8

NEW REGULATORY DEVELOPMENTS IN SUPERVISORY MATTERS

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THE BANCO DE ESPAÑA'S POWERS

The Banco de España prepares circulars implementing higher-ranking regulations, and technical guidelines with criteria, practices, methodologies or procedures for compliance with supervisory regulations.

BANCO DE ESPAÑA'S NEW REGULATORY DEVELOPMENTS

Since January 2021, the Banco de España has published seven circulars and one set of technical guidelines. Noteworthy is Circular 5/2021, which develops certain macroprudential tools.

BANCO DE ESPAÑA DRAFTS IN PROGRESS

There are three draft circulars in progress. One of them will complete the transposition of CRD-V into Spanish law and the other two will implement various payment obligations.

OTHER NEW REGULATORY DEVELOPMENTS AT THE NATIONAL LEVEL

Publication of Royal Decree-Law 7/2021 and of Royal Decree 970/2021, which form the basis of the transposition of CRD-V into Spanish law.

NEW REGULATORY DEVELOPMENTS

Publication of the new Directive on credit managers and credit purchasers.

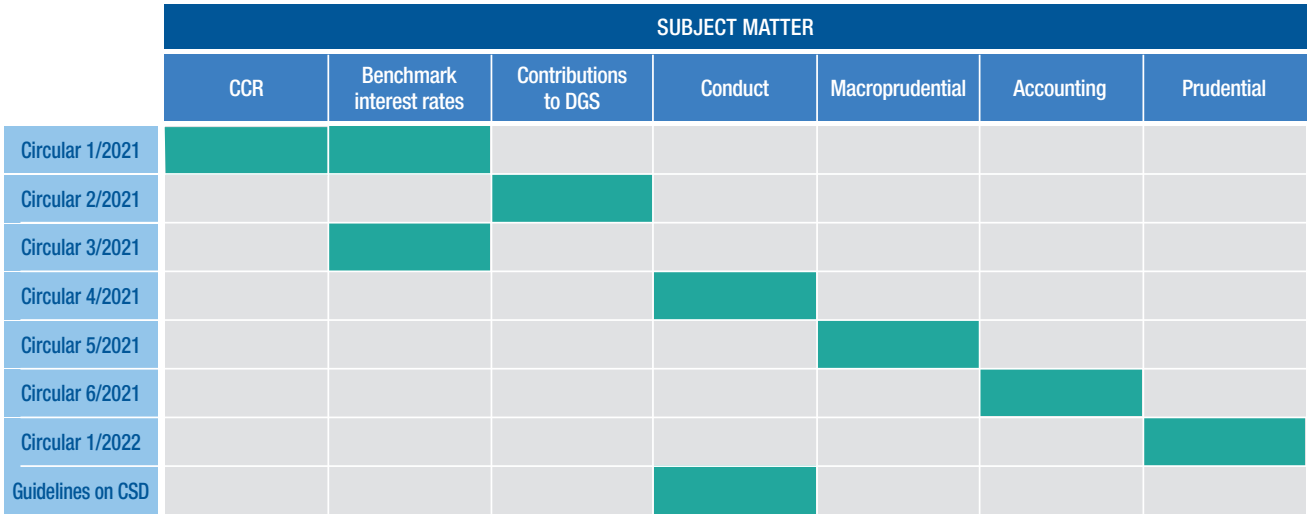
EUROPEAN PROJECTS

The European Commission published its legislative proposals for: i) finalising the incorporation of Basel III in Europe; and ii) the crypto-asset market regulation.

8.1 Banco de España circulars and guidelines

Since January 2021, the Banco de España has published seven circulars and one set of guidelines, which are presented by subject matter in Figure 8.1.

Figure 8.1
NEW BANCO DE ESPAÑA CIRCULARS AND GUIDELINES, BY SUBJECT MATTER



SOURCE: Banco de España.

8.1.1 Circular 1/2021

Circular 1/2021 of 28 January 2021 amending Circular 1/2013 of 24 May 2013 on the Central Credit Register and Circular 5/2012 of 27 June 2012 to credit institutions and payment service providers on the transparency of banking services and responsible lending.

