpose, mechanisms shall be set in place for malus or clawback arrangements.

Additionally, those institutions which have, for restructuring or write-down purposes, received government financial support that has not yet been fully paid back, must give priority to the creation and maintenance of a sound capital base and to the repayment of the government aid received. Hence they may not pay variable remuneration to the top-level directors and managers directing the institution's day-to-day business, unless adequately justified to the Banco de España.<sup>26</sup> In any event it may not be paid without prior authorisation by the Banco de España.

Also, as envisaged in Royal Decree 771/2011, the conditions for the creation of a Remuneration Committee are specified. Thus it will be compulsory to have such a committee by 31 March 2012 for Spanish credit institutions whose total assets in 2010 or in 2011 exceed €10 billion. In those institutions whose total assets reach or exceed this amount in the future, this committee must be set up, or, should it already exist, its composition and functions adapted to those required by the Circular within a period of six months from the closing date of the financial year in which that level of total assets was reached.

Nevertheless, institutions which have not reached the aforementioned total assets figure may, for reasons relating to their internal organisation or the nature, scope or complexity of their activities, be required by the Banco de España to set up a remuneration committee. Similarly, the Spanish subsidiaries of groups of credit institutions whose parent is located in Spain or in another European Economic Area country that so request may, after an individual assessment, be exempted from this requirement.

Finally, credit institutions have to furnish to the public and periodically update, at least once a year, numerous items of information listed in the Circular about their remuneration practices, including salaries and discretionary pension benefits, in respect of their directors and other senior managers, and those employees who are risk takers and whose professional activities have a material impact on the risk profile of the institution, as well as staff engaged in control functions.

OTHER SIGNIFICANT ASPECTS  
OF THE CIRCULAR

Regarding counterparty credit risk, from now on credit institutions can decide to include systematically all credit derivatives not included in the trading book and purchased as protection to cover an exposure of its banking book or an exposure subject to counterparty risk, provided that credit risk coverage is recognised as stipulated in the Circular.

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25 To assess the mediocrity of results, regard must be had to whether they evidence a downward trend either compared with those of the institution itself or with those of its peers, and to parameters such as the degree of achievement of the projected targets or the performance of the institution as a whole or of the business unit to which the employee in question belongs and of the exposures which may have been generated.

26 This remuneration must in any event be associated with the achievement of the aforementioned priority objectives of creating and maintaining a sound capital base and of repaying the government aid received.

Trading book<sup>27</sup> positions must be marked to market whenever possible. Marking to market is the at least daily valuation of positions at close out prices that are sourced independently. It is specified that the prices used for this purpose may include exchange prices, screen prices, or quotes from several independent reputable brokers. Where marking to market is not possible, credit institutions shall conservatively mark to model<sup>28</sup> their positions and portfolios before applying trading book capital treatment.

As regards market risk on credit derivatives, the positions of protection sellers shall be valued, as before, at the notional amount of the credit derivative contract, and, for the purpose of calculating the specific risk charge, other than for total return swaps, the maturity of the credit derivative contract is applicable instead of the maturity of the reference obligation. However, credit institutions may now decide to replace that notional amount with the difference between the notional amount and any change in market value undergone by the credit derivative since it was purchased.

A new requirement is added for external credit assessments. Specifically, such assessments must not be based either totally or partially on guarantees provided by the credit institution itself. Meanwhile, in credit assessments of structured financial instruments, ECAIs must explain publicly how the overall behaviour of the securitised exposures affects their ratings.

Lastly, the law on ECAIs is adapted to EU legislation. Specifically, an ECAI's assessment methodology is considered to comply with the requirements of objectivity, independence, ongoing review and transparency if that ECAI is registered in accordance with Regulation (EC) 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies. Also, the name of the Committee of European Banking Supervisors (CEBS) was changed to the European Banking Authority (EBA), which will be the new body entrusted with setting guidelines on the recognition of ECAIs.

Save certain exceptions, the Circular came into force on 31 December 2011.

#### OTHER NEW DEVELOPMENTS REGARDING SOLVENCY

On 5 December 2011 the Executive Commission of the Banco de España resolved to adopt as its own rules nine guidelines published by the CEBS before the EBA took over its functions. They contain more detailed guidance on matters introduced by Directive 2009/111/EC (CRD II) and Directive 2010/76/EU (CRD III) in the Capital Requirements Directive (CRD), i.e. Directive 2006/48/EC, and their purpose is to promote effective and harmonised compliance with EU legislation. Thus, in order to adopt the principles set out in these guidelines, the CRD had previously to be transposed in full into Spanish law. This process culminated in the approval of CBE 4/2011 of 30 November 2011 amending CBE 3/2008 of 22 May 2008 on determination and control of minimum own funds, incorporating the basic features of those directives.

Consequently, the guidelines adopted in Spain, without prejudice to Spanish positive law, which already contains many of their provisions, are as follows: Implementation guidelines regarding instruments referred to in Article 57(a) of Directive 2006/48/EC, Implementation

<sup>27</sup> The trading book of an institution shall consist of all positions in financial instruments and commodities held either with trading intent or in order to hedge other elements of the trading book and which are either free of any restrictive covenants on their tradability or able to be hedged.

<sup>28</sup> For these purposes, marking to model is defined as any valuation which has to be benchmarked, extrapolated or otherwise calculated from a market input.

guidelines for hybrid capital instruments, Guidelines on the implementation of the revised large exposures regime, Implementation guidelines on Article 106(2)(c) and (d) of Directive 2006/48/EC recast, Guidelines to Article 122a of the Directive 2006/48/EC, Guidelines on remuneration policies and practices, Guidelines on liquidity cost benefit allocation, Guidelines on liquidity buffers and survival periods and Guidelines on the management of operational risks in market-related activities. The texts of these guidelines and their translation to Spanish can be found on the Banco de España website in the section “Guidelines the Banco de España has adopted as its own”.

**Credit institutions:  
amendment of public and  
confidential financial  
reporting rules**

*CBE 5/2011 of 30 November 2011* (BOE of 9 December 2011) amended CBE 4/2004 of 22 December 2004<sup>29</sup> on public and confidential financial reporting rules and formats.

From now on, credit institutions have to publish annually, at both individual and consolidated level, qualitative and quantitative information on the mortgage market and on financing for construction, real estate development and house purchase, and that relating to assets received in satisfaction of debt corresponding to business in Spain, with data as at each 30 June. This information shall be made public via the same channel used to meet the market disclosure obligations in the area of solvency<sup>30</sup> or on their internet website.

In the notes to their annual accounts, institutions must disclose the policies and strategies set in place by them to deal with the troubled loans granted to finance real estate projects, including urban development and subsequent building work.

The disclosures shall include all significant matters regarding the situation and prospects of recovery of the liquidity of this class of financial assets, including, where applicable, those of the collateral taken, so as to make more readily understandable the risks and uncertainties associated with these assets. In any event, these disclosures shall include at least: 1) the gross amount, the excess of this amount over the value of the collateral, and the specific provisions for impairment of all loans; 2) the gross amount of these loans classified as write-offs and thus derecognised; 3) the gross amount of construction and real estate development loans, broken down into those with and without mortgage collateral;<sup>31</sup> and 4) the gross amount of total loans to households for house purchases, with a breakdown of doubtful loans, and distinguishing in both cases whether they are secured by mortgage collateral. Also, loans shall be distributed in certain tranches based on the risk expressed as a percentage of the amount of the latest appraisal of the collateral taken (40% or less, over 40% but less than or equal to 60%, over 60% but less than or equal to 80%, over 80% but less than or equal to 100%, and over 100%).

Further, credit institutions must explain their policies and strategies for dealing with foreclosed real estate assets and those received in satisfaction of debt. The information must include all significant aspects of the strategy followed to re-establish the liquidity of this class of assets, so as to make it easier to understand the risks and uncertainties associated with these assets.

<sup>29</sup> See “Financial Regulation: 2004 Q4”, *Economic Bulletin*, January 2005, Banco de España, pp. 3-7.

<sup>30</sup> In accordance with CBE 3/2008 of 22 May 2008 on determination and control of minimum own funds, under which credit institutions must set in place a formal policy, approved by the Board of Directors or equivalent body of the institution or group, specifying, among other things, the frequency and place of publication, and the verification of the information they have to furnish to the market.

<sup>31</sup> Those with mortgage collateral have to be broken down by type of collateral into those secured by completed buildings (distinguishing between dwellings and others), buildings under construction (dwellings and others) and land (developed land and other).

The Circular specifies more precisely the individual financial statement footnote in which the board of directors or equivalent body of the credit institution has to make an express manifestation on the existence of express policies and procedures for its mortgage market activities approved by that governing body or by another to which it has delegated powers, and in which manifestation that governing body makes itself expressly responsible for compliance with mortgage market regulations.

As regards the confidential information which institutions must submit to the Banco de España at both individual and consolidated level, certain changes are made in the formats of the existing confidential returns and other new ones are added. Specifically, the following individual returns covering a half-yearly reporting period, to be submitted by the end of the following month, are added: "S.6 Mortgage market information", "S.7 Information on construction, real estate development and house purchase financing (business in Spain)" and "S.8 Information on assets received in satisfaction of debt (business in Spain)". The new consolidated returns, both of them half-yearly, are as follows: "C.17 Information on construction, real estate development and house purchase financing by credit institutions (business in Spain)" and "S.8 Information on assets received in satisfaction of debt by the credit institution (business in Spain)".

Finally, the Circular makes certain technical improvements, adding additional information in the special accounting books for mortgage activities.

The Circular came into force on 10 December 2011. First-time application of the rules on the annual accounts will be in those as at 31 December 2011, except as stipulated for the new confidential returns, which, exceptionally, may be submitted to the Banco de España by 31 March 2012.

#### Unification of the credit institution deposit guarantee funds

Royal Decree-Law 16/2011 of 14 October 2011 (BOE of 15 October 2011), amended by Royal Decree-Law 19/2011 of 2 December 2011 (BOE of 3 December 2011), created the Credit Institution Deposit Guarantee Fund, which replaces the three existing funds.<sup>32</sup>

Table 2 sets out the main new developments with respect to the previous regulations.

The Royal Decree-Law has two aims. The first is to unify the funds in a single Credit Institution Deposit Guarantee Fund which retains the functions and characteristic features of those it replaces, particularly their dual functional nature of not only guaranteeing deposits,<sup>33</sup> but also strengthening the solvency and functioning of institutions. The second aim is to bolster the aforementioned latter function of the system by broadening the range of situations in which the Fund can act.

