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Introduction

Relatively few new financial provisions were adopted in the first quarter of 2013 compared to the preceding periods.

The European Central Bank (ECB) brought in new regulations in four areas: 1) early repayment procedures for certain long-term Eurosystem financing operations, which have recently been adopted by the Banco de España; 2) an extension to the changes to the eligibility criteria for new underlying assets for monetary policy operations; 3) new regulations on the Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET2), and 4) standards for the issue of electronic certificates by the European System of Central Banks (ESCB).

For its part, the Banco de España has updated certain general terms and conditions applicable to monetary policy operations to adapt them to the changes in the Eurosystem's monetary policy instruments and procedures.

Three norms establishing a series of measures affecting financial institutions were published, aiming to: 1) protect the holders of certain types of savings and investment products, among other financial measures; 2) regulate investments by insurance undertakings in securities and movable property issued by the bank restructuring asset management company (Sareb); and, 3) define new assumptions for the calculation of annual percentage rates (APR) for consumer credit agreements.

Four pieces of legislation were enacted in relation to the securities market: 1) as is usual at this time of year, the conditions under which State debt is due to be issued in the coming year were published (covering 2013 and January 2014); 2) certain changes were made to the regulations on State debt market-makers; 3) the information that public limited companies, savings banks and other entities issuing traded securities have to provide was updated, as was 4) the information that investment firms and fund management companies are required to submit to the CNMV.

At European Union level, three pieces of financial legislation have been promulgated: 1) the authorisation of certain Member States to establish enhanced cooperation in relation to the financial transactions tax (FTT); 2) implementation of the regulations on alternative investment fund managers (AIFMs); and 3) a series of additional measures regulating over-the-counter (OTC) derivatives, central counterparties, and trade repositories.

The contents of this article are set out in Table 1.

European Central Bank: financing operations and collateral for monetary policy operations

Guideline ECB/2013/2 of 23 January 2012 (OJEU of 5 February 2013), was published, amending Guideline ECB/2012/18 of 2 August 2012[1] on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral. Resolution of 5 March 2013 of the Executive Commission of the Banco de España (BOE of 7 March 2013)

1 See "Financial regulation: 2012 Q3," Economic Bulletin, October 2012, Banco de España, pp. 163-167.

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TABLE 1

was also published, on additional temporary measures regarding monetary policy operations, amending the Resolution of 11 December 1998, approving the general clauses applicable to monetary policy operations, to adopt the changes made in the aforementioned Guideline.

Guideline ECB/2012/18 authorised the Eurosystem to allow counterparties to reduce the amount of certain long-term financing operations or end such operations before their maturity (actions referred to collectively as «early repayment»). It also provides that the conditions applicable to any such repayment are to be published in the corresponding auction or by any other means the Eurosystem sees fit.

CONTENTS (cont´d) TABLE 1

Guideline ECB/2013/2 describes the early repayment procedure to be followed by counterparties in order to ensure that all euro-area national central banks (NCBs) apply the same conditions.

The repayment option and the date from which institutions can exercise it will be published in the corresponding auction notice, or by whatever other means is deemed appropriate.

For their part, institutions must notify their national central bank (NCB) of the amount they wish to repay and the date on which they intend to do so at least one week in advance. In principle, unless provided otherwise, early repayment may take place on any date coinciding with a main financing operation, provided that the institution has given a week's notice prior to the corresponding date.

This notification will be binding for the counterparty, such that if it fails to execute the repayment on the due date, it may be subject to financial penalties, pursuant to Guideline ECB/2011/14 of 20 September 2011[2] on monetary policy instruments and procedures of the Eurosystem, for non-compliance relating to auctions, bilateral transactions and the use of underlying assets. This is all without prejudice to the right of the NCB concerned to exercise the actions envisaged for non-compliance also provided for in the aforementioned Guideline.

The Guideline and Resolution came into force on 7 March 2013.

European Central Bank: temporary changes to the collateral eligibility criteria for monetary policy operations

Decision ECB/2012/34 of 19 December 2012 (OJEU of 18 January 2013) on temporary changes to the rules relating to the eligibility of foreign currency denominated collateral was published.

The Governing Council of the ECB has decided to retain the temporary eligibility as collateral assets for Eurosystem monetary policy operations of marketable debt instruments

2 See "Financial regulation: 2011 Q4," Economic Bulletin, January 2012, Banco de España, p. 113.

denominated in pounds sterling, yen or US dollars, irrespective of whether their coupons are linked to a non-euro interest rate or to non-euro area inflation indices.

Consequently, the Governing Council has decided to suspend the new selection criteria introduced by Guideline ECB/2012/25 of 26 November 2012 in Annex I of Guideline ECB/2011/14 of 20 September 2011 on monetary policy instruments and procedures of the Eurosystem, which would have meant that such assets ceased to be eligible as of 3 January 2013.[3]

The Decision came into effect on 3 January 2012.

TARGET2: update to the regulations

Guideline ECB/2012/27 of 5 December 2012 (OJEU of 30 January 2013) on a Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET2) was published, recasting it in a new legal text, which at the same time repealed Guideline ECB/2007/2 of 26 April 2007[4] and its subsequent amendments.

The Guideline incorporates certain rules that were previously internal to the Eurosystem. These include rules on the handling of complaints and claims for losses caused by technical malfunctions of TARGET2, and those arising from the obligation of NCBs to inform the ECB of any complaints and claims filed by their participants, not included in the scope of the TARGET2 clearing system, but relating to its technical malfunctions.

It also establishes the exchange of information on the suspension or termination of access to monetary policy operations and its consequences for access to intraday credit, and incorporates certain provisions relating to the inapplicability of sanctions to NCBs not belonging to the European Union. Finally, it introduces changes to the general price structure.

The Guideline came into effect on 7 December 2012 and is applicable as of 1 January 2013.

European System of Central Banks: public key infrastructure framework for the issuing of electronic certificates

Decision ECB/2013/1 of 11 January 2013 (OJEU of 16 March 2013) laying down the framework for a public key infrastructure for the European System of Central Banks was published.

This decision sets out the general details of this proprietary Eurosystem infrastructure (referred to here as «ESCB-PKI») designed to issue, manage, revoke or renew all types of electronic certificates,[5] such as personal and technical certificates for ESCB and non-ESCB users.

ESCB and Eurosystem electronic applications, systems, platforms and services may only be accessed and used following authentication by means of an electronic certificate issued and managed by a certification authority accepted by the ESCB in accordance with the ESCB certificate acceptance framework, including by the ESCB-PKI certification authority, or by certification authorities accepted by the ESCB for TARGET2 and TARGET2 Securities.

ESCB-PKI is based on three levels of governance: Level 1 consists of the Governing Council and the Executive Board, Level 2 of the Eurosystem central banks and Level 3 of the providing central bank.

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3 Guideline ECB/2012725 established that coupons on fixed income instruments may not generate negative cash flows and must be of one of the types laid down in this Guideline.

4 See "Financial regulation: 2007 Q3," Economic Bulletin, October 2007, Banco de España, pp. 151-152.

5 An electronic certificate is an electronic file, issued by a certification authority, which binds a public key with a certificate subscriber's identity and is used for some or all of the purposes envisaged in this decision. In particular, it is used to verify access rights to ESCB and Eurosystem electronic applications, systems, platforms and services.

At Level 1, the Governing Council is responsible for the direction, management and control of the activities and deliverables needed to develop and operate the ESCB-PKI. Also, the Governing Council delegates its normative powers to the Executive Board to take any measures to implement this Decision that are necessary for the efficiency and security of the ESCB-PKI, and to adopt amendments relating to the technical aspects of the ESCB-PKI and ESCB- PKI services provided for in the annexes to the Decision, after taking into consideration the advice of the ESCB Information Technology Committee (ITC) and, if applicable, of the Eurosystem IT Steering Committee.

The Eurosystem central banks are responsible for the tasks assigned to Level 2, within the general framework defined by the Governing Council. They have competences regarding the technical means of implementing the ESCB-PKI in the Member States.

At Level 3, the providing central bank will be responsible for creating, implementing and managing the ESCB-PKI technical infrastructure. The Banco de España has been appointed by the Governing Council as the providing central bank.