The main purpose of this circular is to adapt Circular 1/2013 and Circular 5/2012 to the Revolving Credit Ministerial Order[1]. On the one hand, it modifies the functioning

1 Order Ministerial Order ETD/699/2020 of 24 July 2020 on the regulation of revolving credit and amending Ministerial Order ECO/697/2004 of 11 March 2004 on the Central Credit Register, Ministerial Order EHA/1718/2010 of 11 June 2010 on regulation and control of the advertising of banking services and products and Ministerial Order EHA/2899/2011 of 28 October 2011 on transparency and customer protection in banking services.

of the CCR to improve the information available to lenders for the purpose of analysing the creditworthiness of potential borrowers. On the other hand, it adds new official interest rates that institutions may use as benchmarks in loan and mortgage loan agreements with their customers, such as, inter alia, the benchmark interest rate based on the Euro short-term rate (€STR). Also, it establishes the definition and the procedure for determining new indices.

8.1.2 Circular 2/2021

Circular 2/2021 of 28 January 2021 amending Circular 8/2015 of 18 December 2015 to institutions and branches belonging to the Deposit Guarantee Scheme for Credit Institutions (DGSCI) on information for determining the basis of calculation of contributions to the DGSCI.

The regulations governing the Deposit Guarantee Scheme for Credit Institutions provide that, in the event of insolvency of a credit institution, the funds of investment firm customers held in the investment firm's name on behalf of its customers at the institution for which an insolvency order has been made are also covered. To this end, investment firms must record the balances of each customer on a customer-by-customer basis and report them to the credit institution. Consequently, Circular 8/2015 was amended to include new information on these balances that institutions must submit and make available to the Banco de España.

8.1.3 Circular 3/2021

Circular 3/2021 of 13 May, with regard to the definition of the benchmark interest rate based on the Euro short-term rate (€STR), amending Circular 5/2012 of 27 June 2012 to credit institutions and payment service providers on transparency of banking services and responsible lending.

This Circular adapts the definition of the benchmark interest rate based on €STR in Circular 5/2012 to the new ECB guideline[2]. This guideline describes the methodology used by the ECB in the calculation of the compounded €STR rates and establishes their daily publication. Therefore, the official €STR interest rate of Circular 5/2012 is modified accordingly, and it is now defined by reference to the daily data corresponding to the last business day of the month, for each of the various maturities.

2 Guideline (EU) 2021/565 of the European Central Bank of 17 March 2021 amending Guideline (EU) 2019/1265 on the euro short-term rate (€STR) (ECB/2021/10).

8.1.4 Circular 4/2021

Circular 4/2021 of 25 November to credit institutions and other supervised institutions on confidential return models relating to market conduct, transparency and customer protection and on the complaints register.

The circular responds to the need for complete and standardised information of conduct with the definitions and the level of detail and sectorisation deemed necessary for the proper supervision of institutions' conduct. It also requires institutions to make a claims register with predefined content available to the Banco de España.

8.1.5 Circular 5/2021

Circular 5/2021 of 22 December amending Circular 2/2016 of 2 February to credit institutions on supervision and solvency, which completes the adaptation of Spanish law to Directive 2013/36/EU and to Regulation (EU) No 575/2013.

This circular develops certain macroprudential tools provided for by law[3]. In particular, it includes forecasts on: i) the CCyB requirements applicable to credit institutions' exposures to one or more sectors and total exposures; ii) the establishment of sectoral limits on the concentration of credit institutions or a sub-group of credit institutions; iii) the setting of conditions on the granting by credit institutions of loans and other transactions with the private sector located in Spain.

8.1.6 Circular 6/2021

Circular 6/2021 of 22 December amending Circular 4/2017 of 27 November to credit institutions on public and confidential financial reporting standards and model financial statements, and Circular 4/2019 of 26 November to financial credit institutions on public and confidential financial reporting standards and model financial statements.

This standard amends the accounting circular to credit institutions, mainly to: i) incorporate the simplified treatment of contracts affected by the benchmark interest rate reform; ii) remove the criteria for granting operations to avoid overlaps with new

3 In particular, the tools provided in Articles 45(1), 69 ter and 69 quater of Law 10/2014 of 26 June 2014 on the regulation, supervision and solvency of credit institutions, and in Article 15 of Royal Decree 102/2019 of 1 March 2019 creating the Spanish macroprudential authority (AMCESFI), establishing its legal regime and implementing certain aspects on macroprudential tools.

EBA guidelines[4]; iii) update the percentages for estimating impairment of debt instruments and foreclosed assets; iv) replace certain statistical statements, in accordance with ECB Regulation (EU) 2021/379[5]; and v) reduce the requirements for branches in Spain of EU credit institutions. Also, it was necessary to amend the accounting circular to SLIs to adapt the references it contains to the circular to credit institutions.