Regarding the first aim, the Royal Decree-Law regulates the creation and subrogation of the new Fund to all the rights and obligations of its predecessors, as well as its legal regime, its assets and liabilities and its governing bodies.

The Fund will receive assets in the form of annual contributions from affiliated credit institutions, the maximum amount of which increases from 2‰ to 3‰ of the deposits guaranteed, depending on the type of credit institution. It will also be able to call for supplementary con-

<sup>32</sup> The commercial bank, savings bank and credit cooperative deposit guarantee funds.

<sup>33</sup> The guaranteed amount of deposits remains at €100,000 or, if denominated in another currency, at the equivalent amount obtained by applying the related exchange rates. Similarly, the guarantee to investors that have entrusted securities or financial instruments to a credit institution remains at a maximum of €100,000 per depositor or investor.

Royal Decree 2606/1996 of 20 December 1996

Royal Decree-Law 16/2011 of 14 October and Royal Decree-Law 19/2011 of 2 December 2011

Legal regime	
Existence of three deposit guarantee funds: commercial banks, savings banks and credit cooperatives.	Unification of the three funds in a single credit institution deposit guarantee fund.
The various funds were governed and administered by the respective management committee, consisting of eight members appointed by the Minister of Economic Affairs and Finance, of which four represented the Banco de España and four represented the affiliated credit institutions.	The Fund is governed and administered by a Management Committee of twelve members, six designated by the Banco de España and six by associations representing affiliated credit institutions.
Assets	
Up to 2% of the deposits at year-end plus 5% of the market value on the last trading day of the year, in the relevant secondary market, of the guaranteed securities existing at year-end. If the uncommitted assets become negative, the affiliated institutions will be called on to make the supplementary contributions needed to eliminate that deficit.	Up to 3% of the deposits guaranteed, depending on the type of credit institution. It will also be able to call for supplementary contributions from affiliated credit institutions and to raise funds on the stock market and to receive funds from loans or any other borrowings. In addition, if the Fund has insufficient assets to carry out its functions, it may take the necessary action to restore them to a sufficient level.
Contributions shall be suspended when the assets not committed to operations proper to the end-purpose of the Funds equal or exceed 1% of the deposits of the affiliated institutions.	No significant changes.
Functions	
Guarantees of up to €100,000 on deposits, as well as a maximum of €100,000 per depositor or investor for investors that have entrusted securities or financial instruments to a credit institution.	No significant changes.
The funds may take preventive and reorganisation measures designed to promote an institution's viability so it can successfully exit a situation of crisis, within the framework of an action plan proposed by the institution and approved by the Banco de España.	The Fund's ability to act and the flexibility of its actions to strengthen the capital base of institutions have been raised. The Fund is also endowed with a greater capacity to take measures if it is decided to restructure a credit institution or to provide financial support to strengthen its capital base, all within the framework of the action plan approved by the Banco de España.

SOURCES: Official State Gazette and Banco de España.

tributions from affiliated credit institutions, distributed according to the same proportions as for the annual contributions, and to raise funds on the stock market and to receive funds from loans or any other borrowings. In any event, when the Fund has insufficient assets to carry out its functions, it shall take the necessary action to restore them to a sufficient level.

The contribution regime shall be temporary until an EU-wide system based on the risk profile of each institution is established.

As before, contributions shall be suspended when the assets not committed to operations proper to the end-purpose of the Fund equal or exceed 1% of the deposits of its affiliated institutions.

The Fund shall be administered by a Management Committee of twelve members, six designated by the Banco de España and six by associations representing affiliated credit institutions within the two months following the entry into force of this Royal Decree-Law. Its characteristics and functions are similar to those in the previous funds.<sup>34</sup>

<sup>34</sup> Under the previous legislation, the various funds were governed and administered by the respective management committee, consisting of eight members appointed by the Minister of Economic Affairs and Finance, of which four represented the Banco de España and four represented the affiliated credit institutions.

Should the new members of the Management Committee not be elected in the aforementioned period, the affiliated institutions' representatives on the Committee shall be those who formed part of the management committees of the three funds extinguished upon the entry into force of the Royal Decree-Law and who shall together carry 50% of the Committee members' total votes. Similarly, the Banco de España's representatives shall be those who formed part of the management committees of the three funds extinguished, who shall together carry 50% of the Committee members' total votes.

As to the second aim, the Fund's ability to act and the flexibility of its actions to strengthen the capital base of institutions have been raised.

Thus, to the previous case in which the Fund could take preventive and reorganisation measures,<sup>35</sup> has been added another case in which the Fund may take similar measures if it is decided to restructure a credit institution<sup>36</sup> or to provide financial support to strengthen its capital base,<sup>37</sup> all within the framework of the action plan approved by the Banco de España.

The actions contained in the related action plan may be: 1) financial assistance, which may consist of non-refundable aid, the provision of guarantees, soft loans, subordinated debt financing, acquisition by the Fund of impaired or non-performing assets on the institution's balance sheet and any other financial support; 2) capital restructuring of the institution, which may entail, among other measures, the appropriate use of the institution's own funds to absorb losses, having regard to the special features of each case; 3) facilitate merger or acquisition processes with other institutions of recognised solvency or the transfer of its business to another credit institution; subscription by the Fund of capital increases and the adoption by the related governing bodies of the institution concerned of all resolutions to ensure the appropriate application of the assistance provided by the Fund; and 4) management measures to improve the institution's organisation and procedural and internal control systems. These measures must be aimed at achieving the viability of the institution within a period judged reasonable by the Fund, either by strengthening the institution's assets and solvency or by facilitating its merger with or acquisition by another institution of recognised solvency or the transfer of its business to another credit institution.

Lastly, Royal Decree 2606/1996 of 20 December 1996<sup>38</sup> on deposit guarantee funds of credit institutions remains in effect in those parts that are not inconsistent with the Royal Decree-Law, until such time as the government approves the related implementing regulations.

Royal Decree-Law 16/2011 came into force on 15 October 2011 and Royal Decree-Law 19/2011 on 3 December 2011.

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35 When the situation of a credit institution, according to the information furnished by the Banco de España, is such that foreseeably the obligation to pay will fall on the Fund for the reasons envisaged in the regulations. In this case, the measures are taken within the framework of an action plan proposed by the institution and approved by the Banco de España.

36 Carried out under the related plan approved by the Banco de España in the cases listed in Article 7.1 of Royal Decree-Law 9/2009 of 26 June 2009 on bank restructuring and strengthening of the capital of credit institutions.

37 Pursuant to Article 9 of Royal Decree-Law 9/2009 of 26 June 2009 on bank restructuring and strengthening of the capital of credit institutions.

38 See "Regulación financiera: cuarto trimestre de 1996", *Boletín Económico*, January 1997, Banco de España, pp. 106-109.



Transparency and protection of banking services customers: updating of regulations

Order EHA/2899/2011 of 28 October 2012 (BOE of 29 October 2012) on transparency and protection of banking services customers has been published. This Order repeals the Order of 12 December 1989<sup>39</sup> on the interest rates and fees, rules of behaviour, customer information and advertising of credit institutions, the Order of 5 May 1994<sup>40</sup> on the transparency of the financial conditions of mortgage loans, and Order PRE/1019/2003 of 24 April<sup>41</sup> on price transparency in banking services provided through ATMs. It also amends Order EHA/1608/2010 of 14 June 2010<sup>42</sup> on transparency of conditions and information requirements applicable to payment services.

The new Order shall apply to the banking services offered or supplied to existing or potential customers in Spain by Spanish credit institutions or the branches of foreign credit institutions. Its aim is twofold: to implement the advances in banking transparency introduced by the Sustainable Economy Law 2/2011 of 4 March 2011, in relation to the protection of banking customers; and to gather together in a single text the various regulations existing in relation to transparency and customer protection, in order to improve their clarity and make them more readily accessible to the public.

Table 3 shows the most important changes introduced, with respect to the previous regulations.

GREATER BANKING SERVICE INFORMATION OBLIGATIONS

Fees and interest rates

As provided previously, the fees and, where applicable, interest rates charged for banking services will continue to be set freely by credit institutions and their customers. However, credit institutions will henceforth make available to customers the fees and interest rates that they normally charge for the services they most frequently provide, as well as the expenses they pass on to the customer in respect of such services,<sup>43</sup> and also these will be presented in a standard format established by the Banco de España. This system replaces the one that has been in force up until now, whereby a list of rates had to be registered at the Banco de España in order to be applicable.

For mortgage loans and credits, the annual percentage rate (APR) needs to be defined and calculated. This rate equalises, on an annual basis, the current value of all the existing and future commitments (credit drawdowns, repayments and charges) assumed by the institution and by the customer. To calculate this rate, the total cost of the loan to the customer is determined, without including the charges the latter would have to pay for breach of any of its obligations under the loan agreement.<sup>44</sup> From now on, the total cost of the loan will also include the following items: 1) the costs of maintaining an account when it is compulsory to open one in order to obtain the loan;<sup>45</sup> 2) the costs relating to the use of a means of payment that enables payment and credit drawdown transactions to be made and, where applicable, 3) the costs of the payment transactions.

39 See "Regulación financiera: cuarto trimestre de 1989", *Boletín Económico*, January 1990, Banco de España, p. 35.

40 See "Regulación financiera: segundo trimestre de 1994", *Boletín Económico*, July-August 1994, Banco de España, pp. 46-48.

41 See "Financial regulation: 2003 Q2", *Economic Bulletin*, July 2003, Banco de España, pp. 80-82.

42 See "Financial regulation: 2010 Q2", *Economic Bulletin*, July 2010, Banco de España, pp. 141-144.

43 This information shall be available at all branches of credit institutions, on their websites and on the Banco de España website and shall be available to customers at any time, free of charge.

44 Under the previous regulations (CBE 8/1990, which implemented the now repealed Order of 12 December 1989), certain expenses and fees, such as brokerage fees, notary expenses, taxes and charges for insurance or guarantees, were not taken into account when calculating the rate.

45 Unless the costs of such account have been clearly and separately specified in the loan agreement or in any other agreement with the customer.

