Financial regulation: 2010 Q2

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Introduction

In 2010 Q2 new provisions of certain importance were promulgated in various areas of the financial system.

The notable new developments in the field of credit institution regulation are the new legal regime for institutional protection schemes (IPSs), certain amendments to the legislation on the Fund for the Orderly Restructuring of the Banking Sector ("FROB", by its Spanish acronym) and on depositor and investor guarantee schemes, and a new legal provision to regulate and control the advertising of banking products and services.

As in the banking market, provisions have been passed in the securities market to update the law on investor compensation schemes and to regulate the advertising of investment products and services. Also, improvements have been introduced to allow greater flexibility in the operations of collective investment institutions (CIIs), and certain problems in the liquidation of their assets have been resolved. Also, the legislation on fees/commissions and standard contracts in investment services has been updated, as has the regime governing the advertising of these services, adapting it to current circumstances.

Provisions have been set in place to implement the legal regime governing payment services and payment institutions and the regime governing the prevention of money laundering and terrorist financing, thereby completing the transposition of Community legislation to the Spanish legal system.

Lastly, in the EU a financial support mechanism has been set in place for Member States in difficulties caused by exceptional circumstances, and a fund to support Greece has been set up.

Measures to promote economic recovery and employment

Royal Decree-Law 6/2010 of 9 April 2010 (BOE of 13 April 2010) on measures to promote economic recovery and employment was enacted. The most noteworthy provisions in the field of financial regulation were as follows:

INSTITUTIONAL PROTECTION SCHEMES (IPSS) FOR CREDIT INSTITUTIONS

Under the regime applicable to IPSs set up in common by various credit institutions, these schemes are deemed to be consolidatable groups of credit institutions. Thus, when an IPS is set up, it must, in addition to complying with the rules in CBE 3/2008 of 22 May 2008[1] on determination and control of minimum own funds, meet the following requirements: 1) there must be a central credit institution that is responsible for compliance with IPS regulatory requirements on a consolidated basis and establishing a binding business strategy; 2) the IPS contractual agreement shall contain a mutual commitment on solvency and liquidity between the institutions composing the IPS, unlimited in respect of liquidity and committing at least 40% of own funds in solvency support; 3) the constituent institutions shall pool a significant portion (at least 40%) of their profits, which must be distributed in proportion to the participating interest of each institution in the IPS; 4) the institutions must remain in the IPS for a minimum period of 10 years and give at least 2 years' notice of their intention to leave it upon ex-

1. See "Financial Regulation: 2008 Q2", *Economic Bulletin,* July 2008, Banco de España, pp. 134-143.

piry of that period, such withdrawal having to be authorised by the Banco de España. Also, the contractual agreement must include a system of penalties for withdrawal from the IPS which encourages the continued presence and stability of institutions in the IPS; 5) the aforementioned central institution shall be one of the credit institutions forming part of the institutional protection scheme or an investee of all of them which also forms part of the IPS; and 6) in the judgement of the Banco de España, the requirements set out in the current regulations on financial institutions' own funds for assigning a risk weight of 0% to the exposures between the IPS members are met.

AMENDMENT OF LEGISLATION ON THE FUND FOR THE ORDERLY RESTRUCTURING OF THE BANKING SECTOR (FROB)

Certain time limits set in previous legislation are reduced. Thus it is stipulated that the action plan[2] shall be submitted simultaneously (the previous time limit was within one month) with the institution's notification to the Banco de España of the weakness of its economic and financial position.

The amendment reduces to ten calendar days (previously one month) the period within which the Banco de España must notify that it requires an action plan to be submitted by a credit institution suffering from financial weakness evidenced by the deterioration of its assets, of its regulatory capital or of external confidence in its solvency.

The amendment reduces to five working days (previously ten) the period which the Ministry for Economic Affairs and Finance has to manifest its opposition to the proposals made by the FROB in the economic report detailing the financial impact of the restructuring plan submitted on the funds contributed out of the State budget.

Further, a new instance is added in which a credit institution has to be restructured with the intervention of the FROB. It is when a financially weak institution finds itself in circumstances which, in the Banco de España's judgement, are such that a viable remedy will not foreseeably be found without the FROB's support.

For savings bank equity units issued with a view to subscription by the FROB, the amendment provides that the two reports specified in Royal Decree 302/2004[3] of 20 February 2004 on saving banks' equity units will be replaced by a single report issued by the FROB, and they will not have to be quoted on an organised secondary market so long as they are owned by the FROB. These units will be eligible as tier 1 capital.

Lastly, the FROB retains representation rights in the savings bank's general assembly in proportion to the equity units held by it. This representation will not count for the purposes of calculating limits on the representation of general government and of public law entities and corporations.

SECURITISATION SPES: AMENDMENT OF LEGISLATION

The current legislation[4] has been amended to allow securitisation SPEs to own real estate, goods, securities or financial claims and amounts received in payment of principal and interest of mortgage-backed securities or other claims grouped together in their assets pursuant to a ruling derived from any legal proceeding initiated to settle those claims (e.g. the proceeds from liquidation of mortgage or non-mortgage collateral).

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2. This action plan sets out the actions envisaged to remedy that situation. Those actions should be aimed at ensuring the institution's viability, either by strengthening its net assets and solvency or by facilitating its merger with or absorption by another institution of recognised solvency or the full or partial transfer of its business or operating units to other credit institutions. **3.** See "Financial Regulation: 2004 Q1", Economic Bulletin, April 2004, Banco de España, p. 94. **4.** Specifically, the fifth additional provision of Law 3/1994 of 14 April 1994 adapting Spanish law on credit institutions to the Second Banking Directive. Also, other amendments relating to the financial system are introduced.

SECURITIES MARKET: SECURITIES OFFERINGS NOT REQUIRING A PROSPECTUS

To ensure investor protection, Securities Market Law 24/1988 of 28 July 1988[5] was amended to require the intervention of a duly authorised institution to provide investment services in certain securities offerings[6] to the general public that do not require a prospectus and can be publicised by any means. Non-compliance with this requirement by the issuer shall be classed as a very serious infringement under the securities market organisation and discipline regulations.