8.1.7 Circular 1/2022

Circular 1/2022 of 24 January to specialised lending institutions on liquidity, prudential rules and reporting obligations, and amending Circular 1/2009 of 18 December to credit institutions and other supervised institutions, in relation to information on the capital structure and non-voting equity units of credit institutions, and on their branches, and on the senior officers of supervised institutions, and Circular 3/2019 of 22 October exercising the power conferred by Regulation (EU) 575/2013 to define the materiality threshold of the obligations.

This circular completes the SLI legal regime by implementing Law 5/2015[6] and Royal Decree 309/2020[7]. It regulates the liquidity buffer and the structure of SLI funding sources and maturities, building on those of credit institutions, but adapting them to the nature, funding structure and lower liquidity risk of their activities. Additionally, it establishes their solvency and liquidity reporting obligations. It also sets the guarantees required when control of an SLI is to be exercised by non-EU persons; the reporting requirements on the shareholder structure; and the circumstances in which SLIs must draw up the internal capital adequacy assessment report and the Banco de España must conduct the SREP.

8.1.8 *Guidelines on the organisational and operational criteria of the customer service departments of institutions supervised by the Banco de España*

On 19 July 2021, these supervisory guidelines were published, the objective of which is to facilitate the institutions' application of the organisational and operational

4 Guidelines on loan origination and monitoring (EBA/GL/2020/06).

5 Regulation (EU) 2021/379 of the European Central Bank of 22 January 2021 on the balance sheet items of credit institutions and of the monetary financial institutions sector (recast) (ECB/2021/2).

6 Law 5/2015 of 27 April on the promotion of business financing.

7 Royal Decree 309/2020 of 11 February 2020 on the legal regime of specialised lending institutions and amending the Mercantile Registry Regulation, approved by Royal Decree 1784/1996 of 19 July 1996, and Royal Decree 84/2015 of 13 February 2015 implementing Law 10/2014 of 26 June 2014 on the regulation, supervision and solvency of credit institutions.

criteria of their CSDs. Thus, the aim is to ensure that all supervised institutions have a regulatory compliance and governance culture geared towards customer protection and banking transparency and, ultimately, to increase the level of legal certainty.

8.2 Other draft circulars in progress

The Banco de España is currently preparing three circulars on various subject matters, which are shown in Figure 8.2.

A circular, which is being drafted, will affect the content of Circulars 2/2016 and 2/2014, which contain prudential requirements for credit institutions, and also Circular 5/2012, on the transparency of banking services and responsible lending.

The main objectives of this circular are as follows: i) to complete the transposition of CRD-V into Spanish law; ii) to exercise the national options and discretions conferred by Regulation (EU) 2019/876 (CRR-II)[8]; iii) to repeal transitional options that have become obsolete or have been eliminated; and iv) to develop reporting obligations applicable to revolving credit, both in the pre-contractual phase and over the term of the contract.

Also, a circular is being drafted for payment service providers on the management of operational and security risks related to payment services and the notification of serious operational and security incidents.

This circular will develop certain obligations for payment service providers[9], in particular the obligations to: (i) establish mitigating measures and control mechanisms to manage operational and security risks relating to payment services; (ii) provide, at least annually, an assessment of the above-mentioned risks, measures and mechanisms; and (iii) notify the Banco de España immediately of serious operational and security incidents.

Lastly, a new circular on payment statistics is under preparation, which is essentially justified by the amendments introduced by Regulation (EU) 2020/2011[10].

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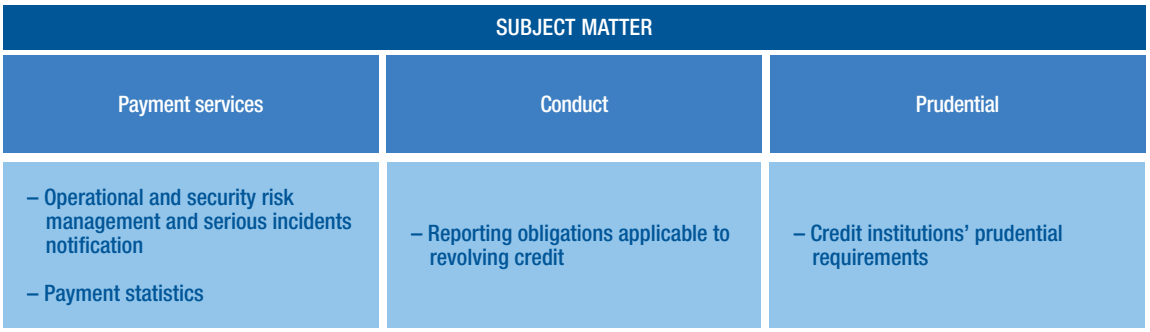
8 Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012.