Order of 12 December 1989; Order of 5 May 1994; Order PRE/1019/2003 of 24 April 2003 and Order EHA/1608/2010 of 14 June 2010

Order EHA/2899/2011 of 28 October 2011

<b>Greater banking service information requirements</b>	
Fees for banking services are freely set. They may only be charged for services that have been requested and actually provided	No significant changes.
The interest rates applicable to banking services, in both deposit and lending transactions, are also freely set by the parties, whatever the type and maturity of the transaction.	No significant changes.
After registering it with the Banco de España, institutions must publish a list of their maximum rates of fees and charges and may not charge higher rates or amounts or for items not included on the list	Credit institutions must make available to their customers the fees and interest rates normally charged for the services they most frequently provide, as well as the expenses they pass on to the customer in respect of such services, which will be presented in a standard format established by the Banco de España.
Not provided for.	Credit institutions will supply customers, free of charge, with all relevant precontractual information, so that they can make informed decisions on banking services and compare similar offers.
There are certain exceptions to the obligation to deliver a document that includes the contractual information, unless it is expressly requested by the customer.	The obligation to deliver to the customer a document containing the contractual information is extended to cover all banking services.
Not expressly provided for.	When advising customers, credit institutions are obliged to act in the customer's best interests, considering both the latter's personal and financial situation and preferences and objectives.
Not provided for.	In the case of banking services linked to the purchase of another service, credit institutions must inform the customer, in an understandable way, whether or not it is possible to purchase each service independently and on what terms.
Reasonable notice must be given of the application of any change in the terms of an agreement to provide a banking service. Alternatively, the change may be published in a national newspaper, and in some cases it is sufficient for it to appear on the institution's noticeboard.	Customers must be given at least one month's personal notice of any change to the terms of a contract for banking services.
Not provided for.	Notification, in January each year, with information on the fees, charges and interest rates applied to each banking service provided during the previous year.
<b>New information requirements in relation to bank deposits</b>	
Not provided for.	Customers must be sent free of charge, at least once a month, a statement of all the movements in their current account.
Not provided for.	Content of the contractual documents for structured or hybrid time deposits.
<b>Improved bank loan and credit granting practices</b>	
Not specifically provided for.	Credit institutions must have internal procedures to assess customers' solvency.
Not provided for.	"Pre-agreement information card" (FIPRE), which institutions must provide free of charge, with clear and sufficient information on the loans and credits they offer.
Not provided for.	"Individualised information card" (FIPER), which institutions must provide, free of charge, with the individualised information necessary to respond to their demand for credit, before the customer is bound by any agreement or offer.
Not provided for.	"Mortgage Loan Access Guide" available at credit institutions, on their websites and at the Banco de España.
When mortgage loans have "floor" and "ceiling" clauses, these must appear in the contractual documentation.	When loans have these clauses, in addition to appearing in the contractual documentation they will be included in a FIPER annex.
<b>Other changes</b>	
Not provided for.	The transparency rules for reverse mortgages are regulated. In general such mortgages are subject to the information obligations of this Order, with certain particularities. In addition, a "Reverse Mortgage Access Guide" will be prepared.

SOURCES: BOE and Banco de España.

Pre-contractual and contractual information

Another of the changes made by the Order is the obligation on credit institutions to supply certain pre-contractual information to customers, free of charge, so that they can make informed decisions on banking services and compare similar offers. This information must be clear, sufficient, objective and delivered in advance or, in any event, before the customer is bound by a contract or offer.

As regards contractual information, the obligation on credit institutions to deliver to the customer, whether or not requested thereby, the relevant copy of the contractual document in which such services are agreed is extended to cover all banking services received.<sup>46</sup> In addition, the minimum content of such documents relating to banking services to raise repayable funds, especially deposits, and to grant loans and credits, in addition to the other content requirements that may be established by the Banco de España, is extended and specified. *Inter alia*, credit institutions shall supply their customers with appropriate explanations to enable them to understand the essential terms of the banking services offered, taking into account their needs and financial situation.

Credit institutions that market banking services linked to the purchase of another service, whether or not financial, must inform the customer, in an understandable way, whether or not it is possible to purchase each service independently and on what terms. If it is only possible to purchase the banking service along with others on the terms offered, the customer must be informed of the part of the total cost that corresponds to each of the services, provided that this information is available, and of the effects that not purchasing it by itself or cancelling it early will have on the total cost of the banking services.

Customer advice

The Order expressly mentions advice to customers,<sup>47</sup> which used not to be specifically addressed in our legal system, distinguishing it from the direct marketing of banking products. In this respect, when credit institutions and customers decide to enter into a contract for advice, the former shall specifically notify the latter of this circumstance and, unless the service is free of charge, of the remuneration payable therefor. When providing this service institutions are under an obligation to act in the customer's best interests, on the basis of an objective and sufficiently broad analysis of the banking services available on the market, and taking into consideration the customer's personal and financial situation and preferences and objectives.

Notifications to the customer

As regards notifications to customers in respect of services provided, certain changes have been introduced. Thus, when the credit institution has the right to modify any term of a banking service contract unilaterally, it is now under an obligation to give the customer at least one month's personal notice of such modification. In cases of modification of limits or the ability to draw down further amounts, when the customer has been in breach of its obligations, at least ten days' notice must be given.<sup>48</sup>

In addition, credit institutions must send to their customers, in January each year, a notification with full and detailed information on the fees, charges due and interest rates actu-

<sup>46</sup> In the previous regulations (CBE 8/1990, which implemented the now repealed Order of 12 December 1989), certain exceptions were established, such as, for example, for certain transactions (time deposit transactions, or transactions to raise funds using bank promissory notes or similar instruments; repurchase agreements, transactions in financial instruments traded on organised secondary markets, and loan or credit transactions, including those involving credit cards) for an amount of at least €60,000, unless the customer expressly asked for it.

<sup>47</sup> Advice shall be deemed to be any personal recommendation made by a credit institution to a specific customer with respect to one or more banking services available on the market.

<sup>48</sup> In the previous regulations (CBE 8/1990), which implemented the now repealed Order of 12 December 1989) there was no time limit, but rather reasonable notice had to be given. Moreover, such notice could be replaced by publication in a nationwide newspaper, and in some cases a notice on the institution's noticeboard was sufficient.

ally applied to each banking service provided to the customer during the previous year. The Banco de España will establish a standard document for these notifications. In the event of the death of the customer, the heirs thereof, when their status has been evidenced, must be informed of the deceased's financial position with the credit institution.

NEW INFORMATION  
REQUIREMENTS IN RELATION TO  
BANK DEPOSITS

In relation to sight deposits, credit institutions are now obliged to supply customers, free of charge and at least once a month, with a statement of all the movements in their current accounts, specifying in each case the date, the item and the amount of the transaction.

With regard to structured and "hybrid" time deposits, the contractual documents must set out explicitly and clearly, the obligation on the institution to repay the principal amount of the deposit upon maturity, as well as the nominal interest rate, the APR or some other equivalent expression of the effective total remuneration in terms of annual interest, taking into account the effects on the remuneration of both the main contract and the implicit derivative.

Finally, the contractual documents relating to banking deposit services must include a reference to the deposit guarantee fund to which the institution belongs.

IMPROVED BANK LOAN AND  
CREDIT GRANTING PRACTICES

The contributions made by Law 2/2011 of 4 March 2011 in respect of the responsible extension of loans, especially regarding customer "solvency assessment", have been implemented. Thus, before any credit or loan agreement is entered into, the credit institution shall assess the customer's ability to meet the attendant obligations on the basis of sufficient information obtained by means appropriate to this end. Such means include, most notably, information provided by customers themselves. Furthermore, credit institutions shall have specifically developed internal procedures to conduct this assessment, which should envisage specific aspects of the customers such as: 1) assessment of the customer's working, wealth and financial situation; 2) the customer's financial capacity to assume significant changes in instalments over the course of the life of the operation in the event of credit or loans at variable interest rates; 3) the capacity of the guarantors to meet their payment obligations, and 4) a prudent valuation of real guarantees in the case of mortgage credit or loans.

As regards mortgage credit and loans, new transparency regulations<sup>49</sup> have been implemented to replace those of the Ministerial Order dated 5 May 1994 on transparency of the financial conditions of mortgage loans, which are along the lines of the current Law 16/2011 of 24 June 2011<sup>50</sup> on consumer credit agreements. One new feature here is the "Mortgage Loan Access Guide" that will be drafted by the Banco de España, so that those demanding mortgage loan banking services may have, prior to entering into the related agreements, appropriate information with which to adopt their financing decisions. The guide shall be available, free of charge, in all commercial establishments of credit institutions, on their websites, and at the Banco de España.

A so-called "Pre-agreement Information Card" (FIPRE by its Spanish abbreviation) has been introduced, which credit institutions must provide, free of charge, to customers requesting information on the mortgage credit and loans offered, and which shall contain clear and sufficient information on these loans. A so-called "Individualised Information

<sup>49</sup> Applicable to mortgage credit on loan banking services entered into with an individual customer, in which the mortgage is on a dwelling or whose end-purpose is to acquire or maintain ownership rights over land or buildings that have been constructed or are to be constructed.

<sup>50</sup> See "Financial regulation: 2011 Q2", Economic Bulletin, July 2011, Banco de España, pp. 154-156.

Card” (FIPER) has also been created. This card will be provided for customers, likewise free of charge, once they have made over to the credit institution the FIPRE information, the institution having obtained from customers the information needed in respect of their financing requirements, their financial situation and their preferences. The FIPER provides the individualised information needed to respond to customers’ demand for credit, allowing customers to compare mortgage credit and loans available on the market, to assess the implications and to adopt a grounded decision on whether they should subscribe to the agreement or not. The content of the FIPRE and the FIPER is regulated in detail in the annexes to the Ministerial Order.

If the customer and credit institution have expressed their willingness to enter into a specific mortgage credit or loan agreement and, among other requirements, the appraisal of the real estate is available and customer solvency has been assessed, then the latter may request that the credit institution make a binding offer. The previous regulations already covered this, the novelty now being that the FIPER will provide for this, additionally specifying that what is involved is a binding offer and the term of its applicability, which may not in general be fewer than 14 calendar days (previously it was 10 working days) from the delivery date.

Further, transparency and information disclosure obligations regarding floor and ceiling clauses in mortgage loans have been reinforced. Thus, should such clauses have been set in these loans, the minimum and maximum interest rates and the maximum and minimum instalment payments shall be included in an annex to the FIPER. Previously, it was only necessary to include this information in the loan agreement documentation.

Finally, in accordance with the provisions of Law 36/2003 of 11 November 2003 on economic reform measures, credit institutions shall be required to provide specific additional information to their customers on interest rate hedging instruments for mortgage loans for which an adjustable rate has been agreed. This information, if any, shall also be included in an annex to the FIPER.

#### OTHER CHANGES IN THE REGULATIONS

The transparency arrangements governing reverse mortgages<sup>51</sup> have been regulated. This type of mortgage will be subject, in general, to reporting obligations laid down in this Order, with certain particularities. Thus, delivery of the FIPRE, the FIPER, the binding offer and the provision of a prior independent assessment service – at the latest as at the delivery date of the binding offer – shall be obligatory.