SME SUPPORT MEASURES

Law 26/2009 of 23 December 2009[7] on the State budget for 2010 was reformed to enable SPEs securitising loans to SMEs to function more flexibly, so that the liquidity obtained from the securitisation process could also be used to finance the current assets of SMEs.[8]

The Official Credit Institute ("ICO" by its Spanish acronym) has made available since 14 June a new direct line of finance to SMEs and self-employed workers (ICOdirecto), in which the ICO assumes 100% of the credit risk on transactions of up to €200,000.

The Royal Decree-Law came into force on 14 April 2010.

Amendment of legislation on depositor and investor guarantee schemes

Royal Decree 628/2010 of 14 May 2010 (BOE of 3 June 2010) amending Royal Decree 2606/1996 of 20 December 1996[9] on credit institution deposit guarantee funds (DGFs) and Royal Decree 948/2001 of 3 August 2001[10] on investor compensation schemes was enacted in order to complete the transposition of Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009.[11]

The most significant provisions in the Royal Decree are as follows:

The level of protection remains at €100,000 both in DGFs and in the ICS, and those guarantees continue to apply per depositor or investor, whether a natural or a legal person, regardless of the number and type of cash, securities or financial instrument deposits in the holder's name at the same institution.

The period which the Banco de España has to check that a credit institution is unable to repay deposits which are due and payable is reduced to five working days.

Two different time periods are established for DGFs to pay guaranteed amounts, depending on whether the payee is a depositor or an investor. DGFs have to pay depositors within 20 working days of the date when insolvency proceedings were declared against the institution

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5. See "Regulación Financiera: tercer trimestre de 1988", *Boletín Económico*, October 1988, Banco de España, pp. 61-62. **6.** Specifically, some of the cases of securities public offerings set out in Article 30 bis of Securities Market Law 24/1988, such as those targeted at fewer than 100 natural or legal persons of a Member State, without including qualified investors; those targeted at investors that purchase securities for a minimum of €50,000 per investor in each separate offering; and those whose unit nominal value is at least €50,000. **7.** See "Financial Regulation: 2009 Q4", Economic Bulletin, January 2010, Banco de España, pp. 172-174. **8.** Previously, an institution which assigned loans and credits had to reinvest the resulting liquidity in new lending, particularly to SMEs, with maturities longer than one year. **9.** See "Regulación financiera: cuarto trimestre de 1996", Boletín Económico, January 1997, Banco de España, pp. 106-109. **10.** See "Financial Regulation: 2001 Q3", Economic Bulletin, October 2001, Banco de España, pp. 93-97. **11.** Directive 2009/14/EC introduced a series of essential reforms in the regulation of European deposit guarantee schemes, as follows: it fosters cooperation between European schemes, raises credit institutions' reporting obligations to depositors on the coverage of their deposits by foreign or domestic schemes, increases credit institutions' obligations to inform depositors of the coverage of their deposits by foreign or national schemes, increases the level of deposit coverage, reduces the time periods for the competent authorities to declare that a given institution is unable to satisfy the amounts claimed by depositors or investors and to make payment, and, lastly, obliges guarantee funds to conduct stress tests to assess their ability to cope with a possible crisis at a credit institution. A significant portion of these reforms were made in Spain through Royal Decree 1642/2008 of 10 October 2008. See "Financial Regulation: 2009 Q1", Economic Bulletin, April 2009, Banco de España.

or when the Banco de España verified the credit institution's inability to pay. In duly justified circumstances, that time period may be extended by up to 10 more working days (previously the time period was three months, which, with extensions, could be prolonged to nine months). The time period which DGFs or the ICS have to pay investors remains at three months, but this period will begin running when the credit position of the investor is identified and calculated (previously it was from when the credit institution's inability to pay was verified or insolvency proceedings were declared). In duly justified circumstances, it may be extended up to another three months (previously it could be extended up to a maximum of nine months).

Credit institutions have to make available to customers information on the functioning of the DGFs of which they are members, specifying the amount and scope of the cover offered. Also, they must inform about the conditions and the formalities which must be completed to obtain compensation payouts.

The surplus held by DGFs in excess of the amount needed to fulfil their objectives shall remain in their assets and may not be distributed or returned to member institutions.

DGFs have to conduct regular operational tests to assess their ability to cope with a possible crisis at an institution.

Lastly, it is expressly specified that the ICS will not cover investors holding a securities account with an institution not covered by the ICS, even if that institution had in turn deposited the securities in an account at one covered by the ICS.

The Royal Decree came into force on 4 June 2010.

Regulation and control of advertising for financial products and services

BANKING PRODUCTS AND SERVICES

Ministerial Order EHA/1718/2010 of 11 June 2010 (BOE of 29 June 2010) on regulation and control of advertising for banking products and services replaced and repealed Chapter III of the Ministry for Economic Affairs and Finance Order of 12 December 1989[12] on interest rates and fees/commissions, operating rules, customer information and advertising of credit institutions.

The Ministerial Order establishes a new administrative control regime for advertising by Spanish credit institutions and the branches in Spain of foreign credit institutions targeted at customers or potential customers resident in Spain and relating to banking products and services other than investment financial instruments and services. Also included in its scope of application is advertising activity relating to the provision of payment services by payment institutions regulated by Law 16/2009[13] of 13 November 2009 on payment services.

Advertising activity is defined as all manner of communication which offers banking products or services or disseminates information on them, whatever the medium used.[14] Excluded from regulation are certain advertising activities such as: a) corporate advertising campaigns; b) the contents in an institution's internet pages or other medium that are necessary to enter into transactions; and c) information on the specific characteristics of the transactions included in the institution's operational internet pages where those transactions are carried out.

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12. See "Regulación financiera: cuarto trimestre de 1989", Boletín Económico, January 1990, Banco de España, p. 35. **13.** See "Financial Regulation: 2009 Q4", Economic Bulletin, January 2010, Banco de España, pp. 150-155. **14.** Press, radio, television, e-mail, internet or other electronic media, indoor or outdoor posters, billboards, pamphlets, circulars and letters forming part of an advertising campaign, telephone calls, door-to-door visits or any other system of dissemination.