In addition to creating and implementing the ESCB-PKI infrastructure, the providing central bank will also be responsible for hosting, operating and managing it in accordance with the Level 2 – Level 3 Agreement. The providing central bank is to put the necessary organisational infrastructure in place for creating, issuing and managing certificates and to ensure that the infrastructure is maintained. To do so, it may adopt any internal organisation and management rules necessary. The providing central bank will act as the ESCB-PKI certification authority[6] and validation authority[7] of the ESCB-PKI.

Each Eurosystem central bank using ESCB-PKI services will act as a registration authority for its certificate applicants and ensure that its certificate applicants accept and apply the user terms and conditions set out in the ESCB-PKI certification authority's application form for its services.

Each Eurosystem central bank shall make arrangements with regard to third party secure access and use of the ESCB and Eurosystem electronic applications, systems, platforms and services through the use of ESCB-PKI certificates.

Subject to the approval of the Governing Council, a non-euro area NCB may also decide to use ESCB-PKI services under the same conditions as those applying to Eurosystem central banks. A non-euro area NCB may act as a registration authority for its internal users as well as for third party users, and may create the role of a registration officer to perform this task.

Banco de España: amendment to the regulations on monetary policy instruments and procedures of the Eurosystem

Resolution of 26 December 2012 of the Executive Commission of the Banco de España (BOE of 1 January 2013) was published, amending the Resolution of 1 December 1998 of the Executive Commission of the Banco de España approving the general conditions applicable to the Banco de España's monetary policy operations, in order to incorporate the changes introduced by Guideline ECB/2012/25 of 26 November 2012,[8] as described below.

6 The certification authority issues, manages, revokes and renews certificates on behalf of the ESCB central banks or the Eurosystem central banks in accordance with the ESCB certificate acceptance framework.

7 The validation authority provides information on the validity of certificates issued by the ESCB-PKI certification authority.

8 See "Financial regulation: 2012 Q4," Economic Bulletin, January 2013, Banco de España, pp. 118-121.

CLAUSE V: PROCEDURES APPLICABLE TO MONETARY POLICY OPERATIONS

Clause V specifies that marketable assets can be used as underlying assets for open market transactions and the marginal lending facility. Non-marketable assets can only be used as underlying assets for reverse open market transactions and the marginal lending facility, but not for outright transactions.

Under the heading of open market operations, and in particular, in relation to tender operations, the ECB reserves the right to take any action it deems appropriate in order to correct an error in the tender announcement, including cancelling or interrupting a tender under execution.

CLAUSE VI: UNDERLYING ASSETS

Clause VI introduces certain obligations on counterparties submitting asset-backed securities which have close links to the originator of the underlying assets of these asset-backed securities. Thus, the Banco de España must be informed at least one month in advance of any planned changes[9] to them that might affect their credit quality. Moreover, at the time of the asset-backed security's submission, the counterparty should provide information on any modifications made in the preceding six months. The Banco de España will not give an opinion on the eligibility of asset-backed securities prior to a modification.

Moreover, despite their eligibility, the Banco de España may decide not to accept the following marketable or non-marketable assets as collateral from a counterparty: 1) debt instruments falling due in the immediate future, and 2) debt instruments with an income flow (e.g. a coupon payment) occurring in the immediate future.

Finally, in the case of fixed income securities, as of the entry into force of this guideline, the Eurosystem will define the most representative price to be used for the calculation of the market value. The value of a marketable asset will be calculated on the basis of the most representative price on the business day preceding the valuation date. In the absence of a representative price for a given asset, the Eurosystem will define a theoretical price.[10]

CLAUSE VIII: EFFECTS OF NON-COMPLIANCE

Clause VIII revises the financial penalties for non-compliance by counterparties of obligations relating to tenders[11], bilateral transactions[12] and the use of underlying assets[13]. Penalties were previously calculated by applying a fixed coefficient. This has been changed to a coefficient that varies according to the number of days, up to a maximum of seven, during which the counterparty was infringing the rules, with a minimum penalty of €500.

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9 Such as alteration in the interest rate due on the notes, a change in the swap agreement, changes in the composition of underlying loans not provided for in the prospectus, changes to the priority of payments.

10 The valuation was previously obtained by using the market price on the preceding business day, based on the average price of the day's trades or the closing price, depending on the market concerned. If this price is not available, the valuation of assets of the same price type corresponding to the immediately preceding business day will be taken.

11 Counterparties are considered to be in breach of the provisions laid down by the Banco de España for auctions when: 1) they fail to transfer a sufficient amount of underlying assets or cash to settle on the settlement day; 2) they fail to collateralise, prior to the maturity of the operation, the amount of liquidity it has been allotted in a liquidity-providing operation; or 3) they fail to transfer a sufficient amount of cash to settle the amount allotted in a liquidity-absorbing operation.

12 Counterparties are considered to be in breach of the provisions laid down by the Banco de España for bilateral transactions when: 1) they fail to transfer a sufficient amount of collateral; 2) they fail to transfer a sufficient amount of cash to settle the amount agreed in the operation; or 3) if they fail to collateralise an outstanding bilateral transaction at any time prior to its maturity by means of corresponding margin calls.

13 Counterparties are considered to be in breach of the provisions laid down by the Banco de España for the use of collateral when they use any of the following to collateralise their monetary policy operations: 1) assets issued or guaranteed by the counterparty itself; 2) assets issued or guaranteed by a third party with which the counterparty has close links; 3) assets that are or have become ineligible for use as collateral under the applicable rules laid down by the Banco de España or the Eurosystem; or 4) when it has provided information affecting the collateral value negatively (e.g. on the outstanding amount of a used credit claim that is false or out of date).

In relation to non-compliance by counterparties of end-of-day procedures or access conditions for the marginal lending facility, the current financial penalties[14] have been retained, but henceforth a minimum penalty of €500 shall apply if the calculation yields a lesser amount.

The Resolution came into effect on 3 January 2013 and is applicable as of that date.

Protection of the holders of certain saving and investment products and other financial measures

Royal Decree-Law 6/2013 of 22 March 2013 (BOE of 23 March 2013) on the protection of the holders of certain savings and investment products and other financial measures was published.

This Royal Decree-Law introduces certain mechanisms to speed up the resolution of disputes between credit institutions and their customers, primarily through arbitration, in relation to the marketing of certain savings and investment products, particularly hybrid capital instruments (generally preference shares) and subordinated debt. It also aims to offer liquidity to holders of shares received in exchange for these instruments, granting the Credit Institution Deposit Guarantee Fund (FGD) sufficient legal powers to create market mechanisms allowing liquidity alternatives for these shares.

HYBRID CAPITAL INSTRUMENTS AND SUBORDINATED DEBT MONITORING COMMITTEE

A monitoring committee has been set up (referred to here as the Committee) as a decision-making body under the Ministry of Economic Affairs and Competitiveness to oversee hybrid capital and subordinated debt instruments, with specific responsibility for: 1) analysing the factors behind judicial and extrajudicial claims by holders of this type of financial product against credit institutions in which the Fund for the Orderly Restructuring of the Banking Sector (FROB) has a shareholding; 2) quarterly submission of a report to the Spanish Parliament on the elements underlying these claims,[15] and, where applicable, 3) making proposals to the competent authorities to improve the protection of purchasers of these products.

The Committee will also determine the basic criteria to be applied by credit institutions in which the FROB has a shareholding in order to offer their customers the option of submitting disputes arising in relation to the instruments mentioned to arbitration, so that they are appropriately compensated for the economic loss incurred. It will also specify the criteria to designate the group of customers whose claims, in view of their personal or family circumstances, should receive priority treatment by credit institutions in which the FROB has a shareholding. The Committee will agree these criteria at its inaugural meeting and may review them on a quarterly basis.

The Commission will be chaired by the President of the CNMV, with the Deputy Governor of the Banco de España as deputy chairman, with a secretary appointed by the CNMV. The remaining members are the General Secretary for Health and Consumer Affairs, at the Ministry of Health, Social Services and Equality; the General Secretary for the Treasury and Financial Policy, at the Ministry of Economic Affairs and Competitiveness; and the President of Consumers' and Users' Council. Representatives appointed by the consumer af-

14 For the first non-compliance, the financial penalty will be equal to applying the marginal lending facility interest rate plus 5 percentage points to the amount obtained by unauthorised access to the marginal lending facility. In the case of successive instances of non-compliance in the following 12 months, the penalty interest rate will be increased by 2.5 percent each time an additional breach occurs.