The Banco de España, along with the Directorate General for Insurance and Pension Funds, shall draw up a “Reverse Mortgage Access Guide”, in similar terms to those envisaged for the above-mentioned “Mortgage Loan Access Guide”.

Further, the regulations govern official interest rates, in keeping with the powers conferred

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51 The reverse mortgage was regulated in the first additional provision of Law 41/2007 of 7 December 2007, which amended Law 2/1981 of 25 March 1981 on mortgage market regulation and other mortgage and financial system rules, regulating reverse mortgages and dependency insurance, and establishing a specific tax regulation. A reverse mortgage is defined as a mortgage loan or credit taking the form of a mortgage over real property constituting the principal residence of the applicant, provided that it meets the following requirements: a) the applicant and any beneficiaries designated by him or her must be aged 65 or over or in a situation of severe or considerable dependency; b) the mortgagor must draw the loan amount in periodic withdrawals or as a lump sum; c) the debt must only be claimable by the creditor and the security interest enforceable upon the death of the borrower or, if so stipulated in the contract, upon the death of the last of the beneficiaries; and d) the mortgaged residence must have been appraised and insured against damage.

and included in Law 26/1988 of 29 July 1988 on the discipline and intervention of credit institutions, with the aim of integrating them with the existing benchmark rates on European markets, and of increasing the alternatives for choosing rates across institutions and customers. In this way, the BOE (Official State Gazette) shall publish monthly the following official interest rates, which will also be available on the Banco de España website: 1) average rate of mortgage loans at over three years, for the purchase of open-market housing, granted by credit institutions in Spain; 2) average rate of mortgage loans at between one and five years, for the purchase of open-market housing, granted by credit institutions in the euro area; 3) internal rate of return on the secondary market for government debt at between two and six years; 4) one-year interbank benchmark (Euribor); 5) five-year interest-rate swap, and 6) Mibor, applicable exclusively for mortgage loans entered into prior to 1 January 2000.

The Order shall come into force, with certain exceptions, on 29 April 2012.

#### Government debt market-makers: amendment of the regulations

The Directorate General of the Treasury and Financial Policy *Resolution of 29 November 2011* (BOE of 1 December 2011) has been published, amending that dated 18 November 2008,<sup>52</sup> which sets the conditions under which Spanish government debt market-makers may act.

Greater flexibility has been introduced when calculating the share of market-makers in the second round of medium- and long-term government bond auctions. Each market-maker may, as the maximum for each medium- or long-term bond in this second round, following submission of the related application, obtain 24% of the face value awarded to the entity in the aggregate of the auction of that bond and a comparable auction. Under the change, the maximum amount that it may buy will be the result of multiplying the total awarded face value at the auction phase for this same medium- or long-term bond by an auction-share ratio, multiplied in turn by a ratio constituting a bonus for the market-maker function.

The auction-share ratio shall reflect the share of each market-maker in the allotments of the latest comparable auctions. The calculation of this ratio shall be made following objective methodology set by the Treasury, further to consultation with medium- and long-term bond market-makers.

The bonus ratio may have four possible non-cumulative tranches: 1) 24%, which the Treasury may grant to those market-makers that have met the minimum bond prices established in this rule and that have proven most active in the latest evaluation periods prior to the auction; 2) 20%, which the Treasury may grant to those market-makers that have met, in the latest evaluation period prior to the auction, the minimum prices and, yet, have not proven most active in the latest evaluation periods prior to the auction; 3) 4%, for those which, in the Treasury's opinion, feature as most active in the latest evaluation periods prior to the auction and which, however, have not met, in the latest evaluation period prior to the auction, the minimum bond prices established in this rule, and 4) 0% for those that have not met, in the latest evaluation period prior to the auction, the minimum prices established in this rule, and that do not feature either as most active in the latest evaluation periods prior to the auction.

Further, there has been an amendment of the obligation as to the time prices must remain

<sup>52</sup> See "Financial regulation: 2008 Q4", *Economic Bulletin*, January 2009, Banco de España, pp. 109-110.

on the screens of regulated markets or multilateral trading facilities<sup>53</sup>, to conform to habitual international market practices and, therefore, to make bond market pricing conditions uniform.

The Resolution came into force on 1 December 2011.

#### Regime on cross-border transactions: updating of attendant regulations

*Royal Decree 1360/2011 of 7 October 2011* (BOE of 8 October 2011), amending Royal Decree 1816/1991 of 20 December 1991,<sup>54</sup> on cross-border economic transactions, and *Ministerial Order EHA/2670/2011 of 7 October 2011* (BOE of 8 October 2011), amending the Order dated 27 December 1991, which implemented Royal Decree 1816/1991, have been published. Their aim is to align Spanish regulations in this area to those in force in practically all the Member States, and to act in anticipation of the forthcoming reform of Regulation 924/2009, of the European Parliament and of the Council of 16 September 2009 on cross-border payments in the Community.<sup>55</sup>

Apart from certain improvements in aspects relating to the accreditation of resident and non-resident status, the main content of the recent regulations amends the reporting system for statistical purposes of cross-border economic transactions.

Under the previous system, entities had to identify transactions entailing a cross-border payment, demanding data of customers to complete the information on the transactions in which they were taking part, and to submit such information to the Banco de España. The new regulations eliminate the obligation to submit that information which is not immediately available to them and automatable. Furthermore, for those making cross-border transactions, the obligation is included to furnish the information that the Banco de España may require of them.

The Banco de España shall determine the content, procedure for and frequency of the information, provided that its compilation should not affect the direct automated treatment of payments, and can be done fully automatically.

Hence, the information for statistical purposes from these transactions shall be obtained in two ways: the automatic information furnished by registered entities, and that obtained from the data required by the Banco de España of those conducting cross-border acts, business, transactions and operations.

Lastly, the current reporting system remains in place temporarily until 31 December 2013, without prejudice to compliance with the new reporting obligations.

The Royal Decree and the Order shall enter into force on 1 June 2012.

#### Securities Market: amendment of regulations

*Law 32/2011 of 4 October 2011* (BOE of 5 October 2011) was published. This legislation amends Law 24/1988 of 28 July 1988<sup>56</sup> on the Securities Market, and is intended, among other aspects, to reform securities clearing, settlement and registration arrangements.

53 Which will be for at least five hours between 08.30 and 17.15 of each working day, according to the calendar approved by the Treasury.

54 See "Regulación financiera: cuarto trimestre de 1991", *Boletín Económico*, January 1992, Banco de España, pp.58-60.

55 This Regulation established a revision clause whereunder, before 31 October 2011, the European Commission would submit a report on the advisability of eliminating the national reporting obligation in respect of payments, which will soon take the form of a legislative initiative.

56 See "Regulación financiera: tercer trimestre de 1988", *Boletín Económico*, October 1988, Banco de España, pp.61-62.

Law 24/1988 of 28 July 1988	Law 32/2011 of 4 October 2011
<b>Changes to the legal regime governing IBERCLEAR</b>	
Not envisaged.	It must have an audit committee, a risks committee and an appointments and remuneration committee.
Not envisaged.	It shall have mechanisms in place so that opinions may be expressed on the performance of its functions and rules aimed at preventing potential conflicts of interest.
Not envisaged.	it may enter into agreements with other residents and non-resident entities, public and private alike, that perform all or some analogous functions, with central counterparties and others.
<b>Changes to the legal regime governing central counterparties (CCPs)</b>	
Not envisaged.	Their corporate status shall be that of a public limited company legally separate from IBERCLEAR.
Not envisaged.	They must have minimum capital and own funds suited to their activity, and these shall be established in regulatory terms.
Not envisaged.	Internal rules shall be drawn up and approved by the Minister of Economy and Finance further to reports by the CNMV, the Banco de España and the Regional Governments whose charter entrusts them with powers in respect of the regulation of securities trading centres. Among other aspects, regulations shall cover the entity's working regime and the services provided by it.
Not envisaged.	It must have an audit committee, a risks committee and an appointments and remuneration committee.
Not envisaged.	It shall have mechanisms in place so that opinions may be expressed on the performance of its functions and rules aimed at preventing potential conflicts of interest.
<b>Other changes</b>	
There are mechanisms of insurance on delivery in securities registration, clearing and settlement systems.	Eliminated.
Establishment of a control system based on registration references for equity.	Eliminated.
Not envisaged.	Unification of registration system is introduced by means of book-entry balances of equity, fixed-income and public debt.

SOURCES: BOE and Banco de España.

Table 4 indicates the most significant changes in relation to the previous regulations.

AMENDMENT OF THE LEGAL  
REGIME GOVERNING  
IBERCLEAR<sup>57</sup>

IBERCLEAR shall be obliged to have, at least, an audit committee, a risks committee and an appointments and remuneration committee. Further, it shall have the mechanisms so that users and other interested parties may express their opinions on the performance of its functions, also including in its internal regulations a set of rules aimed at preventing potential conflicts of interest to which it might be exposed as a result of its relations with shareholders, directors and managers, participating entities and customers. All these aspects shall be under the conditions that should so be determined in regulatory terms.

The implementation of these regulations shall also determine the specific surveillance and control functions it shall exert over its participating entities, solvency requirements, techni-

<sup>57</sup> Law 44/2002 of 22 November 2002 on financial system reform measures created the Management Company of the Securities Registration, Clearing and Settlement Systems (called IBERCLEAR) via the merger of the Spanish Book-Entry Debt System and the Securities Clearing and Settlement System.



cal resources, specific reporting obligations to the Spanish National Securities Market Commission (CNMV) and other aspects deemed necessary for its proper functioning.

IBERCLEAR may enter into agreements with other resident and non-resident entities, public and private alike, that perform all or some analogous functions, with central counterparties or with others. The adoption and amendment of these resolutions will require prior approval by the CNMV, subject to a report by the Banco de España or the regional government with competence in this area, in the case of regional markets.

#### AMENDMENT OF THE LEGAL REGIME FOR CENTRAL COUNTERPARTIES

A new regulatory regime has been developed for central counterparties (CCPs). As a result, in addition to the requirements laid down for their authorisation, a series of changes has been introduced. For instance, the corporate status of CCPs shall be that of a public limited company legally separate from IBERCLEAR. Their articles of association and the amendments thereto, with the regulatorily established exceptions, shall require authorisation by the Ministry of Economy and Finance further to a report by the CNMV. They must likewise have minimum capital and own funds suited to their activity, and these shall be established in regulatory terms. The overriding aim is to ensure the solvency of the entity and of the system it may manage, and sound capacity to manage compliance failures by their members.