The current system of prior authorisation is replaced by an advertising control system based on two lines of action: the first, *preventive*, involves the establishment of the general principles to which advertising must conform and the general criteria governing the minimum content and format of the advertising message, which will be determined by the Banco de España, as well as the requirement that credit institutions have procedures and internal controls to protect the legitimate interests of customers and manage the risks to which they are or may be exposed as a result of their advertising activity; and the second, consisting of revision or *ex post* action, enables possible inappropriate conduct to be corrected, for which purpose the Banco de España may require the withdrawal or rectification of any advertising not complying with the aforementioned Ministerial Order or, where applicable, require such warnings as it deems necessary about the advertised produce or service to be included in the advertising.

Institutions and persons holding administrative or management positions in them that fail to comply with the obligations set in this Ministerial Order or its implementing regulations shall be liable to administrative penalties pursuant to the provisions of Law 26/1988 of 29 July 1988[15] on the discipline and intervention of credit institutions.

The Ministerial Order came into force on 30 June 2010.

INVESTMENT PRODUCTS AND SERVICES

Following identical principles to those in the previous case, *Ministerial Order EHA/1717/2010 of 11 June 2010* (BOE of 29 June 2010) on regulation and control of advertising for investment products and services established the rules, principles and criteria to which advertising for financial instruments and investment services has to conform.

This Ministerial Order regulates advertising activity targeted at investors resident in Spain relating to financial instruments, to other financial products subject to supervision by the Spanish National Securities Market Commission (CNMV), to investment and ancillary services and ancillary and reserved activities involving the aforementioned financial instruments, and to CII, venture capital entity and securitisation SPE management activity.

As with banking products, advertising activity is defined as all manner of communication addressed to the general public in order to promote, whether directly or through third parties, the use of a certain investment service or activity or the subscription or acquisition of financial instruments, as well as those communications made by any interested party during a takeover bid with a view to influencing the outcome.

Likewise, there is an advertising control system based on two lines of action. The first is *preventive*, in which the CNMV will determine the general principles to which advertising must conform and the general criteria governing the content and format of the advertising message and any other matter that may affect advertising. Further, investment firms and other entities providing investment services are required to have a commercial communication policy with suitable criteria and procedures to ensure compliance with current legislation.

The second, which involves revision or *ex post* action, provides that the CNMV has administrative power to require the withdrawal or rectification of any advertising not complying with the aforementioned Ministerial Order or to require that such warnings as it deems necessary about the advertised produce or service have to be included in the advertising by the offeror or is-

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15. See "Regulación financiera: tercer trimestre de 1988", Boletín Económico, October 1988, Banco de España, pp. 56-58.

suer. Failure to comply with such requirements may be liable to penalties in accordance with the provisions of Securities Market Law 24/1988 of 28 July 1988.

If a prospectus has to be prepared, the advertising must indicate such publication and state where investors are, or will be, able to obtain it. In these cases, the advertising information must be consistent with the information contained in the prospectus.

The Ministerial Order came into force on 30 June 2010.

Amendment of regulations on collective investment institutions

Royal Decree 749/2010 of 7 June 2010 (BOE of 8 June 2010) amended the implementing regulations of Law 35/2003 of 4 November 2003 on CIIs approved by Royal Decree 1309/2005 of 4 November 2005[16] and other regulations in the tax field.

AMENDMENTS AIMED AT ENHANCING THE FLEXIBILITY OF CII OPERATIONS

The legal regime governing exchange-traded funds, or ETFs, is made more flexible.[17] Thus, the constitution of these funds before a notary and their registration in the mercantile register become optional. Also, their investment policy objectives are broadened, since they may reproduce not only an index meeting the conditions set out in the regulations, but also any other underlying index expressly authorised by the CNMV.

Exchange-traded index open-end investment companies are provided for in legislation. Their legal regime is similar to that of an ETF, but in the form of an open-end investment company. They enjoy certain exceptions with respect to open-end investment companies. Thus, upon admission to listing, they are not required to have the stipulated minimum number of shareholders;[18] they are exempt from most of the special rules applicable to open-end investment companies regarding the application for admission of their shares to stock-exchange trading; nor are they subject to the procedure for share transfers.[19]

Also, the legal regime governing real estate CIIs is made more flexible, as follows: 1) the assets in which they invest may include listed real estate investment companies (referred to by their Spanish acronym "SOCIMI"),[20] provided they have no holdings in the capital or net assets of other real estate CIIs; 2) their main corporate purpose may include investment in other real estate CIIs of similar characteristics, up to a limit of 10% of their assets, and 3) the percentage of the compulsory investment in urban rental properties is reduced from 90% to 80% of their assets, to equate it to that set for SOCIMI.

With regard to hedge funds (also known as alternative investment funds), certain exceptions are stipulated for unit-holders having the status of professional investor (previously known as qualified investors) as defined in the Securities Market Law[21] in respect of the subscription and purchase of units, and the rest of the text is brought into line with this new nomenclature.

AMENDMENTS AIMED AT ENABLING CII ASSETS TO BE LIQUIDATED MORE READILY

Legal provisions are laid down to introduce the concept of *special-purpose CIIs* or *investment compartments* (hereafter "special-purpose CIIs), known in the international arena as "*side*

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16. See "Financial Regulation: 2005 Q4", Economic Bulletin, January 2006, Banco de España, pp. 112-119. **17.** ETFs resemble index funds, but the acquisition or sale of their shares is now permitted not only once a day, but throughout the daily trading period on the relevant exchange. Their shares are admitted to trading on a stock exchange. **18.** The number of shareholders may not be below 100. In the case of investment firms composed of compartments, the minimum number of shareholders in each compartment may not be less than 20 and in no case may the total number of total shareholders of the firm be less than 100. **19.** See Article 28 of Law 35/2003 of 4 November 2003. **20.** Regulated by Law 11/2009 of 26 October 2009. See "Financial Regulation: 2009 Q4", Economic Bulletin, January 2010, Banco de España, pp. 166-169. **21.** The term "professional client" and characteristics thereof were introduced by Law 47/2007 of 19 December 2007. See "Financial Regulation: 2007 Q4", Economic Bulletin, January 2008, Banco de España, pp. 183-189.

pockets"). These new entities are the result of spinning off a part of the original CII in order to transfer solely those assets which are affected by exceptional circumstances preventing them from being valued or sold on reasonable terms and which represent more than 5% of the CII's net assets. Hence a special-purpose CII will have the same legal form as the original CII, but is subject to a special valuation, liquidity, subscription and redemption regime which enables its assets to be liquidated in an orderly fashion.