15 The fundamental aspects on which the Committee may request and gather information are: 1) the amounts of claims; 2) the judicial or extrajudicial channels chosen by the claimant, 3) the geographical location where the instrument is marketed; 4) the direction of the court ruling or arbitrator's award, including the basic grounds for upholding or rejecting the claim, and 5) the issuing institution, the customer profile, and any other analogous information deemed relevant for the Committee to perform its tasks.

fairs authorities at the regional government and the National Consumer Affairs Institute who have taken part in the claim and resolution mechanisms mentioned will also be invited to attend in an advisory capacity.

PROVISION OF LIQUIDITY THROUGH THE DGF

The Royal Decree-Law also sets out a mechanism for providing liquidity through the Deposit Guarantee Fund (DGF) for shares due to be received by holders of the aforementioned instruments as a result of their being exchanged. Thus, first of all, the functions of the DGF have been expanded to allow it to subscribe for shares or subordinated debt instruments issued by Sareb.

Moreover, it is empowered to purchase ordinary shares not admitted to trading on a regulated market issued by credit institutions transferring their assets to Sareb[16] and which are the product of the conversion of hybrid capital instruments and subordinated debt. The DGF will primarily acquire the shares of the institution's customers who are in situations of particular hardship as a result of their personal and family circumstances, in accordance with the criteria laid down by the Committee.

The foregoing instruments will be acquired at a price that does not exceed their market value and is in accordance with European Union rules on State aid. For the purposes of determining the market value, the DGF will commission an independent expert report.

SPECIAL CONTRIBUTION TO THE DGF

In order to maintain the DGF's asset position healthy to ensure it is able to perform its role in supporting the stability of the Spanish financial system properly, a special one-off contribution to it by member institutions has been established, of 3 per mille of deposits held on 31 December 2012.

This contribution will be made in two phases. A first tranche equivalent to 40% is to be paid within 20 business days of 31 December 2013. The management committee of the DGF may establish certain exemptions in relation to this tranche, such as: 1) non-application of this tranche to institutions in which the FROB has a majority shareholding; 2) a deduction of up to a maximum of 50% of the contributions of DGF member institutions whose basis for the calculation does not exceed €5 billion; and 3) a deduction of up to a maximum of 30% of the amounts invested by institutions in the subscription or purchase, before 31 December 2013, of shares or subordinated debt instruments issued by Sareb.

The second tranche, which will account for the remaining 60%, must be paid within 7 days of 1 January 2014, in accordance with the timetable of payments laid down by the management committee. Without prejudice to the payment timetable, the amount due for this second tranche will be recognised on the assets of the DGF on the date of settlement of the first tranche.

AMENDMENT OF THE LEGISLATION ON CREDIT INSTITUTION RESOLUTION AND RESTRUCTURING

Further details have been added to Law 9/2012 of 14 November 2012[17] on restructuring and resolution of credit institutions. Firstly, new conditions have been added in relation to the framework for the transfer of assets to Sareb, namely: 1) transferred loans may not be classed as subordinated in the context of the debtor's possible bankruptcy proceedings, even if Sareb is a shareholder in the debtor company. However, if already classed as sub-

16 Pursuant to the ninth additional provision of Law 9/2012 of 14 November 2012 on restructuring and resolution of credit institutions, credit institutions in which the FROB is the majority shareholder or which, the Banco de España judges, after an independent evaluation of their capital requirements and asset quality, will require the commencement of restructuring or resolution processes envisaged in this Law, are obliged to transfer certain assets to Sareb.

17 See "Financial regulation: 2012 Q4," Economic Bulletin, January 2013, Banco de España, pp. 36-68.

ordinated prior to the transfer, they shall remain classed as such; 2) Sareb will be entitled to adhere to proposed agreements presented by any legitimate party and the right to vote at the shareholders' meeting, in relation to any loans acquired by it following the declaration of bankruptcy proceedings; 3) Sareb may be the beneficiary of «*hipotecas de máximo*» (mortgages securing multiple debts or obligations up to a set maximum amount)[18] encumbering assets it already holds or subsequently transferred to it; and 4) the contractual compensation and financial guarantee schemes regulated in Royal Decree-Law 5/2005 of 11 March on urgent reforms to promote productivity and improve public sector procurement shall be applicable to Sareb.[19]

Additionally, the terms under which the price of repurchasing issues or tranches of hybrid capital instruments and subordinated debt included within the scope of the FROB's management actions may be paid are clarified.

OTHER CHANGES

The Law also introduces a number of other provisions relating to financial matters, as summarised below.

A new function has been added to financial institutions' customer care and ombudsman services as referred to in Ministerial Order ECO/734/2004 of 11 March 2004 on the customer service department and ombudsman of financial institutions. Once these services come into operation they will handle claims relating to commitments undertaken by credit institutions in relation to the constitution of a pool of social housing owned by them, for use by persons who have been evicted from their main residence as a result of default on their mortgage.[20]

Additionally, certain modifications have been made to Law 44/2002 of 22 November 2002 on financial system reform measures regarding the information that reporting entities are to provide to the central credit register. As well as determining the classes of risks that are to be declared, the Minister for Economic Affairs and Competitiveness and the Banco de España with the minister's express authorisation, may differentiate risks by setting different reporting thresholds according to the purpose of the reporting: either exclusively for the exercise of supervision and inspection functions and other legally assigned functions, or also to provide them to reporting entities in the exercise of their functions.

Natural or legal persons named in relation to risks subject to declaration to the central credit register (CIR) shall continue to be able to access all the information concerning

18 *Hipotecas de máximo* are covered by Article 153 bis of the Mortgage Law (Consolidated Text enacted by Decree of 8 February 1946), in favour of: 1) financial institutions as collateral for one or more present or future obligations, of whatever type, and 2) the public administration as the holder of tax or social security credits. No new contract is necessary in either case. It will be sufficient that the deed constituting the mortgage and the registry entry in which it is recorded specify: its name and, if necessary, the general description of the basic legal acts from which the guaranteed obligations derive or may derive in the future; the maximum amount for which the estate is liable; the duration of the mortgage, and the way in which the final balance guaranteed is calculated. It may also be stipulated in the deed that the amount recoverable in foreclosure is that resulting from the settlement by the creditor financial institution in the manner agreed between the parties in the deed.

19 The legal framework for this type of agreement is applicable to financial operations in the context of contractual compensation agreements, provided that the agreement envisages the creation of a single legal obligation covering all the operations included in the agreement, by virtue of which, in the case of early maturity, the parties will only be entitled to demand the net balance of the product of the settlement of such operations. The net balance must be calculated as established in the contractual compensation agreement or its related agreements.

20 Under the sole additional provision of Royal Decree-Law 27/2012 of 15 November 2012 on urgent measures to strengthen the protection of mortgage debtors, the government was charged with promoting with the financial sector the constitution of a pool of social housing owned by credit institutions intended to provide accommodation for persons evicted from their main residence as a result of default on their mortgage. The purpose of this pool will be to facilitate these people's access to affordable housing.

them, except data supplied by declaring entities in compliance with the reporting obligations established by the Banco de España in the exercise of its functions. When a data subject's data are supplied solely for inspection and other legally assigned functions, the Banco de España will only provide the names of the entities that have reported the risks.

The measures necessary to comply with the requirements of Regulation 260/2012 of the European Parliament and of the Council of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro have also been adopted. Specifically: 1) the Minister for Economic Affairs and Competitiveness is authorised to grant authorisations and exemptions in the cases and under the terms envisaged in the Regulation;[21] 2) the Banco de España is designated as the competent authority responsible for ensuring compliance with Regulation 260/2012, and 3) Law 16/2009 of 13 November 2009 on payment services is amended to include the provisions of the Regulation and the rules on organisation and discipline of payment services providers.

Finally, certain changes have been made to the consolidated text of the Private Insurance Law, enacted by Legislative Royal Decree 6/2004 of 29 October 2004, to allow Spanish insurance undertakings to enter into proxy contracts with legal persons to subscribe risks on their behalf (generally referred to as underwriting agencies). This therefore puts an end to the previous difference in the treatment of Spanish insurance undertakings and those of other Member States, whereby only insurance undertakings registered in Member States of the European Economic Area other than Spain, and conducting their business in Spain under the right of establishment or the freedom to provide services, could grant proxies to the aforementioned agencies to underwrite insurance on their behalf.

The Royal Decree came into force on 24 March 2013.