It is stipulated that internal regulations shall be required, the content of which shall be defined in the rule and which shall be approved by the Minister of Economy and Finance further to reports by the CNMV, the Banco de España and the Regional Governments whose statutes of autonomy entrusts them with powers in respect of the regulation of securities trading centres. Among other aspects, regulations should cover the entity's working regime, the services provided by it, access requirements for membership status, the types of members, specification of the technical and solvency requirements demanded and the economic regime of CCPs.

Like IBERCLEAR, they should have an audit committee, a risks committee and an appointments and remuneration committee, along with mechanisms so that users and other interested parties may express their opinions on the performance of its functions, and a set of rules aimed at preventing potential conflicts of interest to which it might be exposed as a result of its relations with shareholders, directors and managers, participating entities and customers.

A regulatory framework has been introduced for cases where a member or a customer were to cease to meet, in full or in part, the obligations incurred vis-à-vis the central counterparty or vis-à-vis the member, in which case they may use the assets pledged by the non-complying party and adopt the necessary measures for their satisfaction in the terms established in the entity's regulations.

If any member (or any of its customers) were to be subject to bankruptcy proceedings, the CCP would enjoy an absolute right of separation of the financial instruments and cash posted by the member as guarantees, in keeping with the regime established in the regulation of the entity. The amount remaining after settlement of the guaranteed operations shall be incorporated into the customer's or member's bankruptcy assets and liabilities.

CCPs may enter into agreements with other resident and non-resident entities whose functions are analogous or which manage securities clearing and settlement systems, participate as shareholders in these entities or admit them as shareholders. These agreements,

and those that may be entered into with markets or multilateral trading facilities, will require approval by the CNMV, following a report by the Banco de España, and they must meet the regulatory requirements laid down.

CCPs shall remain subject to supervision by the CNMV and the Banco de España, in their respective areas of competence, and the provisions of Law 41/1999 of 12 November 1999<sup>58</sup> on securities payment and settlement systems shall be applicable to them, for systems regulated by this legislation.

Finally, to facilitate the performance of these functions, they may have access to IBER-CLEAR participant status.

#### OTHER CHANGES IN THE RULE

A more precise framework has been designed for entities entrusted with the recording of book-entry securities or of depositary institutions for cases of creditors' meetings, in a similar fashion to CCPs and to the existing regime for participating entities. The right of separation is therefore established for holders in respect of securities registered on their behalf, and they may exercise this by requesting their transfer to another entity. Also, the rights arising from operations in the course of being settled at the time bankruptcy is declared have been regulated, having regard in this connection to the rules of the corresponding clearing, settlement and registration system.

Another notable change in stock market operations is the obligation for a CCP to intervene for equity transactions traded multilaterally both on an official secondary market and under the multilateral trading facilities system. This obligation responds to the need to provide legal security to relations between investors and the CCP so as to provide for orderly settlement and the successful completion of the operations.

The current mechanisms of insurance on delivery<sup>59</sup> in securities registration, clearing and settlement systems have been eliminated. In their place, the resolution of incidents is allowed through cash settlements should it prove impossible to gain access to the securities, which enhances the system's stability. However, investors will retain a high level of protection, since, essentially, any relation is entered into solely with the central counterparty entity, which minimises - although it does not eliminate - the risk of failure in delivery. In addition, should a failure occur, cash settlements shall be appropriate to the security concerned and to the change in price that has taken place during the process.

The current control system based on registration references for equity has been eliminated, and the unification of registration systems has been introduced by means of book-entry balances of equity, fixed-income and public debt, the content of which shall be implemented in regulatory terms.

Finally, the CNMV shall maintain as official registers, along with those it currently has, another register to which the public shall have free access: this register relates to the clearing, settlement and registration systems, and central counterparties.

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<sup>58</sup> See "Financial regulation: fourth quarter of 1999", *Economic Bulletin*, January 2000, Banco de España, pp. 103-105.

<sup>59</sup> Insurance on delivery has traditionally been interpreted as the commitment to settle all buy and sell operations, always delivering securities in kind in exchange for cash. To do this, a system of collective guarantees was set in place with which to finance securities or cash-obtainment procedures in operations that could not be settled in time.

The Law came into force on 6 October 2011.

**Investment firms:  
amendment of solvency  
regulations and  
accounting standards**

CNMV *Circular 5/2011 of 12 December 2011* (BOE of 15 December) has been published, amending *Circular 12/2008 of 30 December 2008*,<sup>60</sup> on investment firms (IFs) and their consolidable groups, as has *Circular 7/2008 of 26 November 2008*<sup>61</sup> on accounting standards, annual accounts and confidential reporting returns for IFs, management companies of CILs and management companies of venture capital companies.

**SOLVENCY-RELATED CHANGES**

As is the case for credit institutions, the Circular makes the final transposition of European solvency regulations. This began with Law 2/2011 of 4 March 2011 on the sustainable economy, followed by Law 6/2011 of 11 April 2011, amending Law 13/1985 of 25 May 1985, on investment ratios, own funds and reporting obligations of financial intermediaries, and, finally, by Royal Decree 771/2011 of 3 June 2011, amending Royal Decree 216/2008 of 15 February 2008 on financial institutions' own funds.

The Circular amends subordinated financings received by IFs and subordinated financings without a specific maturity date, which should meet similar conditions to those demanded of credit institutions. It also introduces instruments other than the aforementioned ones that have to comply with a series of requirements<sup>62</sup> in order to be eligible as own funds.

Under the methods for calculating own funds, the requirements laid down in the Circular for hedging exchange rate risk, settlement risk and commodities risk are introduced.

In relation to the regime for major exposures, those incurred vis-à-vis a natural or legal person, or a group of natural persons acting systematically in concert that controls a company or group, shall be combined with those of that company or group.

Certain amendments are made to the internal models for calculating exposures within the trading portfolio, and remuneration policies are reflected in similar terms to those discussed for credit institutions.

Finally, the Circular does not include changes to the headings that amend the determination of own-funds requirements for credit risk arising on securitisations or "resecuritisations", since these are regulated in the case of IFs by CBE (Banco de España Circular) 3/2008 of 22 May 2008 on the determination and control of minimum own funds, amended by above-mentioned CBE 4/2001 of 30 November 2001.

**CHANGES TO ACCOUNTING  
STANDARDS**

The Circular amends *Circular 7/2008 of 26 November 2008* in order to include, among the standards relating to business combinations and consolidation, the precepts of CBE 4/2004 of 22 December 2004 on credit institutions: public and confidential financial reporting rules and formats.

60 See "Financial regulation: 2009 Q1", *Economic Bulletin*, April 2009, Banco de España, pp. 188-193.

61 See "Financial regulation: 2008 Q4", *Economic Bulletin*, January 2009, Banco de España, pp. 114-116.

62 Including most notably the following: 1) they shall have no maturity date, or the initial maturity shall be at least 30 years; 2) they may include one or several purchase options, at the discretion of the issuer, but they shall not be repayable until five years have elapsed since their date of issue, and 3) if the terms of issue of the instruments without a specific maturity date include some incentive for their repayment by the entity, in the opinion of the CNMV, such incentive may not become effective until ten years have elapsed since their date of issue. In the case of instruments with a specific maturity, no repayment incentive shall be allowed at any date other than their maturity date.

The classification of consolidable groups of IFs has been broadened; not only does this encompass those in which there is a decision-making unit because there is a situation of control, but also those in which systematic action in concert is taken. Also, the cases in which the CNMV shall decide how consolidation should be conducted have been broadened.<sup>63</sup>

As a result of the amendments in respect of solvency, amendments to the definition of own funds, reserves and net worth, among others, have been made in order to maintain consistency between both circulars. Under this same criterion, the existence of significant influence in an entity or consolidable group has been updated, being evidenced in the following situations, inter alia: 1) representation on the board of directors, or on the equivalent management body of the investee; 2) participation in the policy-setting process, including those related to dividends and other distributions; 3) existence of significant transactions between the investor and the investee; 4) exchange of senior management personnel, and 5) furnishing of essential technical information.

In the analysis to determine whether there is significant influence on an entity, the importance of the investment in the investee, the number of years of representation on the governing bodies of the investee and the existence of potentially convertible or exercisable voting rights as at the date to which the financial statements refer shall all be taken into account. It shall also be presumed, unless proven otherwise, that there is significant influence when the investor, individually or together with the other entities in the group, holds at least 20% of the voting rights in the investee.

Finally, a series of necessary technical amendments is introduced for the more efficient application of Circular 7/2008, clarifying and specifying certain items and amending others in order to facilitate the application of accounting standards. These include, among others, those relating to goodwill, hedges of net investment in foreign operations, the identification of impaired non-financial assets and non-current assets held for sale.

The Circular came into force on 1 January 2012.

#### Investment firms: brochure of fee and commission charges and content of standard contracts

CNMV *Circular 7/2011 of 12 December 2011* (BOE dated 24 December 2011) on the brochure of fee and commission charges and content of standard contracts has been published.

The Circular, availing itself of the powers conferred by Ministerial Order 1665/2010 of 11 June 2010,<sup>64</sup> completes the new regulatory framework covering relations between retail customers and institutions providing investment services, resulting from Directive 2004/39/CE of the European Parliament and of the Council of 21 April 2004<sup>65</sup> on markets in financial instruments (MIFID). It repeals Circular 1/1996 on standards of conduct, transparency and identification in securities market transactions, and Circular 2/2000 on standardised formats of standard contracts for the discretionary and individualised management of investment portfolios, and other implementations that still remained in force.

The regime for transparency with customers has been implemented, covering aspects such as the following:

<sup>63</sup> These cases are the following: 1) when the IF exerts significant influence over one or several IFs or financial institutions, without however owning a share in or having other capital links to these institutions, and 2) when two or more IFs or financial institutions are under a single management structure, without this having had to be established by contract or by means of statutory clauses.

<sup>64</sup> See "Financial regulation: 2010 Q2", *Economic Bulletin*, July 2010, Banco de España, pp. 139-140.

<sup>65</sup> See "Financial regulation: 2004 Q2", *Economic Bulletin*, July 2004, Banco de España, pp. 110-114.