The units or shares of the resulting special-purpose CII will be received by the unit-holders or shareholders of the original CII in proportion to their investment in the original CII.

The creation of the special-purpose CII must be notified to the CNMV and will be considered to be a significant event. Also, the unit-holders or shareholders must be notified in writing, indicating the reasons for creating the special-purpose CII and the conditions governing it.

Once the redemptions have been satisfied or the repurchases or transfers vis-à-vis investors have been carried out, the resulting special-purpose CII will be extinguished and the CNMV notified accordingly.

It should be noted that open-end investment companies whose shares are admitted to trading on stock exchanges or other regulated markets or multilateral trading facilities may not create special-purpose compartments, must necessarily opt for CIIs and may not apply for admission to trading on stock exchanges or other regulated markets or multilateral trading facilities.

The liquidation regime governing securities funds is improved in that the liquidator (i.e. the IIC management company with the involvement of the depositor) may, via liquidations on account, progressively distribute the proceeds from disposal of the fund's securities and assets proportionally among all the fund's unit-holders, once all creditors' claims have been satisfied or the amounts due and payable to them have been settled . Previously, by contrast, securities funds were subject to certain requirements and time limits stipulated in the implementing regulations. This same liquidation regime also becomes applicable to real estate investment funds, albeit subject to certain specific features detailed in the legislation allowing such funds to gradually be liquidated and the resulting liquidity distributed among unit-holders without need to wait until all the assets are sold.

Finally, the implementing regulations on non-resident income tax, corporate income tax and personal income tax are amended. Those amendments consist of exemption from the obligation to made withholdings from or prepayments on account of income derived from the transfer or redemption of shares or equity holdings in ETFs or exchange-traded index open-end investment companies.

The Royal Decree came into force on 9 June 2010.

Investment services: updating of legislation on fees/commissions and standard contracts

Ministerial Order 1665/2010 of 11 June 2010 (BOE of 23 June 2010) implementing Articles 71 and 76 of Royal Decree 217/2008 of 15 February 2008[22] on the legal regime of IFs and of other investment services entities in respect of fees/commissions and standard contracts was promulgated.[23]

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22. See "Financial Regulation: 2008 Q1", Economic Bulletin, April 2008, Banco de España. **23.** The Ministerial Order repeals in full the Ministerial Order of 25 October 1995 and the Ministerial Order of 7 October 1999, which had been partially repealed by Royal Decree 217/2008.

The legal regime governing fees/commissions shows no significant new features with respect to the previous situation. Thus, their minimum content is defined, the formal requirements are specified and it is stipulated that entities may not apply fees/commissions at rates higher than or for items other than those stated in the brochure, nor may they charge fees/commissions or expenses for unnecessary transactions or for services not effectively rendered or not expressly accepted or requested by the customer.

Also, the regime of prior inspection of fee and commission brochures by the CNMV remains in place. Following receipt of a brochure from entities, the CNMV will have 30 days (previously 15 days) to formulate objections or recommendations for rectification purposes or require the inclusion of specific financial services when such services contribute to the aforementioned objective of transparency. If it takes no action, the CNMV has to make the brochure available to the public on its website. The brochure will become applicable once the aforementioned time limit of 30 days has elapsed.

As regards standard contracts, the current regime of prior inspection is replaced by a system of ex post inspection by the CNMV. This measure represents an improvement for entities, since they will not have to wait for their standard contract to be authorised in order to be able to use it with their customers, but rather will be able to use it directly, provided it has been made public sufficiently. However, the CNMV may require entities to rectify or terminate any standard contracts that do not comply with current legislation. This measure is to be adopted without prejudice to such liability as may have been incurred by the entity under the penalty regime established by the Securities Market Law.

The minimum content of these contracts is brought up to date,[24] although the CNMV reserves the right to specify in greater detail the compulsory content of the standard contracts for certain services.[25] Also included is a list of investment services for which the entities wishing to provide them must prepare standard contracts, as well as a general clause permitting entities to use standard contracts for the provision of other services not contained in the list.

Lastly, the legal regime governing the making public of fee and commission brochures and standard contracts is updated and adapted to current circumstances. Thus the CNMV has to make available to the public on its website the fee and commission brochures and the changes thereto sent by entities, once the CNMV has checked that they comply with current legislation. For their part, the entities have to do the same in all their full and representative offices and on their websites. The CNMV may set the requirements and conditions applicable to such publicity in order to achieve, inter alia, the widest dissemination of information.

The Ministerial Order came into force on 24 June 2010.