Regulation of investments by insurance undertakings in securities or movable property rights issued by Sareb

Royal Decree-Law 2/2013 of 1 January 2013 (BOE of 1 February 2013), on urgent measures in the electricity system and financial sector was published.

In the financial area, this addressed the regulation of investments by insurance undertakings in securities or movable property rights issued by Sareb. Specifically, assets issued by Sareb may be included among those eligible to cover insurance undertakings' technical reserves, provided they do not exceed the limit of 3% of total provisions. They will be valued at their cost of acquisition, as defined in the accounting plan for insurance companies.

In addition, for the purposes of their solvency margin, unrealised capital gains or losses deriving from these assets, whether recognised on the accounts or not, will not be included in the calculation.

The Royal Decree came into force on 2 February 2013.

Consumer credit agreements: additional assumptions for the calculation of APR

Ministerial Order *ECC/159/2013 of 6 February 2013* (BOE of 8 February 2013) was published, amending part II of Annex I of Law 16/2011 of 24 June 2011[22] on credit agreements for consumers. The Order implements the new version of the additional assumptions for APR calculations that were adopted by Commission Directive 2011/90/EU of 14 November 2011 amending part II of Annex I of Directive 2008/48/EC of the European Parliament

21 Regulation 260/2012 established, *inter alia*, the technical requirements to be fulfilled by payment service providers to carry out transfers and account debits as of 1 January 2014. Nevertheless, Member States may authorise their competent authorities to waive compliance with the requirements until 1 February 2016.

22 See "Financial regulation: 2011 Q2," *Economic Bulletin*, July-August 2011, Banco de España, pp. 152.

and of the Council providing additional assumptions for the calculation of the annual percentage rate of charge.[23]

The assumptions in the current version can be summarised as follows:

1) If a credit agreement gives the consumer freedom of drawdown, the total amount of credit shall be deemed to be drawn down immediately and in full. If the consumer has freedom of drawdown in general but the agreement imposes a limitation with regard to the amount of credit and period of time, the amount of credit shall be deemed to be drawn down on the earliest date provided for in the credit agreement and in accordance with those drawdown limits.

2) If a credit agreement provides different ways of drawdown with different charges or borrowing rates, the total amount of credit shall be deemed to be drawn down at the highest charge and borrowing rate applied to the most common drawdown mechanism for this type of credit agreement.

3) In the case of an overdraft facility, the total amount of credit will be deemed to be drawn down in full and for the whole duration of the credit agreement. If the duration of the overdraft facility is not known, the annual percentage rate of charge shall be calculated on the assumption that the duration of the credit is 3 months.

4) In the case of an open-end credit agreement,[24] other than an overdraft facility, it shall be assumed that: a) the credit is provided for a period of 1 year starting from the date of the initial drawdown, and that the final payment made by the consumer clears the balance of capital, interest and other charges, if any, and b) the capital is repaid by the consumer in equal monthly payments, commencing 1 month after the date of the initial drawdown. However, in cases where the capital must be repaid only in full, in a single payment, within each payment period, successive drawdowns and repayments of the entire capital by the consumer shall be assumed to occur over the period of 1 year.

5) In the case of credit agreements other than overdrafts and open-end credits, if the date or amount of a repayment of capital to be made by the consumer cannot be ascertained, it shall be assumed that the repayment is made at the earliest date provided for in the credit agreement and is for the lowest amount for which the credit agreement provides. If the date of conclusion of the credit agreement is not known, the date of the initial drawdown shall be assumed to be the date which results in the shortest interval between that date and the date of the first payment to be made by the consumer

6) Where the date or amount of a payment to be made by the consumer cannot be ascertained on the basis of the credit agreement or the assumptions set out above, it shall be assumed that the payment is made in accordance with the dates and conditions required by the creditor. When these are unknown it will be assumed that: a) interest charges are paid together with the repay-

23 The Directive establishes new assumptions for the calculation of APR, as those laid down in Directive 2008/48/EC proved to be inadequate, as they did not match market realities.

24 For the purposes of this point, 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.

ments of capital; b) a non-interest charge expressed as a single sum is paid at the date of the conclusion of the credit agreement; c) non-interest charges expressed as several payments are paid at regular intervals, commencing with the date of the first repayment of capital, and if the amount of such payments is not known they shall be assumed to be equal amounts; and d) the final payment clears the balance of capital, interest and other charges, if any.

7) If the ceiling applicable to the credit has not yet been agreed, it is assumed to be €1,500.

8) If different interest rates and charges are offered for a limited period or amount, the interest rate and the charges shall be deemed to be the highest rate for the whole duration of the credit agreement;

9) For consumer credit agreements for which a fixed borrowing rate is agreed in relation to the initial period, at the end of which a new borrowing rate is determined and subsequently periodically adjusted according to an agreed indicator, the calculation of the annual percentage rate shall be based on the assumption that, at the end of the fixed borrowing rate period, the borrowing rate is the same as at the time of calculating the annual percentage rate, based on the value of the agreed indicator at that time.

Finally, it is provided that lenders and intermediaries obliged to calculate APR on consumer credit agreements shall have two months from the entry into force of this Order to adapt their systems, internal procedures, advertising, pre-contractual information, and standard contracts to the rules set out therein.

The Order came into force on 9 February 2013.

State debt: issuing conditions in 2013 and January 2014

Law 17/2012 of 27 December 2012[25] on the State Budget for 2013 authorised the Minister for Economic Affairs and Competitiveness to increase State debt this year with the limitation that the outstanding balance at the end of the year may not exceed that on 1 January 2013 by more than €71 billion.

As is normally the case at this time of year, the order providing for the creation of State debt over the coming year was published, namely *Ministerial Order ECC/1/2013 of 2 January 2013* (BOE of 3 January 2013) covering 2013 and January 2014, which includes standard collective action clauses for the first time. Additionally, *Resolutions of the General Secretariat for the Treasury and Financial Policy (the Treasury) of 22 and 29 January 2013* (BOE of 28 and 31 January, respectively) provided for certain issues of Treasury bills and for medium- and long-term government bonds, and published the schedule of auctions for this year and January of next year.

The collective action clauses (CAC) that will apply as of 1 January 2013 to all issues of public debt with a maturity of more than a year[26] are a set of clauses aggregating representative majorities among bondholders. In the event of a proposed modification of a

25 See "Financial regulation: 2012 Q4," Economic Bulletin, January 2013, Banco de España, pp. 68-69.

26 On 28 November 2010 the Ministers of the Economy of the euro area announced a package of strategic measures to safeguard the financial stability of the euro area, including mandatory standard CACs in all new sovereign debt issues in the euro area. The Heads of State and Government of the euro area Member States added the details and ratified this commitment at their meeting on 11 March 2011 and the European Council ratified it at its summit on 24 and 25 March 2011. The text of the CACs has been reached by consensus between all the euro area States and will be applied to debt issued by them as of 1 January 2013.

debt instruments' conditions, this avoids the need to obtain unanimity among all bondholders and thus makes it possible to adopt binding modifications, avoiding a minority's being able to block solutions approved by the majority. This allows, for example, the bonds' terms governing their issue or management to be modified with the prior consent of the issuer and a vote in favour by at least 75% of the total principal of the bonds in circulation represented by a duly called meeting of bondholders, or a written resolution signed by or on behalf of the holders of at least 66% of the total principal of the bonds in circulation.

The instruments and issue mechanisms used for State debt have, however, been left broadly unchanged. Thus, ordinary and special auctions (competitive and non-competitive bids)[27] and other procedures will continue to be used for issues. In particular, issues may be granted, in whole or in part, to one or more financial institutions to ensure their placement. Outright sales or the sale under repos of newly issued securities or expanded existing issues that the Treasury might have in its securities account may also be performed.

In the case of competitive tender operations, the nominal amount and the interest rate required are to be stated. The minimum nominal amount remains €1,000 and tenders are to be made in integer multiples of this amount. Accepted tenders will be allotted at the interest rate asked for, or the weighted average interest rate, depending on the outcome of the auction.[28]

The minimum nominal amount for non-competitive tenders is also unchanged at €1,000 and applications for larger amounts must be integer multiples of this amount. The maximum total nominal amount of non-competitive applications submitted by any individual tenderer in each auction has been changed and may now not exceed €5 million (this was previously €1 million). As an exception, certain institutions[29] are allowed to submit non-competitive tenders for a nominal value of €500 million (this limit was previously €300 million). In all cases, the accepted tenders will be allotted at the price equivalent to the weighted average interest rate.