- 1) The means of preparing and electronically transmitting the brochures of the maximum fee and commission charges applicable to retail customers has been established. That allows for a notable improvement in the procedure, control and publicity of the information that the CNMV receives, and for the electronic treatment of the data received from entities, making their comparison easier.
- 2) The bases for calculation and the definitions of some of the more habitual transactions provided to retail customers are specified, including most notably equity broking on domestic and foreign markets, safekeeping and administration of financial instruments (without stretching to the exercise of the rights corresponding to these instruments), portfolio management and investment consultancy. To this end, the brochure format comprises a fixed section that uniformly lays down the fee and commission charges applicable to the above-mentioned operations, and a variable section in which each entity will reflect the fees and commissions for other operations or services that it might provide. The aim here is that investors should have sufficient criteria to assess whether the fees and commissions are commensurate with the quality of the service provided. The commissions applicable to professional investors, not included within the scope of Ministerial Order EHA 1665/2010, shall be freely determined by the contracting parties, without having to be subject to the regime regulating brochures of fee and commission charges.
- 3) Turning to standard contracts, if there is no prior control by the CNMV in respect of their content, obligatory content is implemented, regulating expressly those aspects that supervisory practices and customer claims and consultations have highlighted as needing greater transparency and which were not properly understood by investors. In particular, the specific content of standard contracts for safekeeping and administration of financial instruments and for the individualised management of portfolios has been established.
- 4) In relation to publicity, it is established that the information brochures of fee and commission charges and of standard contracts must be made available to customers and potential customers in all customer service centres, including at external agents, and on websites, in a readily accessible location. The CNMV is further empowered with disseminating the data contained in the fixed section of the brochure.

A new statement has been added, which IFs shall send to the CNMV on the confidential data<sup>66</sup> of the IFs that provide investment services, so as to ascertain the fee and commission charges actually applied to customers in the most habitual operations.

Lastly, there have been changes to the statements containing the necessary complementary information for determining the contribution to the Investment Guarantee Fund of the management companies of CILs and IFs, in Circular 7/2008.

The Circular shall come into force on 24 June 2012.

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<sup>66</sup> Information is requested on the average and the most frequent figure for commissions actually charged to customers, and on the maximum and minimum values of the extreme intervals.

Law 35/2003 of 4 November 2003	Law 31/2011 of 4 October 2011
<b>Updating of legal regime</b>	
Directors or managers of entities are required to have recognised commercial and professional standing.	Individuals who represent legal entities on the board are required to have recognised commercial and professional standing.
Not envisaged.	Members of the board of directors, like those of credit institutions, are required to have recognised commercial and professional standing.
<b>Enlargement of cross-border activity</b>	
Not envisaged.	Community passport for cross-border management of investment funds so that CII management companies may manage investment funds in other Member States.
Requirements for cross-border marketing included reporting to the competent authority in the home Member State and submitting documentation to the competent authority in the host Member State.	Simplification of administrative steps: documentation is reduced and only notification between competent authorities is required. Deadlines are shortened for marketing of CII's shares and units and the need for the CII to notify the competent authority in the host Member State is eliminated.
<b>Strengthening of investor protection</b>	
Existence of full and simplified prospectuses. The latter summarised information about the CII, the fund or company's objectives and the investment policy, with a brief assessment of the CII's risk profile.	The simplified prospectus is replaced by the "key investor information document" which includes essential information of the CII's in an abridged form that can be easily understood by average investors without the need to have recourse to other documents.
There were legal provisions for sending the annual, six-monthly and any quarterly reports free of charge by telematic means when so requested by unit-holders or shareholders.	Compulsory communications sent to unit-holders and shareholders free of charge may also be sent by telematic means.
Not envisaged.	CII management companies which manage funds and companies established in another EU Member State, must attend to and resolve complaints or claims in the language or in one of the official languages of the home Member State of the CII.
Not envisaged specifically and restricted to exchange of information between competent supervisory authorities.	Strengthening of the mechanisms for cooperation, consultation, exchange of information and professional secrecy between the competent supervisory authorities and with the European Securities and Markets Authority.
<b>Improvement of competitiveness in the sector</b>	
Not envisaged.	Possibility of using global accounts for the marketing in Spain of funds domiciled here.
Not envisaged.	Possibility of CII's being able to provide as a guarantee part of the assets included in their net assets.
Possibility of CII management companies marketing CII's shares or units through agents or authorised parties.	Furthermore, possibility that CII management companies may market CII's shares and units via entities authorised to provide investment services or through other CII management companies.

SOURCES: BOE and Banco de España.

### Changes to the Collective Investment Institutions Law

*Law 31/2011 of 4 October 2011* (BOE of 5 October 2011) amended Collective Investment Institutions (CIIs) *Law 35/2003 of 4 November 2003*<sup>67</sup> in order to adapt it to recent EU legislation.<sup>68</sup>

Table 5 includes the most significant new features of *Law 31/2011* compared with the previous *Law*.

### AMENDMENT OF THE LEGAL REGIME

Certain technical improvements and various qualifications are introduced in respect of the requirements for taking up and pursuing the activity of CIIs. Specifically, at investment companies not only the members of the board of directors but also those individu-

<sup>67</sup> See "Financial Regulation: 2003 Q4", *Economic Bulletin*, January 2004, Banco de España, pp. 84-87.

<sup>68</sup> Specifically in order to transpose Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (consolidating in a single text Directive 85/611/EEC) and Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority.

als who represent legal entities on the board are required to have recognised commercial and professional standing. Furthermore, the concept of commercial and professional standing is adjusted in a similar way to that required for credit institutions. Thus, those individuals with a personal history of respecting business laws and others regulating economic and business activity, as well as of observing good business and financial practices are deemed to be of such standing.

#### MODIFICATION OF CROSS-BORDER ACTIVITY

##### Cross-border management

The main change consists of introducing the “Community passport” for the cross-border management of investment funds,<sup>69</sup> as envisaged by Directive 2009/65/EC. Thus, collective investment institution management companies (CII management companies) may manage investment funds in other Member States, either through setting up a branch or via the freedom to provide services.

There are two sides to cross-border management: the activity abroad of Spanish CII management companies and the activity in Spain of foreign CII management companies. Furthermore, the Law sets out different requirements according to whether they are EU or non-EU CII management companies. It also establishes different procedures for opening branches and the freedom to provide services and contains additional requirements for the management of the CII in the host country.

In any event, under the new Law the provision of services in another Member State by an EU CII management company does not require any authorisation from the supervisory authority in the host country; only certain information must be sent by the supervisory authority in the home country.

##### Cross-border marketing

The cross-border marketing regime within the EU is simplified. Under the previous regulations, reporting to the competent authority in the home Member State was required as well as submitting a series of documents to the competent authority in the host Member State, which considerably prolonged these formalities. From now on, in addition to reducing the documentation,<sup>70</sup> the procedure will involve the notification between the competent authorities of the CII management company’s request and the monitoring solely by the competent authority in the home Member State of fulfilment of the necessary requirements to sell shares or holdings of the CII to investors in Member States other than that in which the CII is domiciled. The deadlines for commencing the marketing of the CII management companies’ shares and units<sup>71</sup> are also shortened and the need for the CII to provide notification to the competent authority of the host Member State is eliminated.

In keeping with the following section (strengthening investor protection), the CIIs domiciled in Member States will provide investors located in a Member State, other than their home Member State, with all the information and documentation in the form set out in the Law

69 Management companies, investment funds and harmonised investment companies already had a Community passport for the cross-border marketing of their shares and holdings. The change comprises introducing the passport for the cross-border management of funds between EU Member States.

70 In addition to the notification letter, the CII must only submit the investment fund rules or the instruments of incorporation of the company, its prospectus, the latest annual report and the following six-monthly report, if any, the document containing the key investor information and the attestation that it complies with the conditions imposed by Directive 2009/65/EC.

71 Previously, it was necessary to wait for at least two months from when the documentation was submitted, unless a reasoned decision was issued rejecting it, whereas under the new Law marketing may commence from when the competent authority in the home Member State informs the CII that the letter of notification and the documentation required has been sent to the competent authority in the host Member State.

and in its implementing regulations. This includes, *inter alia*, the investment fund rules or the instruments of incorporation of the investment company, key investor information, the prospectus, annual and six-monthly reports and the changes thereto.

Finally, a framework of supervision and cooperation is established between competent authorities in the Member States in respect of cross-border marketing by CII.

#### STRENGTHENING OF INVESTOR PROTECTION

The most important aspect of the Law is the introduction of a new informative document called the “key investor information document”<sup>72</sup> which replaces the previous simplified prospectus. The two major changes contained in the new document with respect to the simplified prospectus are, on one hand, that it is standardised so as to make harmonised funds and companies in any Member State perfectly comparable. On the other, it includes only the essential information of the CII which will be presented in an abridged form that can be easily understood by average investors, in order that they can understand the basic characteristics, nature and risk of the investment product on offer and take well-founded investment decisions without the need to resort to other documents.<sup>73</sup>

New cases in respect of amendments to an investment fund’s management rules are included, such as: setting or raising fees, modifications of the frequency of calculation of the unit redemption price, transformations into a CII divided into sub-funds, or into sub-funds of other CII, the replacement of the depositary and other cases which will be determined in regulations. As with the aforementioned cases, they will have to be authorised by the CNMV and communicated by the CII management company to the unit-holders prior to their entry into force.

The communications which must be sent to unit-holders or shareholders, as required by the Law or by its implementing regulations, must be sent by telematic means when investors specifically choose this communication channel.<sup>74</sup>

The CII management companies which manage funds and companies established in another EU Member State, must attend to and resolve complaints or claims in the language or in one of the official languages of the home Member State of the fund or company.

Another means of investor protection arises from the strengthening of the mechanisms for cooperation, consultation, exchange of information and professional secrecy between the competent supervisory authorities, similar to that which was established for credit institutions. Thus, the CNMV will cooperate with the competent authorities of the Member States and with the European Securities and Markets Authority to undertake the functions established in this Law.

It will also assist the competent authorities of the other Member States to provide the necessary information for these authorities to perform their functions as well as to collabo-

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72 The document with the key investor information will provide, *inter alia*, the following information: identification of the CII, a brief description of its investment objectives and its investment policy; a presentation of past returns or, if appropriate, profitability scenarios; the associated costs and expenses and the investment’s risk/remuneration profile with the appropriate guidelines and warnings in respect of the risks associated with investments in the CII.

73 The prospectus and key investor information may be provided in a durable medium or via the investment company’s or management company’s website. A paper copy of these documents will be delivered free of charge to investors on request.

74 Previously, there were legal provisions only for sending the annual, six-monthly and any quarterly reports free of charge by telematic means when so requested by unit-holders or shareholders.



rate in investigation or supervisory activities. Similarly, it may request the cooperation of another Member State in a supervisory activity for an onsite verification or an investigation in the other Member State's territory in the framework of the powers conferred in this Law and its implementing regulations.