Payment services and institutions: implementing regulations

Royal Decree 712/2010 of 28 May 2010 (BOE of 29 May 2010) on the legal regime governing payment services and payment institutions ("PIs"),[26] implements Law 16/2009 of 13 Novem-

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24. Standard contracts must now be worded in accordance with Legislative Royal Decree 1/2007 of 16 November 2007 enacting the consolidated text of the General Consumer and User Protection Law and other supplementary laws and with the rules of conduct set out in Securities Market Law 24/1988 of 28 July 1988 and its implementing regulations. **25.** Specifically, portfolio management, safekeeping and administration of financial instruments and any other services or cases which the CNMV considers should be standardised and for which it has thus deemed a standard contract to be compulsory. **26.** Payment institutions are legal persons that have been granted authorisation to provide and execute all or some of the payment services specified in Law 16/2009. Included are the following: a) services enabling cash to be placed on or withdrawn from a payment account as well as all the operations required for operating a payment account; b) execution of payment transactions such as direct debits, payment transactions through a payment card or a similar device, and credit transfers, including standing orders; c) issuing and/or acquiring of payment instruments; and d) money remittance. Under Law 16/2009 the provision of these services is reserved to the payment institutions now being discussed and to traditional credit institutions, electronic money institutions and the Spanish State postal service.

ber 2009 on payment services and *Ministerial Order EHA/1608/2010 of 14 June 2010* (BOE of 18 June 2010) on transparency of conditions and information requirements applicable to payment services implements the general obligations in this area contained in Law 16/2009. This completes the transposition to Spanish legislation of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007[27] on payment services in the internal market.

LEGAL REGIME FOR PAYMENT INSTITUTIONS

It is the prerogative of the Ministry for Economic Affairs and Finance to authorise the creation of PIs, following an report from the Banco de España and the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences on the matters in their areas of competence. Before commencing their operations, PIs must be registered in the Special Registry of PIs to be set up by the Banco de España. This registry will state the payment services for which they have been authorised and, in addition, their agents and branches.

The requirements for obtaining and conserving the authorisation to operate as a payment institution are established, inter alia, as follows: 1) have at all times a minimum initial capital between €20,000 and €125,000, depending on the type of payment services provided; 2) have suitable shareholders or owners of qualifying holdings;[28] 3) have directors, general managers or similar officers of recognised repute; 4) have in place solid corporate governance procedures effective for identifying, managing, controlling and communicating risks and have the means to forestall and prevent money laundering and terrorist financing.

The special features of hybrid PIs, i.e. entities that, in addition to providing payment services, engage in some other economic activity are addressed.[29] In certain cases they may be required to set up a separate PI; specifically, this is so when the performance of economic activities other than payment services may affect their financial soundness or detract from the Banco de España's ability to supervise compliance by PIs with their obligations.

CROSS-BORDER ACTIVITY

PIs authorised in another EU Member State which wish to engage in cross-border activity in Spain through the opening of branches or in exercise of the freedom to provide services may do so only if the Banco de España receives a communication from the PI's supervisory authority which contains certain information.[30]

PIs authorised in a non-Member State of the EU must, in addition to meeting the requirements set for resident PIs, comply with other additional ones, such as having at least one person who is responsible for managing the branch it is intended to establish in Spain and who effectively determines the orientation of that branch. Authorisation may be denied in application of the principle of reciprocity.

Similarly, Spanish PIs intending to engage in cross-border activity in a non-Member State of the European Union through the opening of branches, in exercise of the freedom to provide services or through a subsidiary must apply to do so to the Banco de España, providing certain information in their application.[31]

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27. See "Financial Regulation: 2007 Q4", Economic Bulletin, January 2008, Banco de España, pp 194-196. **28.** "Qualifying holding" means a direct or indirect holding in an undertaking which represents 10 % or more of the capital or of the voting rights or which makes it possible to exercise a significant influence over the management of that undertaking. **29.** Unlike other financial intermediaries, payment institutions are not entities with an exclusive corporate purpose, since they are permitted to provide payment services simultaneously with other ancillary services or any other economic activity. **30.** Among other things, the information to be provided shall include a programme of activities indicating, in particular, the transactions it is intended to carry out, the organisational structure of the branch, and the names and service records of the proposed managers of the branch. **31.** Among other things, the information to be provided shall include a programme of activities, the organisational structure of the branch, and the names and service records of the proposed managers of the branch.

Lastly, provision is made for the creation or acquisition of qualifying holdings in the PI of a non-Member State of the EU by a Spanish PI, which, in any event, shall be subject to prior authorisation from the Banco de España.

AGENTS AND DELEGATION OF FUNCTIONS

Spanish PIs and branches in Spain of foreign PIs intending to provide payment services through an agent must provide the Banco de España with information about the internal control and communication procedures and bodies to be used in their relations with agents, both to forestall and prevent money laundering and terrorist financing and to ensure compliance with the applicable sectoral regulations.

To delegate essential operational functions relating to payment services, PIs must notify the Banco de España, such notification including detailed information on the characteristics of the delegation and the identify of the firm to which it is intended to delegate. The delegation must be carried out in such a way as not to affect the quality of the PI's internal control over the delegated functions or the Banco de España's ability to supervise the PI.

GUARANTEE REQUIREMENTS, OWN FUNDS REQUIREMENTS AND OPERATING LIMITS ON PAYMENT ACCOUNTS

PIs must safeguard the funds received from payment service users or received through another payment service provider for the execution of payment transactions, observing for this purpose one of the two procedures stipulated in Law 16/2009. Under the first method, they shall not be commingled at any time with the funds of any other natural or legal person and, where applicable, they shall be deposited in a separate account in a credit institution or invested in secure, liquid low-risk assets, in respect of which the payment service user shall be insulated in accordance with insolvency law against the claims of other creditors of the payment institution. Alternatively, they shall be covered by an insurance policy or some other comparable guarantee from an insurance company or a credit institution which has a high credit rating and does not belong to the same group as the PI.

Regarding the first procedure, a list is given of the secure, liquid low-risk assets in which the funds may be invested. Regarding the second, the conditions to be met by the insurance policy or comparable guarantee are specified.

The method to be applied by PIs for calculating their own funds requirements is specified. It is based on a weighting of the amount of the payment transactions executed by them during the previous year.[32]

Also, several provisions are set in place to ensure that any PI with a shortfall of own funds will return to compliance with the own funds regulations. Specifically, the PI must immediately notify the own funds shortfall to the Banco de España and submit within one month a programme setting out its plans for re-establishing compliance. In these circumstances, PIs are obliged to submit any appropriation of profits to the Banco de España for prior authorisation.[33]

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32. However, the Banco de España may –on its own initiative or in response to the PI in question, and having regard to the need to improve its solvency, protect the interests of users or of the payments system, or ensure more effective supervision of the PI– decide that own funds requirements have to be calculated by one of the other two methods envisaged in law: in one of them, the calculation is based on the preceding year's overheads, and in the other, on the sum of different income, expenses and fees/commissions. **33.** If the own funds shortfall exceeds 20% of own funds requirements, the PI must allocate to reserves all the net profit or surplus, unless the Banco de España authorises otherwise as a result of approval of the programme to return to compliance.