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

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

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27 In competitive tenders, bidders state the price they are willing to pay, as a percentage of the nominal value, or percentage interest rate they are willing to accept for the debt instruments, whereas in the case of non-competitive bids no price or interest rate is stated. Non-competitive tenders are accepted in full and awarded at the weighted average price or price equivalent to the weighted average interest rate.

28 The weighted average price of the auction will be based on the competitive tenders accepted, expressed as a percentage of the nominal value and rounded up to three decimal places. The price at which bonds are allotted will be determined as follows: applications at the minimum price will be allotted at this price; applications with a price between the minimum price and the weighted average price will be allotted at the tendered price; and non-competitive applications and those above the weighted average price will be allotted at the weighted average price.

29 The Wage Guarantee Fund, the Credit Institution Deposit Guarantee Fund, the Social Security reserve fund, the Investment guarantee fund, the Sociedad Estatal de Correos y Telégrafos S. A., the Sociedad Estatal de Participaciones Industriales (SEPI), the Spanish data protection agency, the FROB (which has now been expressly included in the regulations), or any other public entity or State-owned company determined by the Treasury.

TREASURY BILLS

As in previous years, the Resolution sets out the schedule of tender operations to be held in 2013 and January 2014. This gives the dates of ordinary Treasury bill auctions and their maturities, setting the issues and the auction notices at the same times as the publication of the schedule. Nevertheless, for reasons of demand or issuance policy, the Treasury may hold additional auctions to those announced.

To avoid the CACs affecting Treasury bills, issues of eighteen month bills have been eliminated, to be replaced by bills with maturities of nine months. Thus, from February onwards, three-, six-, nine- and twelve-month Treasury bills will be auctioned, and each maturity will be available every three months to ensure sufficient liquidity as soon as the bills are issued.

Starting in February, auctions of six- and twelve-month bills will be held on the third Tuesday of each month and those of three- and nine-month bills the following Tuesday.[30] Maturities may differ from the foregoing by the number of days necessary to group issues together in a single monthly maturity so that, with some exceptions, they coincide with the date of issue of six- and twelve-month bills so as to make it easier to reinvest.

In all other respects auction procedures and awards will be the same as in 2012, including the submission of tenders in terms of the interest rate quoted on secondary markets, so as to simplify bidding for subscribers. Thus, in competitive auctions, tenderers will indicate the interest rate desired. The accepted tenders will be allotted, in each case, at the price equivalent to the interest rate tendered or the weighted average, as appropriate, based on the outcome of the auction.

MEDIUM- AND LONG-TERM GOVERNMENT BONDS

The Resolution sets out the schedule of tender operations to be held in 2013 and January 2014, indicating the dates and maturities of ordinary auctions, setting the issues and the auction notices at the same times as the publication of the schedule. As in 2012, the securities offered will be announced on the Friday prior to each auction, following consultation with market-makers in order to match the issue to market preferences.

Nevertheless, if the market conditions or financing requirements make it advisable, the Treasury may add new security types, in the resolution on the issues of medium- and long-term bonds, or it may choose to omit any of the maturities included, for guidance, in the resolution.

With some exceptions, bond auctions will be held on the first and third Thursday of each month and both medium- and long-term government bonds may be offered.[31] The way in which auctions will be run and awarded remains unchanged from 2012, including the possibility of excluding competitive bids considered unrepresentative of the market situation from the price and weighted average interest rate calculations so as not to distort the results of the auction.

As in previous years, three-, five-, ten-, fifteen- and thirty-year government bonds will be offered during auctions. As a new feature this year, two-year bonds will be issued for the first time, complementing the range of maturities the Public Treasury uses for its funding.

30 Auctions of twelve- and eighteen-month bills were previously held on the third Tuesday of each month and those of three- and six-month bills on the following Tuesday.

31 In previous years, save exceptions, auctions took place on the first Thursday of each month for medium-term bonds and on the third Thursday for long-term bonds.

Previously issued securities may also be reopened with the issue of new tranches in order to ensure their liquidity and meet investors' demands in the various segments in which this takes place, thus increasing the average volume of the bond classes in circulation. The newly issued securities will accrue nominal interest at the same rate as the original issue. Finally, as in 2012, provision is also made for the issuance of index-linked medium- and long-term bonds.

The Ministerial Order came into force on 3 January 2013 and the Resolutions on 28 and 31January 2013.

Government debt market-makers: amendments to the regulations

Treasury Resolution of 10 January 2013 (BOE of 21 January 2013) was published, amending the Resolution of 20 July 2012[32] setting the conditions under which Spanish government debt market-makers operate.

The Resolution eliminates the second round of special auctions and the obligation of market-makers to take part. It also eliminates subscriptions to special bond auctions for the purposes of the calculations of market-makers' monthly evaluation.

The Resolution came into force on 21 January 2013.

Annual corporate governance report, annual compensation report, and other information mechanisms for public limited companies, savings banks and other entities

Ministerial Order ECC/461/2013 of 20 March 2013 (BOE of 23 March 2013) was published, setting out the content and structure of the annual corporate governance report, the annual compensation report, and other information mechanisms for public limited companies, savings banks and other entities issuing securities admitted to trading on official securities markets.

This Order, as well as introducing a number of new features, groups together in a single ministerial order all the regulations implementing the obligations concerning the corporate governance of public limited companies, savings banks and other entities issuing securities admitted to trading on official securities markets. It therefore repeals Ministerial Order ECO/3722/2003 of 26 December 2003 on the annual corporate governance report and other information channels of listed public limited companies and other entities, and Ministerial Order ECO/354/2004 of 17 February 2004 on the annual corporate governance report and other information of savings banks issuing securities listed on official securities markets.

ANNUAL CORPORATE GOVERNANCE REPORT

The arrangements existing in the previous regulations have been kept in the case of public limited companies, although the minimum information to be included in the corporate governance report has been expanded to include information about:

1) The manner in which holders of significant shareholdings are represented on the board of directors.

2) The company's compensation agreements with its directors and managers.

3) Securities not traded on a regulated market in the EU, stating, where applicable, the different classes of shares, and the rights and obligations associated with each.

4) Any restrictions as to the transferability of shares and voting rights.

32 See "Financial regulation: 2012 Q3," Economic Bulletin, October 2012, Banco de España, p. 188.

5) The rules applicable to the amendment of the company's articles of association. In particular the majorities envisaged for their amendment and, where applicable, the rules safeguarding shareholders' rights.

6) The number of women on the board of directors and management bodies, with details of how the composition has changed in the last four years. The measures taken, if any, to seek to increase the number of women on the board of directors so as to achieve a balanced presence of men and women.

In the case of the savings banks, the Ministerial Order leaves the bulk of the previous regulations unchanged. However, there have been some significant changes, in particular, the obligation to prepare a corporate governance report and a report on directors' compensation (discussed below) has been extended to all savings banks (previously it was only obligatory for those that had issued securities admitted to trading on official securities markets).[33] Other noteworthy changes include: 1) details of conflicts of interest affecting members of the governing bodies or between any savings banks' non-voting equity unit holders and the savings bank's social functions; 2) description of the main characteristics of the internal risk control and management systems,[34] and 3) information about the number of women on the board of directors, its committees and monitoring committee, and the role of these female directors, stating how the number of women has changed over the last four years, in a similar way to the requirement for listed companies.

The content of the annual corporate governance report of entities issuing securities traded on official markets has been left largely unchanged, with the exception of certain additions, such as: 1) information on any restrictions on the transferability of securities and any restrictions on voting rights; 2) information on the compensation of the board of directors or equivalent body, and the number of women on the board of directors and its committees or equivalent bodies; 3) a description of the main features of the internal risk control and management systems in relation to the process of issuing financial information; and 4) information on the number of women on the board of directors and management bodies, but with less detail than in the preceding cases.

As was the case under the previous regulations, the corporate governance report will be published as a significant event and the CNMV notified so it can publish it on its website. In the case of companies it will be made available to shareholders, and in that of savings banks, to the general assembly. It will also be available in electronic format on their websites.

ANNUAL REPORT ON DIRECTORS' COMPENSATION

Implementation of the provisions of Law 24/1988 of 28 July 1988 on the Stock Market, amended by Law 2/2011 of 4 March 2011 on sustainable economy, which establishes that public limited companies are to prepare an annual report on their directors' compensation to accompany the annual governance report. This new report is to include full, clear and comprehensible details of the company's compensation policy for the current year, as approved by the board of directors, and that planned for future years, where applicable. It is also to include an overall summary of how the compensation policy is to be applied during the year, and details of the individual compensation accruing to each of the directors.