Finally, the CNMV may request the temporary suspension of the issuance, redemption or repurchase of the units or shares of authorised CIIs in Spain, when it is not possible to determine their price or for other reasons of *force majeure*.

INCREASE OF  
COMPETITIVENESS IN THE  
SECTOR

An essential change with a view to strengthening the competitiveness of Spain's investment industry is the possibility of using global accounts for the marketing in Spain of funds domiciled here, in a similar way to the foreign CIIs which have been using this marketing mechanism and for which they must fulfil a series of requirements.<sup>75</sup>

Along these lines of strengthening competitiveness, CIIs are granted the possibility of being able to provide as a guarantee part of the assets included in their net assets, thus improving their financing possibilities, especially through framework agreements on contractual compensation. Throughout the articles other measures are established for encouraging the competitiveness of this industry in Spain by reducing the administrative burdens and making procedures more agile.

CII management companies are permitted to market CIIs' shares and units via agents or representatives, either through entities authorised to provide investment services or through other CII management companies. These units must be included in the CII management company's register of unit-holders under the corresponding unit-holder's name with at least the tax identification number and the marketing entity through which the units were acquired. Each marketing entity must keep a register that identifies the unit-holders who subscribed units through it.<sup>76</sup>

OTHER NEW FEATURES OF THE  
LAW

The Law establishes new cases for the suspension<sup>77</sup> and revocation<sup>78</sup> of the licenses of CII management companies. If the CII management company performs the functions of administration, representation, management of investment and management of subscriptions and redemptions of CII authorised in another EU Member State, the competent authority of the host Member State (the CNMV in the case of Spain) will consult the competent authorities of the home Member State prior to withdrawing the license. If the license of a CII management company domiciled in a non-EU Member State were revoked, it would also mean that the license of the branch operating in

<sup>75</sup> The following requirements should be noted: a) the marketing entity will notify, as frequently as the fund handles the subscription and redemption of its units, the corresponding CII management company of every subscription and redemption operation, identifying all unit-holders channelled through the marketing entity by their corresponding tax identification numbers; b) the contracts entered into by the CII management company and the marketing entity must stipulate the latter's obligation to provide, at least, the tax identification number of each unit-holder channelled through said marketing entity for the purposes of complying with the material and formal tax obligations for which the management entity is responsible, and c) these contracts must also stipulate that the marketing entity must send to the CNMV all the information on the CII's unit-holders channelled through it. Under current legislation in force, the marketing entity must refer the CII management company to the CNMV provided that the CII management company does not have said information.

<sup>76</sup> It may be established in regulations that, as an alternative to the identification system, a third-party entity be entrusted with keeping the centralised register of unit-holders.

<sup>77</sup> The new cases are: non-fulfilment of obligations in respect of the registers, non-compliance with obligations vis-à-vis the Investments Guarantee Fund and insolvency of the entity.

<sup>78</sup> The new grounds for revoking the license are: serious and systematic non-compliance with obligations in respect of the registers, non-compliance with obligations vis-à-vis the Investments Guarantee Fund for three months and when the auditor's report on the annual accounts includes a disclaimer of opinion.

Spain would be revoked. In this case, the CNMV will adopt the appropriate measures so that the entity does not commence new activities in Spain and investor interests are safeguarded.

Lastly, the penalty regime of CII is updated by adding new cases of serious and very serious infringements and the imposition of the corresponding penalties.

The Law came into force on 6 October 2011.

**Collective investment institutions: modification of the accounting rules, annual accounts and confidential returns**

CNMV *Circular 4/2011 of 16 November 2011* (BOE of 6 December 2011) was published, which partially amends CNMV *Circular 4/2008 of 11 September 2008*,<sup>79</sup> on the content of quarterly, half-yearly and annual reports of CII, and of the statement of position.

In order to replace the simplified prospectus by the key investor information (KII), it is necessary to adapt certain information which is currently included in the periodic public information to bring it into line with the KII. Specifically, this information refers to the expense ratio (known to date as TER or Total Expense Ratio), expressed as a percentage of its average net assets, which is redefined,<sup>80</sup> and the performance-based management fee which will have to be reported separately. Furthermore, the KII requires that a chart with the CII's past returns be published which, although it does not form part of the periodic public information, will be sent out with it.

Also, the Law includes the obligation for management companies to report the costs arising from the analysis services, specific circumstances and other relevant information which has led, to the creation of any CII or special-purpose sub-fund and the most important aspects of the winding up or liquidation of real estate investment funds.

CII must detail transactions with derivatives<sup>81</sup> in the periodic public information. Additionally, they must specify the chosen method of measuring total exposure to market risk (commitment approach, absolute VaR or relative VaR) and the maximum, minimum and average levels of VaR and of leverage existing at the end of the reference period.

The Circular came into force on 31 December 2011.

**Modification of the accounting rules of secondary market governing companies, excluding the Banco de España, of multilateral trading facilities, the system operator and of other entities**

CNMV *Circular 6/2011 of 12 December 2011* (BOE 23 December 2011) amends *Circular 9/2008 of 10 December 2008*<sup>82</sup> on accounting rules, confidential and public returns and annual accounts of official secondary market governing companies (excluding the Banco de España), multilateral trading facilities (MTFs), the system operator, the central counterparties, the Sociedad de Bolsas, the companies controlling all the shares of the secondary market governing companies and multilateral trading facilities, and any other market clearing and settlement systems that may be established under the provisions of the Securities Market Law.

<sup>79</sup> See "Financial Regulation: 2008 Q4" *Economic Bulletin*, January 2009, Banco de España, pp. 15 and 16.

<sup>80</sup> The numerator will include: the direct expenses borne by the CII, except for the performance-based management fee, comprising the management fee based on net assets, the depositary's fee, the periodic CNMV registration fees, expenses for external services (apart from financing expenses), plus any other current management expense borne by the CII, excluding fees from the purchase or sale of its financial assets or any other expense corresponding to payments made directly by the unit-holder or the shareholder such, for example as the subscription and redemption fees.

<sup>81</sup> These transactions are undertaken either with the aim of hedging risk or the investment, or within the framework of management to achieve a targeted rate of return.

<sup>82</sup> See "Financial Regulation: 2009 Q1" *Economic Bulletin*, April 2009, Banco de España, pp. 195 and 196.

The Circular introduces various improvements. Thus, first it includes formats for the public intermediate consolidated financial statements. It also updates the confidential consolidated financial returns.

Second, several technical improvements are introduced in the structure of the data in the formats for financial statements and for supplementary information as well as in the procedures, deadlines and formalities in respect of the submission and publication of the information. All these improvements have been advised on the basis of experience, comparative analysis with other jurisdictions and general practice. Thus, various data have been eliminated from the monthly and quarterly statements whose cost/benefit analysis in practice has proven to be unreasonable. The formalities for certifying approval of the public intermediate statements and making them public have been simplified; the obligation to file public individual intermediate statements at those entities which are part of a group that files public intermediate consolidated statements has been eliminated and, at the same time, the deadlines for submission of confidential and public quarterly financial statements and supplementary information have been extended.

Finally, the breakdowns of confidential information on revenue have been restructured. The most notable changes are the addition of a new segment for the activity of clearing and acting as a central counterparty in anticipation of a central counterparty being formed in Spain in the near future, as well as the reorganisation of the other revenue segments and the grouping together of some of them with similar segments within the same operational activity.

The Circular came into force on 1 January 2012.

#### Credit agreements for consumers: updating of Community law

*Commission Directive 2011/90/EU of 14 November 2011* (OJ L 15 November 2011) amends Part II of Annex I to Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008,<sup>83</sup> relating to credit agreements for consumers.

The new Directive sets out additional assumptions for the calculation of the annual percentage rate (APR), since the assumptions established in Directive 2008/48/EC do not suffice and in certain circumstances are not adapted any more to the commercial situation at the market.

Specifically, new assumptions are introduced for open-end credit agreements.<sup>84</sup> In these cases, for the purposes of calculating the APR, it will be assumed that: 1) the credit is provided for a period of one year starting from the date of the initial drawdown; 2) the capital is repaid by the consumer in twelve equal monthly payments, and 3) the final payment made by the consumer clears the balance of capital, interest and other charges.

Also, certain additional assumptions are adopted for fixed-term credit agreements. Specifically, for the following cases: 1) if the date of conclusion of the credit agreement is not known; 2) if the date or amount of a repayment of capital to be made by the consumer cannot be ascertained, and 3) if a credit agreement provides different ways of drawdown with different charges or borrowing rates.

<sup>83</sup> See "Financial Regulation: 2008 Q1" *Economic Bulletin*, April 2008, Banco de España, pp. 23-25.

<sup>84</sup> An open-end credit agreement is a credit agreement without fixed duration and includes credits which must be repaid in full within or after a period but, once repaid, become available to be drawn down again.

The Member States will adapt their legal system to the contents of the new Directive by 31 December 2012 and the provisions used for this purpose will be applied from 1 January 2013.

### Urgent budgetary, tax and financial measures to correct the budget deficit

*Royal Decree-Law 20/2011 of 30 December 2011* (BOE 31 December 2011) on urgent budgetary, tax and financial measures to correct the budget deficit has been published.

#### MEASURES REGARDING THE FINANCIAL SYSTEM

The following sections should be underlined from the standpoint of financial regulation.

As for the indirect exercise of the financial activity of savings banks envisaged in Royal Decree-Law 11/2010 of 9 July 2010,<sup>85</sup> it was provided that the savings banks could pursue their declared purpose as a credit institution through a commercial bank to which they would transfer all their financial operations. It was also envisaged that if the savings bank reduced its holding below 50% of the voting rights in the credit institution, it should give up its authorisation to operate as a credit institution and transform itself into a foundation. This has been modified now so that giving up the authorisation and the subsequent transformation into a savings bank should be undertaken when control is no longer held, in the terms provided for in Article 42 of the Spanish Commercial Code.<sup>86</sup>

As for the Institutional Protection Schemes (IPSS),<sup>87</sup> formed by savings banks, the Royal Decree-Law specifies that the central institution must be a public limited company and must be controlled jointly by all the savings banks.

#### FISCAL MEASURES

A supplementary levy was introduced to raise the gross personal income tax payable at state level which will be applied in the 2012 and 2013 tax periods.<sup>88</sup> Thus, the gross tax payable at state level will be increased progressively according to a specific scale from 0.75% (for tax bases up to €17,707.20) to 7% (for tax bases above €300,000.20).

A supplementary levy was also introduced on the tax base for income from savings. Thus, it is progressively increased according to a specific scale from 2% (for tax bases up to €6,000) to 6% (for tax bases above €24,000).