9 Obligations under Articles 66 and 67 of Royal Decree-Law 19/2018 of 23 November on payment services and other urgent financial measures.

10 Regulation (EU) 2020/2011 of the European Central Bank of 1 December 2020 amending Regulation (EU) No 1409/2013 on payments statistics (ECB/2013/43) (ECB/2020/59).

Figure 8.2
DRAFT BANCO DE ESPAÑA CIRCULARS AND GUIDELINES IN PROGRESS, BY SUBJECT MATTER



SOURCE: Banco de España.

It regulates both the procedure and frequency of statistical reporting to the Banco de España by the reporting agents referred to in Regulation (EU) 1409/2013 and the Banco de España's power to grant exemptions from compliance with statistical reporting obligations.

8.3 Other new regulatory developments

Although the following regulations have not been issued by the Banco de España, Royal Decree-Law 7/2021 of 27 April and Royal Decree 970/2021 of 8 November, which form the basis of the transposition of CRD-V and the exercise of the national options contained in CRR-II, are particularly important. The Spanish legislative framework will be completed with the future amendment of Circulars 2/2016 and 2/2014 discussed in the previous section. These regulations amend, among others, Law 10/2014 and Royal Decree 84/2015. In this respect, noteworthy are the following new developments:

— Necessary approval of financial holding companies and mixed financial holding companies.

— Obligation to incorporate an intermediate EU parent company, in certain cases.

— Incorporation of the new Pillar 2 regime, which is split into a requirement and guidance.

— Possibility of requiring the systemic risk buffer of one or more sub-groups of institutions, for all exposures or for a sub-group of exposures.

— Introduction of restrictions on Tier 1 capital distributions due to non-compliance with the new leverage ratio buffer requirement.

— Adaptation to amendments in remuneration regulations.

In addition, work has started on finalising the incorporation of Basel III into European law. For the time being, the European Commission has published a legislative proposal, which represents the starting point for discussion in the EU (see Box 8.1).

Also, worthy of mention is the new Directive of the European Parliament and of the Council on credit servicers and credit purchasers, which establishes a European framework for both of them. This directive defines the credit manager as a legal person which, in the course of its business, manages and enforces the rights and obligations related to the creditor's rights arising from a non-performing credit agreement, arranged by a credit institution established in the EU, or from the non-performing credit agreement itself, on behalf of a credit purchaser, and which carries out at least one credit servicing activity. The credit servicer must obtain prior administrative authorisation from the NCA.

A credit purchaser is any natural or legal person, other than a credit institution, which purchases rights from a creditor arising from a non-performing credit agreement, or from the non-performing credit agreement itself, in the course of its trade, business or profession. Unlike in the case of the loan servicer, the loan purchaser is not required to obtain administrative authorisation.

The directive contains a number of provisions related to the sale and purchase of loans, such as:

— The obligation of credit institutions to provide the future credit purchaser with the necessary information on the credits being sold.

— The obligation of the buyer to engage a credit institution, other institutions referred to in the directive or a credit servicer to service certain purchased credits.

Finally, the directive includes several rules aimed at protecting debtors of transferred credits, especially if they are consumers.

Lastly, it is worth noting the European Commission's proposal on the markets of crypto-assets. The proposed regulation includes a definition of these assets and incorporates provisions for certain types of assets, for example with regard to their authorisation and supervision, the operation, organisation and governance of crypto-asset issuers or the prevention of market abuse (see Box 8.2).

Box 8.1

LAST PHASE OF BASEL III ADOPTION IN THE EUROPEAN UNION

The publication of the European Commission's legislative proposal on 27 October triggered discussions on finalising the incorporation of Basel III in the European Union (EU), which it is proposed will come into force in 2025. The proposal consists of three separate documents:

- Amendment of Regulation (EU) No 575/2013 (CRR-III): constitutes the bulk of the reform, and includes changes to the methods for calculating own funds requirements.
- Amendment of Directive 2013/36 (CRD-VI): while incorporating changes relating to the adoption of Basel III, most of the amendments are not related to Basel III, but seek to improve the supervisory framework for institutions and the harmonisation of the various national regimes.
- Amendment of Regulation (EU) No 575/2013 and Directive 2014/59: both the Regulation and the Directive are amended on issues relating to global systemic institutions with a multiple point of entry (MPE) resolution strategy, and to the indirect subscription of minimum requirement for own funds and eligible liabilities (MREL) instruments in chains of subsidiaries.