33 The single additional provision of the Ministerial Order establishes the obligation upon both savings banks that do not issue securities admitted to trading on official securities markets and savings banks operating as credit institutions through a banking institution to draw up corporate governance and compensation reports. Both reports will be sent to the CNMV, which will forward a copy to the Banco de España.

34 Specifically, the description of the main risks that may affect the achievement of the business objectives, the risks that have materialised during the year, the scope of management systems, the bodies responsible, the level of tolerance and description of the response and supervision plans.

Likewise, as mentioned in the previous section, all savings banks[35] are to prepare an annual report on the compensation of the members of the board of directors and the monitoring committee, which will include complete, clear and comprehensible information on the compensation policy for the current year, and that planned for future years, where applicable. It will also include details of the individual compensation accruing to each of the directors and the members of the monitoring committee.

As in the case of the corporate governance report, the annual compensation report will be considered a significant event, and it will be sent to the CNMV so it can publish it on its website. It will be circulated and put to the vote, on a consultative basis and as a point on the agenda, by the ordinary general meeting of shareholders or the general assembly. Finally, it will also be made available in electronic format on the company's website.

OTHER INFORMATION MECHANISMS FOR LISTED COMPANIES AND SAVINGS BANKS

The Ministerial Order implements Law 26/2003 of 17 July 2003,[36] amending Law 24/1988 of 28 July 1988 on the Stock Market,[37] and the consolidated text of the Public Limited Companies Law approved by Legislative Royal Decree 1564/1989 of 22 December 1989, to strengthen the transparency of listed public limited companies, and Royal Decree Law 11/2010 of 9 July 2010 on governing bodies and other aspects of the legal regime for savings banks, as regards the main information that must be published on the websites of public limited companies and savings banks that issue securities traded on official securities markets.

In addition to the two reports mentioned above, the following must also be included: 1) the articles of association; 2) the most recent approved individual and consolidated accounts; 3) the regulations of the general meeting of shareholders, the board of directors and, where applicable, the regulations of the board of directors' committees; 4) the annual reports and internal rules of conduct; 5) the interim management statement; 6) details of the information channels existing between the company and its shareholders, and in particular, the relevant explanations on how shareholders can exercise their right to information, stating the postal and e-mail addresses which shareholders can contact; and 7) information on the means and procedures for the exercise of distance voting, in accordance with the rules developed for this system, including the forms to accredit attendance and on-line voting at general meetings.

The Ministerial Order came into force on 24 March 2013.

Securities Market: investment firms' and fund management companies' obligations to notify the CNMV

CNMV Circular 1/2013 of 30 January 2013 (BOE of 19 February 2013), on communication and information regarding investment firms and their parent companies, and fund management companies[38], was published.

Investment firms (IFs) and fund management companies are obliged to notify the CNMV of the following:

35 As in the annual corporate governance report, this obligation extends to savings bank that do not issue shares admitted to trading on official securities markets, and those that conduct their business as a credit institution through a banking institution.

36 See "Financial regulation: 2003 Q3," *Economic Bulletin*, October 2003, Banco de España, pp. 93-94.

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

38 Royal Decree 2018/2012 of 13 July 2012 approving the implementation of Law 35/2003 of 4 November 2003 on collective investment institutions, authorised the CNMV to specify and implement the reporting standards, content of information obligations, manner in which information is to be sent (which may be electronic), and the deadlines for notification of any changes in the conditions of authorisation of investment firms (IFs) or fund management companies.

APPOINTMENTS AND DISMISSALS OF EXECUTIVES AND DIRECTORS[39]

The CNMV must be informed in advance of the appointment of new directors or senior managers to IFs or their parent companies. This requirement shall not apply to fund management companies, as they already notify the CNMV (as do IFs) following acceptance of the post, once compliance with the requirements of good repute, sound knowledge and experience required by the regulations has been verified.

COMPOSITION OF SHAREHOLDER STRUCTURE

IFs and fund management companies are to notify the CNMV of any change of ownership of the shares comprising their capital within 7 days of the date of their becoming aware of the fact, and inform the CNMV of the subsequent composition of their shareholder structures. Each year it will submit a list of all direct shareholders, and, if applicable, persons who, through a chain of shareholders, exercise ultimate control over the entity.

For their part, legal and natural persons must inform the CNMV of their shareholdings in an IF or fund management company when, either alone or in concert with others, they hold 5% or more of its share capital or voting rights, or they acquire a significant shareholding (10% of the share capital or voting rights) or increase their holding above certain thresholds (20%, 30%, or 50%) or take control over the entity.

OTHER CASES

IFs and fund management companies must also report the following to the CNMV: 1) the opening and closing of branches in Spain, stating the address, manager, geographical scope of action and date of opening or closing; 2) changes to the activities or instruments included in the programme of activities, or changes to the articles of association that do not require the CNMV's authorisation for them to be entered on the register; and 3) lists of the investment firms' agents and delegation of administrative functions, internal control and analysis and selection of the fund management company's investments.

The Circular came into force on 11 March 2013.

European Union: enhanced cooperation in relation to the financial transactions tax

Council Decision 2013/52/EU of 22 January 2013 (OJEU of 25 January 2013) authorising enhanced cooperation in the area of financial transaction tax was published.

Specifically, 11 Member States (Belgium, Germany, Estonia, Greece, Spain, France, Italy, Austria, Portugal, Slovenia and Slovakia) have been authorised to establish enhanced cooperation between them with a view to setting up a common financial transaction tax (FTT) system.

In accordance with the Decision's stated objectives, the initiative aims to ensure that the financial sector help meet the cost of the crisis; dissuade financial institutions from engaging in excessively high-risk activities; complete the regulatory measures aimed at avoiding future crises, and generate supplementary revenues for the general budget or specific policies.

Enhanced cooperation should also introduce the legal framework necessary to establish a common financial transaction tax in the participating Member States, and ensure that the basic characteristics of the tax are harmonised.

The Decision came into force on 22 January 2013.

39 General managers and persons performing high-level management functions in the entity, reporting directly to the governing body or executive commissions or chief executive officer, are considered to hold executive positions.

Alternative investment fund managers: regulatory implementation

Commission Delegated Regulation 231/2013 of 19 December 2012 (OJEU of 22 March 2013), supplementing Directive 2011/61/UE of the Parliament and of the Council of 8 June 2011[40], regarding alternative investment fund managers (AIFMs)[41], as regards exemptions, general conditions governing pursuit of the activity, depositaries, leveraging, transparency and supervision.

Making use of the powers granted to the Commission by Directive 2011/61/EU, the Delegated Regulation implements certain rules regarding, *inter alia*, asset value calculations, leveraging, conditions under which alternative investment fund managers are to operate, including risk management and liquidity, evaluation and delegation, rules defining the tasks and duties of alternative investment fund (AIF) depositaries, and rules on transparency and requirements specifically applicable to non-EU countries.

The main points are summarised below.

VALUATION OF ASSETS MANAGED BY AIF MANAGEMENT COMPANIES

The rules for the calculation of the total value of the assets managed by AIF management companies have been defined in order to determine whether they exceed the thresholds set in Directive 2011/61/EU. The Directive established a somewhat looser framework for those AIF management companies managing AIF portfolios in which the total assets under management do not exceed the following thresholds: the aggregate value of the AIFs managed is less than €100 million, or it is less than €500 million in the case of unleveraged AIFs[42] which do not entitle investors to reimbursement of their investment for a period of five years from the date of the initial investment.

CALCULATING AIFS' LEVERAGE

The general provisions for the calculation an AIF's leverage are defined, whereby it is expressed as the ratio of the AIF's exposure to its net assets. IAFs' exposures are obtained using the gross and commitment approaches, which are described more fully in the Delegated Regulation.