The tax credit on homeownership has been re-introduced irrespective of taxpayers' income (previously it could be applied if taxpayers obtained income of less than €24,107.20). The ceiling for this credit remains at €9,040 per year and will comprise the amounts paid to acquire or renovate dwellings, including the expenses which have arisen and been paid by the purchaser and in the case of borrowed funds, the repayments, interest and the cost of instruments for hedging the floating rate interest risk on mortgage loans and other expenses arising therefrom.

<sup>85</sup> See "Financial Regulation: 2010 Q3" *Economic Bulletin*, October 2010, Banco de España, pp. 137-142.

<sup>86</sup> According to Article 42 of the Spanish Commercial Code, control shall be presumed to exist when a company, denoted the parent, has any of the following relationships with another one, denoted the subsidiary: 1) the parent holds a majority of the voting rights in the subsidiary; 2) the parent has the power to appoint or remove a majority of the members of the board of directors of the subsidiary; 3) through agreements with third parties, the parent can exercise a majority of the voting rights in the subsidiary; and 4) the parent has, with its votes, appointed most of the members of the board of directors of the subsidiary in office at the time the consolidated accounts have to be prepared and during the two immediately preceding accounting periods. In particular, this will be presumed to be so if the majority of the members of the subsidiary's board of directors are members of the board of directors or senior managers of the parent or another company controlled by the parent.

<sup>87</sup> The IPSS were regulated by Royal Decree-Law 6/2010 of 9 April 2010 on measures to promote economic recovery and employment and adapted to savings banks through Royal Decree-Law 11/2010 of 9 July 2010 on governing bodies and other aspects of the legal regime of savings banks.

<sup>88</sup> The withholding amounts will be increased further by the percentages established for the State's portion for that period.

The tax credit on homeownership may also be taken by taxpayers who refurbish and undertake construction work on their dwelling, including communal parts of the building and areas through which passage is necessary to obtain access to the building. The maximum deduction base is €12,080 per year and the percentage of the tax credit is 10%, irrespective of taxpayers' income (previously it could be applied if recipients earned income of less than €24,107.20.)

Similarly, this credit may be applied to amounts deposited at credit institutions in accounts which meet the formalisation and draw down requirements and are established in regulations, provided that they are used to buy a first home or refurbish a principal residence, with the annual limit of €9,040 and the income limit of €24,107.20 was also eliminated.

As for corporate income tax, a series of measures which ended on 31 December 2011 were extended throughout 2012. They included the reduced rate of corporate income tax for maintaining or creating jobs which applies to microenterprises<sup>89</sup> and the percentage of gross tax payable under the advance partial payments system remained at 18%.

The standard tax rate applicable to non-residents' income was increased from 24% to 24.75%. The tax rate applicable to the following income was raised from 19% to 21%: 1) income obtained by permanent establishments of non-resident entities which is transferred abroad; 2) dividends and other income arising from shareholdings in any type of firm; 3) interest and other income obtained from the transfer of capital to third persons, and 4) capital gains disclosed on transfers of assets.

Another measure, concerning value added tax, which ended on 31 December 2011 was extended and the reduced rate of VAT of 4% (instead of the standard rate of 8%) will be applied to housing sales.

The real estate tax has been increased temporarily for exceptional reasons during 2012 and 2013. It will be increased by the following rates: 1) 10% for municipalities which have been subject to a general collective valuation procedure for urban real estate as a result of a complete valuation report<sup>90</sup> approved prior to 2002, the minimum additional rate may not be lower than 0.5% in 2012 and 0.6% in 2013; 2) 6% for municipalities which have been subject to a general collective valuation procedure for urban real estate as a result of a complete valuation report approved between 2002 and 2004, the minimum additional tax may not be lower than 0.5% and 3) 4% for municipalities which have been subject to a general collective valuation procedure for urban real estate arising from a complete valuation report approved between 2008 and 2011.

This will not apply to municipalities whose valuation reports have been approved between 2005 and 2007, nor will it be effective for 2013 in those municipalities in which a complete valuation report is approved in 2012.

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<sup>89</sup> Entities whose turnover is less than €5 million and have average headcount of less than 25 employees. These entities will be taxed according to the following scale: 1) the tax base between €0 and €300,000, will be taxed at 20% for tax periods which began between 2011 and 2012, and 2) the remainder of the tax base will be taxed at 25%.

<sup>90</sup> The valuation report includes the criteria, valuation modules, town planning and other factors required to determine the rateable value of real estate.

OTHER MEASURES OF INTEREST During 2012 government and certain public entities and companies<sup>91</sup> may not make contributions to occupational pension schemes or group insurance contracts which include coverage of retirement contingencies.

Similarly, during this period, remuneration of public sector employees may not undergo any increase. Contributory pensions paid by the social security system and those of retired state employees will increase by 1% in 2012.

The Royal Decree-Law came into force on 1 January.

#### Measures to expedite proceedings

*Law 37/2011 of 10 October 2011* (BOE 11 October) contains measures to expedite proceedings. These measures are of different types: some are designed to guarantee the public's basic rights, as in the criminal sphere and others are geared towards optimising the proceedings by eliminating unnecessary steps or replacing them by shorter ones and others are earmarked for limiting the abusive use of the courts.

From a financial and social point of view, the key measures are briefly detailed below.

The minimum amount for which creditors can request the foreclosure of property is reduced from 60% to 50% of the appraised value of said property, if there should have been no bidder at the attendant auction of property, or to the amount which creditors are owed in respect of all items, provided that the property is not the debtor's principal residence.<sup>92</sup>

If there was a bidder and the amount offered was below 70% of the reserve price and the party subject to the foreclosure had not submitted a bid, the creditor may request the foreclosure of the property at the aforementioned 70% or for the amount owed in respect of all items provided that this amount is higher than the best bid.<sup>93</sup>

The "juicio monitorio" system (fast procedure for debt recovery) is extended to eviction proceedings on account of non-payment with the result that should the tenant not abandon the property, pay or submit an objection following the order, the next step is eviction, notification of the eviction date is provided in the order.

The quantitative limit of the "juicio monitorio" is abolished (previously it was set at €250,000) thus bringing it into line with the same proceeding in Europe in order to avoid limiting access to it.

Finally, remedy of appeal is excluded from oral proceedings if the amount in question does not exceed €3,000.

The Law came into force on 31 October.

<sup>91</sup> Including, inter alia, central government and its independent bodies and state agencies, universities, regional government, local government and their dependent bodies, administrative entities and common services of the health and social services, public mercantile companies and public business entities and other public organisations and bodies in the state, regional and local public sector.

<sup>92</sup> In the case of principal residences, the minimum amount for which creditors can request the foreclosure of the property remains at 60%. This amount had been raised from 50% to 60% by Royal Decree-Law 8/2011 of 1 July 2011.

<sup>93</sup> Previously, it was conditional upon that amount being higher than 60% of its appraised value and higher than the best bid.

Law 38/2011 of 10 October 2011 (BOE of 11 October), reforming Insolvency Law 22/2003 of 9 July,<sup>94</sup> has been published. It introduces a series of amendments in order to correct errors of approach detected in practice and to update the attendant regulations on the basis of the experience and the application thereof.

The Law affords insolvency proceedings the following: greater legal certainty; the opening up of alternatives which seek to strike a balance between the firm's viability and the necessary legal guarantees; the promotion of electronic media, and simplified and more flexible proceedings.

Greater headway has been made in the alternatives to insolvency, known as "pre-insolvency institutes". These offer those subject to insolvency a more flexible and economical solution to their crisis through refinancing agreements with creditors,<sup>95</sup> provided that they follow a viability plan that provides for the continuity of professional or business activity in the short and medium term, and prior to the announcement of the insolvency.

The so-called "fresh money privilege" has been incorporated into Spanish law. This specifically considers as claims against the debtor's estate 50% of the credit entailing fresh income for the debtor and which have been granted under a refinancing agreement with the creditors, the former being senior in the event of the subsequent winding up of the entity.

Along similar lines is the consideration as claims against the debtor's estate of credit granted to the debtor that originated following the legal approval of the agreement in the event of the initiation of the liquidation phase.

As regards cases of exemption from the prohibition to vote in the creditors' meeting,<sup>96</sup> these are extended to financial institutions subject to supervision if they should have acquired their credit after the announcement of insolvency.<sup>97</sup>

Insolvency proceedings have been simplified and made more flexible, thereby favouring earlier liquidation, promoting and regulating a shorter procedure and offering specific solutions in the common phase and in the agreement.

There has been an improvement to the regime governing insolvency disclosure for registration purposes, which has increased notably, and to the Insolvency Public Register which, unlike under current regulations, features as an instrument for the disclosure and transparency of insolvencies, providing a safeguard for all parties that may be affected.

The requirements for appointment as insolvency administrator have been reinforced, allowing a better assessment by the insolvency judge of the experience and specific training needed to perform the role. Two fundamental measures have been taken along these

94 See "Financial regulation: 2003 Q3" *Economic Bulletin*, October 2003, Banco de España, pp. 97-99.

95 Refinancing agreements should meet certain requirements: 1) they must be entered into by creditors whose loans account, at least, for three-fifths of the debtor's liabilities, and 2) they must be accompanied by a favourable report from an independent expert designated for prudent arbitration purposes by the mercantile registrar of the debtor's domicile. The expert report shall contain a technical judgment on the sufficiency of the information provided by the debtor, on the reasonableness and feasibility of the viability plan and on the proportionality of the guarantees in accordance with normal market conditions at the time of the agreement being signed.

96 As envisaged under the previous regulations, holders of subordinate loans and those who acquired their credit through inter-vivos proceedings after the declaration of insolvency will continue to have no right to vote in the creditors' meeting, barring the aforementioned exceptions.

97 Previously, this possibility was only envisaged when the acquisition of the credit was by way of universal accession as a result of an obligatory enforcement.

lines: 1) the extension of cases in which insolvency administration involves a single member, cases which will not solely be shortened insolvency procedures, which has a clear repercussion on the functioning of the administration, on decision-making, and on the cost savings it will entail; and 2) the recognition of the legal person as insolvency administrator.

Notwithstanding the foregoing, it is envisaged that, for insolvency procedures of particular importance that are defined under law, a significant creditor should also be present along with the insolvency administrator. The possibility of designating general government with creditor status is even envisaged in any case in which a cause of public interest is involved.

Finally, the regime governing connected insolvencies is reinforced, especially in relation to groups of companies, enabling the accumulation of insolvencies of several debtors, which may come about through a joint declaration application or through the accumulation of insolvencies that have already been declared.

The law came into force on 1 January 2012.

5.1.2012.