The provisions relating to operating limits on payment accounts of PIs regulate the effect of a payment account remaining inactive for one year[34] and they also limit the possibility of an account having a debit balance as a result of transactions initiated directly by the payer holding the payment account.[35]

DISCIPLINARY AND SUPERVISION REGIME

The disciplinary regime set out in Law 26/1988 of 29 July 1988 on the discipline and intervention of credit institutions shall, with certain adaptations, be applicable to PIs and persons holding administration or management positions in them.

PIs must send to the Banco de España information on: a) any acquisition of a qualifying holding in them; b) the financial institutions with direct or indirect holdings in their capital; c) any person holding at least 2.5% of their capital.

OTHE PROVISIONS ON THE LEGAL REGIME FOR PAYMENT SERVICES

Some aspects of the payment service regulations may not apply to payment instruments of small amount,[36] if this is expressly agreed.

Also set out are transparency requirements and certain conditions for payment transactions subject to framework contracts and for other ("single") transactions. In those cases in which the payment service user is not a consumer, the parties may agree that such requirements are totally or partially non-applicable.

Both in single transactions and in those subject to a framework contract, the payment service provider is required to furnish previously to the user, in a readily accessible form, certain general information and the conditions applying to the service. The general information on single transactions must basically include prior information on the maximum execution period of the payment service, the expenses to be paid by the user to the provider for that service and, in the event that the payment transaction includes a change of currency, the effective or reference exchange rate to be applied.

In the case of transactions under a framework contract, the payment service provider shall furnish the user with prior information on the conditions contained in it. When a payment transaction takes place, the provider shall furnish the payer with explicit information on the maximum execution period and on the expenses to be paid, adding, where applicable, a breakdown of those expenses. Similarly, the payee's payment service provider must furnish to the payee certain information on payment transactions subject to a framework contract, such as the amount of the payment transaction and of any related expenses and, where applicable, the related breakdown of expenses and/or interest to be paid by the payee.

Finally, regarding the currency-exchange bureaux that were authorised to make transfers abroad before the new legislation came into force, the procedure and the minimum requirements for their authorisation to be recognised or, where applicable, for them to be converted into PIs are set out.

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34. Payment accounts will, from they time they are opened and at all times thereafter, have associated with them a cash deposit account opened by one of its holders at a credit institution authorised in the European Union, to which the balance of the payment account has to be transferred if the latter shows no transaction in the preceding year. **35.** Save in exceptional cases envisaged in law, payment accounts may have a debit balance only as a result of the provision of payment services initiated by the payee thereof, and never as a result of payment transactions initiated directly by the payer holding the payment account. **36.** Specifically, for individual payment transactions not exceeding €30 or subject to an expense limit of €150 or allowing the storage of funds not exceeding at any time €150, payment service providers are permitted to agree with users that certain provisions of Law 16/2009 will not apply.

The Royal Decree came into force on 30 May 2010 and the Ministerial Order on 8 July 2010.

Prevention of money laundering and terrorist financing: new regulations

Law 10/2010 of 28 April 2010 (BOE of 29 April 2010), on the prevention of money laundering and terrorist financing has been published. It repeals Law 19/1993 of 28 December 1993[37] on certain measures to prevent money laundering, and amends law 19/2003 of 21 May 2003, on the prevention and blocking of terrorist financing, and Law 19/2003 of 4 July 2003[38] on the legal regime governing capital movements and cross-border transactions and on certain measures to prevent money laundering.

This law transposes Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005[39] into Spanish law and adopts the penalty rules of Regulation (EC) No 1781/2006 of the European Parliament and of the Council of 15 November 2006 on information on the payer accompanying transfers of funds. The Law, in line with the Directive, unifies the rules for the prevention of money laundering and terrorist financing insofar as the prevention obligations of subject parties are concerned.[40]

Table 1 offers, in summary form, a comparison between the main provisions of this Law and the situation prior to this Law.

SUBJECT PARTIES

A preventive burden is placed on parties acting as intermediaries in legal operations or transactions when there are signs or proof that they involve assets of illicit origin. Among the parties required to supervise these acts are, as under the previous rules, financial institutions,[41] property developers, auditors, notaries, registrars, casinos, lawyers and court attorneys, and dealers in jewels and objets d'art. The Law includes some new parties, such as the recently regulated payment institutions, loan brokers, persons who, without obtaining authorisation to be a specialised credit institution, carry on some of the activities thereof, and persons who deal professionally in goods when payments are made in cash or cash equivalents[42] in amounts of €15,000 or more, whether through a single operation or in several operations which appear to be linked.

At the same time, the threshold amount of cash or cash equivalents for which individuals are required to make a prior declaration of inward or outward cross-border transfers is raised from €6,000 to €10,000, and from €80,500 to €100,000 in the case of movements of cash or cash equivalents within the national territory. Only individuals, acting on behalf of firms which, duly authorised and registered by the Ministry of the Interior, carry on activities involving the transit of cash or cash equivalents, are excepted from this obligation.