I Main amendments introduced by CRR-III

In order to reduce the unwarranted variability and lack of comparability of risk-weighted assets (RWAs) resulting from the use of internal models, it incorporates a number of measures, including:

- Establishment of floors for some components of credit risk models.
- Elimination of the possibility of modelling certain risks or categories of exposures (e.g. operational risk or equities).
- Setting the output floor in capital requirements calculated under internal models: Basel III establishes a floor at 72.5% of overall RWAs of any institution based on the RWAs that would result from calculating its exposures and risks under the standardised approach. The European Commission's proposal requires this limit at the consolidated level, with a certain distribution among subsidiaries. Also, it provides for a more lax transitional period by allowing a more favourable treatment for certain exposures (e.g. unrated firms or residential mortgages) and leaving open the possibility of this treatment lasting over time.

In addition, other measures, that seek to improve the regulatory framework's risk sensitivity, are included:

- Greater granularity in certain categories of credit risk exposures.
- Introduction of the new approaches to market risk calculation (alternative internal model, alternative standardised and standardised).
- Amendments to the regulation of counterparty risk and credit valuation adjustment risk.

II Main amendments introduced by CRD-VI

The most significant amendments are:

- Temporary freeze of Pillar 2 requirements, and of the buffers for other systemically important institutions and the systemic risk buffer for institutions affected by the output floor.
- Approval by the supervisory authority of certain transactions carried out by a credit institution.
- Harmonisation of the treatment of incoming third country branches, that had been mainly national to date.
- Definition of environmental, social and governance risks and their incorporation into the processes for assessing capital requirements.

1 Basel III is a set of internationally agreed measures developed by the Basel Committee on Banking Supervision in response to the 2007-2009 financial crisis, with the aim of strengthening the regulation, supervision and risk management of banks.

Box 8.2

PROPOSED REGULATION ON MARKETS IN CRYPTO-ASSETS

Crypto-assets are defined as a digital representation of value or rights which may be transferred or stored electronically, using distributed ledger technology or similar technology.

The proposal for the regulation on markets in crypto-assets (the MiCA regulation), published by the European Commission in September 2020 and still under preparation, introduces rules for the following types of crypto-assets:

— Electronic money tokens (EMTs), which are a type of crypto-asset intended to be used as a means of exchange and that purports to maintain a stable value by referring it to the value of a flat currency that is legal tender.

— Asset-referenced tokens (ARTs), which are a type of crypto-asset, other than EMTs, that purports to maintain a stable value by referring it to any other value or right, or a combination of both, including one or more flat currencies that are legal tender. The ART issuer must establish and maintain a reserve of referenced assets to maintain the stable value of ARTs.

— Other crypto-assets, other than the above, which are included in the scope of the proposed regulation.

EMTs and ARTs may also be relevant when certain criteria are met or certain thresholds are exceeded (customer base, value of EMTs and ARTs issued, number and value of transactions, etc.).

The proposal contains a number of provisions on the authorisation, supervision, operation, organisation and governance of issuers of the above-mentioned crypto-assets.

Also, it includes rules on the provision of services linked to crypto-assets. These services are:

— Custody and administration of crypto-assets on behalf of third parties.

— Operation of a trading platform for crypto-assets.

— Exchange of crypto-assets for funds or other crypto-assets.

— Execution of orders on crypto-assets on behalf of third parties.

— Placement of crypto-assets.

— Reception and transmission of orders for crypto-assets on behalf of third parties.

— Provision of advice on crypto-assets.

— Management of crypto-asset portfolios.

Also, in relation to the providers of these services, it regulates certain prudential and organisational matters and matters relating to customer information, safeguarding of funds, conflicts of interest and outsourcing.

Lastly, the proposed regulation regulates the supervisory architecture for crypto-assets. In essence, the authorisation of the issuer, the receipt of the white paper relating to the issuance of crypto-assets to be notified by the issuer, and the authorisation of the provision of crypto-asset services are attributed to the national competent authorities (NCAs). The supervision of issuers is also the responsibility of the NCAs, unless the ARTs or MTEs issued are significant, in which case the European Banking Authority and a college of supervisors assume supervisory responsibilities. Lastly, the supervision of crypto-asset service providers is the responsibility of the NCAs.