CONDITIONS FOR THE PURSUIT OF THE ACTIVITY

The conditions the competent authorities are to apply when assessing compliance with the conditions for the pursuit of the activity of AIF management laid down in Directive 2011/61/EU are specified. These include: 1) application of due diligence policies and procedures, particularly when investing in relatively illiquid assets; 2) establishment of effective measures to ensure that investment decisions are taken based on the objectives, investment strategy, and where applicable, risk limitation; 3) due diligence in the selection and appointment of the principal counterparties and intermediaries; 4) acting with honesty, loyalty and due skill, acting in the best interest of the AIF and/or its investors at all times; 5) application of appropriate procedures and measures to ensure that orders on behalf of the AIFs are executed rapidly and equitably; and 6) all such measures as are reasonable in order to obtain the best results possible for the IAFs and/or their investors when sending trading orders on behalf of AIFs.

CONFLICTS OF INTEREST

The types of conflict of interest that may arise in the management of AIFs are specified: In particular conflicts of interest may arise when: 1) a relevant person is likely to make a fi-

40 See "Financial regulation: 2011 Q3," *Economic Bulletin,* October 2011, Banco de España, pp. 183-187.

41 Alternative investment funds (AIF or hedge funds) were incorporated in Spanish legislation as «*fondos de inversión libre*» (free investment funds) under Law 35/2003 of 4 November 2003 on collective investment institutions, which was implemented by Royal Decree 1309/2005 of 4 November 2005, approving Law 35/2003 of 4 November 2003 on collective investment institutions.

42 The Directive defines leverage as any method by which the AIF management company increases the risk exposure of an AIF it manages, either by borrowing cash or securities, or by implicit leveraging by taking derivative positions or any other means.

nancial gain, or avoid a financial loss, at the expense of the AIF or its investors; 2) a financial or other incentive is received to favour the interest of a client or group of clients or another AIF over the interest of the AIF, or the interest of one investor over the interest of another investor or group of investors in the same AIF, or 3) the manager carries out the same activities for the AIF and for another AIF, an Undertaking for Collective Investment in Transferable Securities (UCITS) or client.

The AIFM will establish a conflicts of interest policy that will include the preventive measures and procedures that are to be applied in these situations or in those in which the activities carried out may be contrary to the interests of the AIF or its investors. It will cover the activities of delegates, sub-delegates, external valuers and counterparties together with the activities of the AIFM itself.

RISK MANAGEMENT SYSTEMS

AIFMs' risk management policies are to be defined, identifying the relevant types of risk to which the AIFs they manage are, or may be, exposed. In particular, so as to evaluate the exposure of each of the IAFs managed by the AIFM to market, credit, liquidity, counterparty and operational risks. These policies are to be reviewed periodically (at least once a year).

LIQUIDITY MANAGEMENT

The liquidity management systems AIFMs are to use for each AIF they manage, excluding closed-end funds and un-leveraged funds, are to be defined. In particular, as a minimum requirement, they must guarantee that AIFMs: 1) maintain an appropriate level of liquidity for their underlying obligations based on an evaluation of the relative liquidity of the AIF's assets in the market; 2) monitor the liquidity profile of the AIF's asset portfolio, taking account of the marginal contribution of those assets that may have a significant impact on liquidity, and any significant commitments or liabilities, whether contingent or otherwise, that the AIF may have in relation to its underlying obligations; 3) monitor the approach taken to liquidity management by the managers of any other collective investment undertakings in which the AIF may invest; 4) apply and maintain adequate mechanisms and procedures to measure the quantitative and qualitative risks of the positions and investments envisaged to have an important impact on the liquidity profile of the AIF asset portfolio; and 5) study and implement the instruments and mechanisms included in the special measures necessary to manage the liquidity risk of each of the AIFs the AIFM manages.

AIF ASSET VALUATION POLICIES AND PROCEDURES

Valuation policies and procedures are specified that AIFMs are to establish, maintain, implement and review, for each AIF they manage, so as to ensure a sound, transparent, comprehensive and appropriately documented valuation process.

The valuation policies and procedures shall address at least the following: 1) the competence and independence of staff who are effectively carrying out the valuation of assets; 2) the specific investment strategies of the AIF and the assets the AIF might invest in; 3) the controls over the selection of valuation inputs, sources and methodologies; 4) the escalation channels for resolving differences in values for assets; 5) the valuation of any adjustments related to the size and liquidity of positions, or to changes in the market conditions, as appropriate; 6) the appropriate time for closing the books for valuation purposes; and 7) the appropriate frequency for valuing assets.

Where the valuation is performed by the AIFM itself, the policies shall include a description of the safeguards for the functionally independent performance of the valuation task. These safeguards are to include measures to prevent or restrain any person from exercising inappropriate influence over the way in which a person carries out valuation activities.

Where an external valuer is appointed, the valuation policies and procedures shall set out a process for the exchange of information between the AIFM and the external valuer to ensure that all necessary information required for the purpose of performing the valuation task is provided.

If a model is used to value the assets of an AIF, the model and its main features shall be explained and justified in the valuation policies and procedures. The reason for the choice of the model, the underlying data, the assumptions used in the model and the rationale for using them, and the limitations of the model-based valuation must be appropriately documented.

The valuation policies must provide for periodic review of the policies and procedures including the valuation methods. The review must be carried out at least annually and before the AIF embarks on a new investment strategy or acquires a new type of asset that is not covered by the current valuation policy.

DELEGATION OF AIFM FUNCTIONS

The conditions with which AIFMS are to comply when they intend to delegate the exercise of one or more of their functions to third parties are specified. The obligations of the AIFM vis-à-vis the AIF and its investors are not altered as a result of the delegation. The AIFM will supervise the delegated functions, and manage the risks associated with the delegation. It will ensure that the delegate performs its delegated functions effectively and in compliance with applicable laws and regulatory requirements. It will also establish the necessary methods and procedures to evaluate the services provided by the delegate on a permanent basis.[43]

Portfolio management or risk management may only be delegated to entities authorised or registered for the purpose of asset management and subject to prudential supervision (such as investment firms, credit institutions or authorised external AIFMs). When functions are delegated to entities in non-EU countries, cooperation must be ensured between competent authorities in the AIFM's Member State of origin and the supervisory authority responsible for the entity concerned.

The conditions under which any of the delegated functions may be sub-delegated to a third party are defined, specifying in particular that any such sub-delegation must be approved by the AIFM in writing. Finally, the situations in which AIFMs have delegated their functions to the extent that they are deemed to have become a letter-box entity and ceased to be an AIFM are specified.

DEPOSITARY

Directive 2011/61/EU laid down the requirement for AIFMs to ensure that a single depository is to be appointed for each AIF. This regulation specifies the content of the written contract AIFMs are to draw up. This is to include a description of the services to be provided by the depositary and the procedures to be adopted for each type of asset in which the AIF may invest and which will then be entrusted to the depositary, together with a description of the way in which the safe-keeping and oversight function is to be performed depending on the types of assets and the geographical regions in which the AIF plans to invest.

In the case of depositaries in non-EU countries, the Directive defines the criteria for evaluating whether they are subject to ongoing prudential supervision by a competent authority

43 The delegate shall have sufficient resources and shall employ sufficient personnel, with the skills, knowledge and expertise necessary for the proper discharge of the tasks delegated to it and have an appropriate organisational structure supporting the performance of the delegated tasks.

with sufficient resources to perform their role, which has similar effects to provisions under European Union law.

The functions and obligations of the depositary are also broadly defined. In the case of delegation to third parties of any of the functions allowed by Directive 2011/61/EU (specifically, the safe-keeping role), the depositary is to implement and apply appropriate and adequately document due diligence procedures for the selection and ongoing supervision of the delegate. Steps must also be taken to ensure that the financial instruments entrusted to the delegate have an adequate level of protection. These procedures will be reviewed periodically (at least once a year) and made available to the competent authorities upon request.

TRANSPARENCY REQUIREMENTS

The Delegated Regulation defines the following transparency requirements for AIFMs: 1) the content and format of the annual report AIFMs are to prepare for each of the AIF they manage and/or market in the European Union; 2) the obligations for periodic information to be provided to investors, including the information that is to be provided to investors regularly if the AIFM uses leverage; 3) specific requirements for regular reporting to the competent authorities in its Member State of origin, highlighting in particular when the AIFM makes substantial recourse to leverage.

OTHER PROVISIONS

The general requirements for cooperation agreements with non-EU countries covering all the possible situations regarding the location of AIFMs and AIF and their activities.

Finally, the minimum content of information exchanged with the competent authorities in other Member States, and the European Securities and Markets Authority (ESMA) and the European Systemic Risk Board (ESRB) regarding possible systemic consequences of AIFMs' activities.