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37. See "Regulación financiera: cuarto trimestre de 1993», *Boletín Económico*, January 1994, Banco de España, pp. 78 and 79. **38.** See "Financial Regulation: 2003 Q3", *Economic Bulletin,* October 2003, Banco de España, pp. 94-96. **39.** On the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, which was implemented by Commission Directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of 'politically exposed person' and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis. **40.** Those aspects relating to the blocking of funds allegedly linked to terrorism, which remain within the sphere of the Ministry of the Interior, continue to be regulated by Law 12/2003 of 21 May 2003. **41.** This definition includes credit institutions, insurance companies, investment firms, management companies of collective investment institutions and investment companies whose management is not entrusted to a management company, management companies of pension funds, venture capital management companies and venture capital companies whose management has not been entrusted to a management company and mutual guarantee companies. **42.** For the purposes of the Law, cash and cash equivalents shall be deemed to include: a) national or foreign banknotes or coins; b) bearer cheques denominated in any currency; and c) any other physical device, including electronic devices, conceived to be used as a bearer means of payment. In the case of cross-border movements, cash and cash equivalents also include: traveller's cheques, negotiable instruments, including cheques, notes, and payment orders, whether issued to the bearer, endorsed without restriction, issued to the order of a fictitious beneficiary or in any other form by virtue of which title thereto is transferred by delivery and incomplete instruments, including cheques, notes and payment orders, that have been signed, but with the name of the beneficiary omitted.

PREVENTION OF MONEY LAUNDERING AND TERRORIST FINANCING

TABLE 1

LAW 19/1993 OF 28 DECEMBER 1993	LAW 10/2010 OF 28 APRIL 2010
Subject parties	
Financial institutions, property developers, auditors, notaries, registrars, casinos, lawyers, court attorneys, and dealers in jewels and objets d'art.	In addition, payment entities, loan brokers and natural or legal persons who trade professionally in goods, when payments are made in cash or cash equivalents in amounts of €15,000 or more
Natural persons are required to submit prior declarations for inward or outward cross-border transfers of cash or cash equivalents when their amount is €6,000 or more, and for movements within the national territory when their amount is €80,500 or more.	The amounts are raised to €10,000 and €100,000, respectively.
Due diligence measures	
Some.	These shall be applied to their customers to: 1) check the nature of their professional or business activities; 2) conduct ongoing monitoring of their business; 3) determine if they are acting on their own behalf or on behalf of third parties; and 4) to determine the structure of ownership or control of legal persons, to ensure that they do not establish business relations if it is not possible to determine such structure.
Some.	These measures shall be enhanced in certain cases; in particular, when the customer is a person with public responsibilities, or is an immediate family member or known to be a close associate of such a person.
Reporting obligations	
Subject parties shall perform a special examination of any action or operation (including mere attempts), which by its nature may suggest the possibility of links to money laundering or terrorist financing. A report shall be submitted without delay and on the party's own initiative to the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences.	No significant changes.
Subject parties shall notify the Executive Service, with such periodicity as may be determined, of those operations that may be established in regulations, and shall provide it with any documentation or information that it requests from them for the exercise of its powers.	No significant changes.
Subject parties shall keep for at least six years all documentation relating to the performance of the obligations established in the Law.	The period for keeping the documentation is lengthened to ten years.
Internal control measures	
Subject parties shall establish appropriate internal control and communication procedures and bodies to know, anticipate and prevent operations relating to money laundering or terrorist financing.	Due diligence, reporting, document retention, and risk assessment and management policies and procedures are added. Also, the internal control measures shall be subject to annual examination by an external expert.
Not envisaged.	Approval of an appropriate manual for the prevention of money laundering and terrorist financing, which shall be kept updated, with complete information on the internal control measures.
Penalty rules	
Very serious offences: public warning and fines of between €90,000 and the larger of the following amounts: 5% of the subject party's net worth, double the financial amount of the operation, or €1.5 million.	Very serious infringements: public warning and fines of between €150,000 and the larger of: 5% of the subject party's net worth, double the financial amount of the operation, or €1.5 million.
Serious offences: private or public warning and fines of between €6,000 and the larger of: 1% of the subject party's net worth, 150% of the financial amount of the operation, or €150,000.	Serious infringements: private or public warning and fines of between €60,001 and the larger of: 1% of the subject party's net worth, 150% of the financial amount of the operation, or €150,000.
Not envisaged.	Minor infringements: private warning and fines of up to €60,000.
In relation to individuals, in the event of failure to comply with the obligation to declare movements of capital: fine of between €600 and half the value of the means of payment concerned.	In relation to individuals, in the event of failure to comply with the obligation to declare movements of capital: fine of between €600 and twice the value of the means of payment concerned.

SOURCES: BOE and Banco de España.

DUE DILIGENCE MEASURES

One of the most important changes made by this Law is the establishment of a series of due diligence measures to be performed by the subject parties, to obtain information on their customers both at the time of establishing business relations and during the course of the relationship with them. They shall not carry on business or perform transactions with natural or legal persons who have not been duly identified. In particular, opening, dealing in or keeping accounts, passbooks, assets or instruments that are numbered, coded, anonymous or in fictitious names is prohibited.

Subject parties shall apply customer due diligence measures to new and existing customers,[43] among other purposes, in order to: 1) know and check the nature of their professional or business activities; 2) conduct ongoing monitoring of their business and of their business and risk profile, including the source of their funds; 3) obtain information on customers to determine if they are acting on their own behalf or on behalf of third parties (formal and real ownership), so that, if there are signs or proof that customers are not acting on their own behalf, they shall obtain precise information in order to know the identity of the persons on whose behalf they are acting; and 4) to determine the structure of ownership or control of legal persons (if it is not possible to determine such structure they may not establish relations with such customer).

The subject parties shall always apply the measures when there are signs of money laundering or terrorist financing, when dealing in new products or when a transaction arises that is significant in terms of its volume or complexity.

The general rule is that subject parties may adjust the application of the measures according to the risk, type of customer, product or operation. The Law determines the existence of certain customers[44] and operations[45] for which not all of the due diligence measures are applicable, generally only formal identification being required.

By contrast, these measures shall be expressly enhanced in certain cases envisaged in the Law (in particular, and in addition to private banking, money remittances and currency exchange transactions, when the customer is a person with public responsibilities, or is an immediate family member or known to be a close associate of such a person), where the customer has not been physically present for identification purposes and in cross-border correspondent banking relationships with third countries.