The Delegated Regulation came into effect on 11 April 2013 and will be applicable as of 22 July 2013.

European regulations on OTC derivatives, central counterparties and trade repositories

Various European Commission Delegated Regulations have been published to supplement the rules on OTC derivatives, central counterparties and trade repositories, addressed by Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012.[44]

These provisions are briefly summarised below.

TECHNICAL STANDARDS FOR INDIRECT CLEARING AGREEMENTS, RISK MITIGATION TECHNIQUES FOR OTC CONTRACTS NOT CLEARED BY A CENTRAL COUNTERPARTY, AND OTHER RULES.

Commission Delegated Regulation (EU) No 149/2013 of 19 December 2012 (OJEU of 23 February 2013), supplements Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivatives contracts not cleared by a central counterparty (CCP).

In the case of indirect clearing agreements,[45] specific obligations are defined for CCPs, compensating members, and clients, to guarantee the security of these agreements and

44 See "Financial regulation: 2012 Q3," *Economic Bulletin*, October 2012, Banco de España, pp. 32-36.

45 Indirect clearing arrangements are contractual relationships between the central counterparty (CCP), the clearing member, and the client of a clearing member that allows the latter to provide clearing services to an indirect client (i.e. the client of a client of a clearing member).

that, in the event of any failure to meet an obligation, indirect clients have the same level of protection as direct clients. All the parties to an indirect clearing agreement are required to routinely identify, monitor and manage any material risks arising from the arrangement.

Clearing members must use the information provided by clients only for the purposes of risk management and avoid undue use of sensitive information for commercial purposes.

Certain risk mitigation techniques must be applied in the case of OTC derivative contracts not cleared by a CCP, including: 1) timely confirmation;[46] 2) portfolio reconciliation,[47] and 3) portfolio compression in order to reduce counterparty credit risk and to carry out this exercise.

TECHNICAL STANDARDS ON APPLICATIONS FOR REGISTRATION AS A TRADE REPOSITORY

Commission Delegated Regulation (EU) No 150/2013 of 19 December 2012 (OJEU of 23 February 2013), supplements Regulation (EU) No 648/2012 on technical standards for applications for registration as trade repositories.[48]

In particular, legal persons applying to be registered as trade repositories must submit the documentation specified in the Regulation to the ESMA. Specifically, applicants are to provide information on the structure of their internal controls and independence of their governing bodies, in order to enable the European Securities and Markets Authority (ESMA) to assess whether the corporate governance structure ensures the independence of the trade repository and whether its structure and reporting routines are adequate.

TECHNICAL STANDARDS ON THE PUBLICATION OF TRADE REPOSITORY DATA

Commission Delegated Regulation (EU) No 151/2013 of 19 December 2012 (OJEU of 23 February 2013), supplements Regulation (EU) No 648/2012 on the data to be published and made available by trade repositories and operational standards for aggregating, comparing and accessing this data.

Specifically, trade repositories are to allow access to transaction data by certain supervisory bodies, such as: 1) the ESMA, to allow it to fulfil its supervisory mandate; 2) the ESRB and relevant members of the ESCB in order to access data on transactions concerning counterparties located within their jurisdiction or whose reference obligation is sovereign debt of their respective jurisdiction; and 3) the authorities of non-EU countries that have entered into an international agreement with the European Union or a cooperation arrangement with the ESMA.

CAPITAL REQUIREMENTS FOR CENTRAL COUNTERPARTIES

Commission Delegated Regulation (EU) No 152/2013 of 19 December *2012* (OJEU of 23 February 2013), supplements Regulation (EU) No 648/2012 with regard to capital requirements for central counterparties.

Central counterparties (CPPs) are to hold permanent available initial capital, including retained earnings and reserves of at least €7.5 million. This capital must at all times be at

46 Timely confirmation requires that counterparties confirm the conditions of their transactions as soon as possible after execution, especially when the transaction is electronically executed or processed.

47 Portfolio reconciliation allows each counterparty to undertake a comprehensive review of a portfolio of transactions as seen by its counterparty in order to promptly identify any misunderstandings of key transaction terms. These terms should include the valuation of each transaction and may also include other relevant details such as the effective date, the scheduled maturity date, any payment or settlement dates, the notional value of the contract and currency of the transaction, the underlying instrument, the position of the counterparties, the business day convention and any relevant fixed or floating rates of the OTC derivative contract.

48 A trade repository is a legal person established in the European Union that centrally collects and maintains the records of derivatives. Counterparties and CCPs are to ensure that trade repositories are notified of the details of any derivatives contracts they have entered into, together with any modifications or cancellations of contracts.

least equal to the sum of the capital required to cover the following risks: 1) winding down or restructuring of its activities[49]; 2) operational and legal risks[50];; 3) credit, counterparty and market risks[51], and 4) business risk[52].

If the amount of capital held by a CCP falls below 110% of the capital requirements or below 110% of €7.5 million ('notification threshold'), the CCP must immediately notify the competent authority and keep it updated at least weekly, until the amount of capital held by the CCP returns above the notification threshold.

TECHNICAL STANDARDS ON REQUIREMENTS TO BE MET BY CCPS

Commission Delegated Regulation (EU) No 153/2013 of 19 December 2012 (OJEU of 23 February 2013), supplements Regulation (EU) No 648/2012 with regard to the requirements upon central counterparties in order to pursue their activity. These include the following:

1) Organisational requirements, covering various aspects, such as: 1) appropriate governance arrangements;[53] 2) a compensation policy is to be designed to align the level and structure of compensation with prudent risk management; 3) risk management, compliance and internal control mechanisms, and appropriate policies and procedures to detect possible risks; 4) an internal audit function which is separate and independent from the other functions and activities; and 5) information technology systems that are reliable and secure, as well as capable of processing the information necessary for the CCP to perform its activities and operations in a safe and efficient manner.

2) Requirements for CCPs to store their records on a durable medium that allows information to be provided to the competent authorities, the ESMA and the relevant members of the ESCB. It particular, they are to keep: 1) records of all transactions in all contracts it clears; 2) records of positions held by each clearing member; and 3) records of activities related to its business and internal organisation.

3) Requirements regarding business continuity, which is to identify all critical business functions and include the CCP's strategy and objectives to ensure the continuity of these functions and systems.[54] Associated with this is the requirement for a disaster recovery plan containing clearly defined and documented arrangements for use in the event of a business continuity emergency, disaster or crisis which are designed to ensure a minimum service level of critical functions.

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49 For the calculation, CCPs are to divide their annual gross operational expenses by twelve and multiply the resulting number by their time span for winding down or restructuring their activities, which must be estimated to take at least six months. The result of this calculation will be the capital required to guarantee the orderly winding down or restructuring of the CPP's activities.

50 The calculation is to be the basic indicator approach or the advanced measurement approaches provided in Directive 2006/48/CE of the European Parliament and of the Council of 14 June 2006.

51 CCPs are to calculate their capital requirements as the sum of 8% of their risk-weighted exposure amounts for credit and counterparty credit risk and their capital requirements for market risk calculated in accordance with Directives 2006/48/EC and 2006/49/EC, of the Parliament and of the Council of 14 June 2006.

52 The capital requirements for business risk are to be equal to the estimate of the capital needed to cover losses resulting from business risk based on reasonably foreseeable adverse scenarios, subject to approval by the competent authority. The amount must be equal to at least 25% of the CCP's annual gross operational expenses.

53 The governance arrangements of the CCP define its organisational structure and the policies, procedures and processes by which its board and senior management operate.

54 This will also take into account external links and interdependencies within the financial infrastructure including trading venues (cleared by the CCP), securities settlement and payment systems and credit institutions used by the CCP or a linked CCP.

4) Prudential requirements, such as those relating to margins,[55] the default fund, liquidity risk controls, the default waterfall, collateral, investment policy, review of models, stress testing and back-testing.

Finally, provision is made for the information that is to be supplied to the ESMA for the recognition of CCPs established in non-EU countries in order to assess whether they comply with the prudential requirements applicable in that country. Moreover, the equivalence determination by the Commission should ensure that the laws and regulations of the non-member country are equivalent to all the provisions under EU law, in particular those of Regulation (EU) No 648/2012 and this Regulation.

These delegated regulations came into force on 15 March 2013.

2.4.2013.

55 The CCP shall inform its competent authority and its clearing members on the criteria considered to determine the percentage applied to the calculation of the margins for each class of financial instruments.