REPORTING OBLIGATIONS

Subject parties shall, as under the previous rules, perform a special examination of any action or operation (including mere attempts), of whatever amount, when there are signs that it may be linked to money laundering or terrorist financing, and summarise the results of the examination in a written report. This report shall be forwarded without delay and on the party's own initiative to the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences. The latter shall also be notified of any operations that appear to be incongruous with the nature, volume of activity or operational background of the customer, provided that no economic, professional or business justification for their conduct is appreciated in the special examination, as well as of those operations that are specified in regulations, with such periodicity as may be determined.

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43. A period of five years is established for the application of due diligence procedures to existing customers. **44.** Such as: a) public law entities of the Member States of the European Union or of similar third countries; b) financial institutions domiciled in the European Union or in similar third countries whose compliance with due diligence requirements is subject to supervision, and c) companies with a stock exchange quotation whose securities are listed on a regulated market of the European Union or a similar third country. **45.** Such as: a) life assurance policies with an annual premium that does not exceed €1,000 or a one-off premium that does not exceed €2,500, unless splitting of the operation is apparent; b) social welfare instruments, provided that liquidity is limited to the cases envisaged in the legislation on pension schemes and funds and they cannot be used as collateral for a loan; c) collective insurance covering pension commitments, provided that it complies with certain requirements, and d) electronic money in the terms specified in regulations.

Apart from this notification based on evidence, the subject parties are still required to make systematic and periodic notifications to the Executive Service of all operations in an amount exceeding the threshold determined in regulations.

Finally, subject parties shall keep for at least ten years (previously six) all the documentation relating to the performance of the obligations established in the Law.

INTERNAL CONTROL MEASURES

The internal control measures are updated as they are adapted to the changes made by the Law. The subject parties, with the exceptions that may be determined in regulations, shall approve in writing and apply appropriate policies and procedures in the area of due diligence, reporting, document retention, internal control, evaluation and management of risks, ensuring compliance with the relevant provisions and communication, in order to anticipate and prevent operations relating to money laundering or terrorist financing. The internal control measures shall be subject to annual examination by an external expert.

A new requirement is for subject parties to approve an appropriate *manual* for the prevention of money laundering and terrorist financing, which shall be kept up to date, with complete information on the internal control measures. For exercise of its supervision and inspection function, the manual shall be available to the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences, which may require them to adopt the appropriate remedial measures.

PENALTY RULES AND OTHER PROVISIONS

The penalty rules are updated, to cover a larger number of offences, distinguishing between very serious and serious offences and, for the first time, minor ones, and the financial penalties are raised, without prejudice to any criminal liability.

At the same time, it is envisaged that the Ministry of Economy and Finance may decide to set up centralised preventive bodies for the professional associations subject to the Law, which will have the function of intensifying and channelling the collaboration of the professional associations with the judicial, police and administrative authorities responsible for the prevention and suppression of money laundering and terrorist financing, without prejudice to the direct liability of the professionals who are included as subject parties.

It is also envisaged that information on certain operations shall be exchanged among the subject parties in order to anticipate or prevent operations related to money laundering and terrorist financing, in addition to the exchange of information and collaboration between the Spanish authorities and the competent authorities of other states already established.

The Law came into force on 30 April 2010, except for the due diligence measures, which must be applied within five years from that date.

European Financial Stabilisation Mechanism and European Financial Stability Facility

Council Regulation No 407/2010 of 11 May 2010 (OJL of 12 May 2010) establishing a European Financial Stabilisation Mechanism (EFSM) has been published. The purpose of this mechanism is to provide assistance to those Member States experiencing, or seriously threatened with, a severe economic or financial disturbance caused by exceptional occurrences beyond their control. Its activation will be in the context of a joint EU/IMF support and it will be subject to strict conditionality requirements. This mechanism shall be maintained for as long as necessary to safeguard financial stability and shall operate without prejudice to the balance-of-payments assistance for non-euro area Member States. The contribution from the Union budget shall be up to €60 bn.

Member States applying for financial assistance shall discuss with the Commission, in liaison with the European Central Bank (ECB), an assessment of its financial needs. Assistance shall be granted by a Council decision, adopted by a qualified majority on a proposal from the Commission. The assistance shall take the form of a loan or a credit line granted to the Member State.

The loan shall, as a rule, be disbursed in instalments. The Commission shall verify at regular intervals whether the economic policy of the beneficiary Member State accords with its adjustment programme and, on the basis of the findings of such verification, decide on the release of further instalments.

At the same time, *Royal Decree Law 9/2010 of 28 May 2010 (BOE of 29 May 2010)* has been published in Spain, authorising the government to grant guarantees, in an amount of up to €53.9 bn, for operations conducted through the European Financial Stability Facility (EFSF). The EFSF was set up following the agreement reached by the euro area Member States to supplement the EFSM with a contribution of up to €440 bn.

Its purpose is to raise funds on the international capital markets, with the backing of the guarantees granted by the euro area Member States, in order to provide loans, in liaison with the IMF,[46] to those euro area Member States having difficulty meeting their financial needs, subject to strict conditionality. This facility shall be maintained until 30 June 2013.

The Regulation entered into force on 13 May 2010 and the Royal Decree Law on 19 May 2010.

Support Fund for Greece

Royal Decree Law 7/2010 of 7 May 2010 (BOE of 7 May 2010) has been published, which sets up a Support Fund for Greece, and authorises an extraordinary loan in the amount of €9.8 bn to fund it.

In response to Greece's request for assistance, the Eurogroup has activated a support mechanism, consisting in the provision of financing, through bilateral loans pooled by the European Commission. These loans will be granted with strong elements of conditionality, negotiated by the IMF, the European Commission, the ECB and the Greek government.

The amount of the financial package totals €110 bn over three years, of which €80 bn will be contributed by the euro area Member States (€30 bn of which is to be disbursed in 2010), and the other €30 bn by the IMF.

Spain's total contribution to this assistance programme, calculated on the basis of its ECB capital key, adjusted to the euro area Member Stat's, excluding Greece, totals €9.8 bn, of which €3.7 bn will be disbursed in 2010.

The Royal Decree Law entered into force on 7 May 2010.

6.7.2010

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46. The IMF shall make a special contribution of €250 bn.