Introduction

From late 2008, the Spanish banking sector has lived through a constant and deep restructuring process ultimately driven by regulatory responses to the severe crisis the sector faced as a result of the abrupt end of the long period of growth after Spain’s incorporation to the Euro in 1998. Fortunately, the worst of the crisis seems over and we face now a more stable, more transparent and sounder financial sector.

Until the beginning of this decade, it was accurate to describe the Spanish banking sector as quite unique among its European counterparts. While the country was, and is, home to two of the world largest banking corporations (Santander and BBVA) – present in other European jurisdictions and outside the EU, most significantly in Latin America – such large corporations did not account for more than 30% of the domestic deposit market share; the rest was in the hands of many other institutions, including a wide array of mid- and small-sized companies. Bank of Spain’s census as of early 2009 comprised some 80 private banks (of which roughly 10 have a significant market share), 80 credit cooperatives (accounting, altogether, for 5% of the share, approximately) and 45 savings banks (cajas de ahorros), representing, roughly, 50% of the market. Branches of foreign institutions (almost exclusively EU-incorporated) were and are present but hold a negligible share of the retail market.

The relevant presence of savings banks was doubtlessly the most salient feature of the Spanish Banking system. Cajas were a genuinely Spanish type of institution, with no full equivalent in any other Western jurisdiction. The Supreme and Constitutional Courts described them in several judgments as ‘foundation-like’. Strictly speaking, savings banks were foundations not subject to the governance rules in the Foundations Act. As foundations, they lacked capital or any equivalent fund composed of legal instruments bearing voting rights. Their corporate governance depended on a complex set of mechanisms ultimately enacted by regional laws which placed them under the control of regional powers. For this reason, it has been argued that savings banks were similar to German Landesbanken.

The deep crisis changed this landscape dramatically.

The banking sector was severely hit by the real estate crisis. Excessive exposures to developers and constructors accounted for a very significant proportion of the banks’ assets. That, in addition to the effects of the general economic crisis, led many institutions into serious trouble when not simply into factual insolvency. All institutions were affected, but savings banks were particularly in trouble, since their exposure was almost purely domestic and highly concentrated in real estate.

The regulatory response to the crisis came, both at the National and European levels in the form of a wide array of measures (see the section entitled ‘Recent regulatory themes
and key regulatory developments in your jurisdiction’ below) that, ultimately, have changed (and still keep on changing) the banking sector and the regulatory architecture itself. The legislative measures have addressed virtually all aspects relating to the financial sector, encompassing: (i) measures to provide liquidity and solvency support to banks; (ii) measures to promote concentration among institutions and to set up restructuring alternatives, including resolution mechanisms; (iii) changes in the legal regime of savings banks; (iv) provisioning requirements; (v) strengthening corporate governance; (vi) new and significantly higher capital requirements; and (vii) changes in the supervisory and regulatory architecture. But the measure that will probably prove to be most far-reaching over time is the introduction of the EU (Eurozone) Single Supervisory System (the “SSM”) with the ECB taking over most of the supervisory duties of the former Member States’ domestic supervisors, a measure that took full effect on November 4, 2014.

Over the crisis, the State had to take over some banks and provide support to others. The banking sector recapitalisation needs, evidenced through successive stress-tests conducted both at the EU and domestic levels, led to Spain’s request of financial assistance from the EU in the form of a €100 billion credit facility (of which the amount actually used was €40 billion). In order to obtain the line, in July 2012 Spain entered into a MoU with the EU on financial sector policy conditionality (“MoU”) which led to further regulatory measures, including the creation of an asset management company named SAREB3 (commonly known as “bad bank”) in operation from December 31, 2012. Since then, SAREB proved to be a quite successful solution and has effectively started the sale of the legacy assets it manages (€55 billion) primarily to international institutional investors. Other sound financial entities have followed SAREB and are selling its portfolios of impaired assets (loans and REOs).

As a result of this all, the landscape of the banking sector has changed very significantly. Savings banks have de facto disappeared (with two tiny exceptions), their banking business having been taken over by banks, and the savings banks themselves having become foundations, some of them still holding significant stakes in banks, while others do not. Concentration has happened also, to a lesser extent, within the subsectors of cooperatives and banks. The State has taken over several financial institutions, some of which have been subsequently auctioned and acquired by other (Spanish) banks while other institutions have launched massive recapitalisation programmes. The Fund for Orderly Bank Restructuring (Fondo de Reestructuración Ordenada Bancaria – FROB)4 has played a crucial role in the restructuring process of our banking system.

In addition to the traditional credit institutions supervised by Bank of Spain, due to the weakness of most local banks, there are also new players in the banking sector providing credit and marketing other financial products without any supervision, since they take advantage of the fact that collecting funds from the public is the only typical banking activity strictly reserved to credit entities5. This trend of non-bank channels which supplement the regular banking sector will continue progressively in Spain. Therefore, the “shadow-banking” phenomenon and the need to supervise these incoming entities or not constitutes a major debate not only in Spain but also at EU level for harmonisation purposes.

The latest Financial Stability Report issued by Bank of Spain dated on November 2014 provides an updated description of our Banking sector6. In a nutshell, some key references: (i) default rate (tasa de morosidad) has gone down to 7.3%; (ii) recourse of Spanish banks to Eurosystem has decreased significantly; (iii) private deposits at banks and their patrimony on a consolidated basis have slightly increased; and (iv) credit to the private sector has decreased 8% annually but less than in previous years (June 2014).
Regulatory Architecture: Overview of banking regulators and key regulations

Concerning our regulatory architecture, (i) is traditionally based on a sectoral approach (with a different regulator for banks, investment companies and insurance companies), and (ii) attaching banking supervision to the central bank has undergone a very significant change after the implementation of the SSM Regulation. The most relevant public authority for banks is now the ECB which: (i) is responsible for licensing, (ii) controls significant holdings, (iii) is responsible for prudential supervision, including on- and off-site direct inspection of most relevant institutions and receives reporting, and (iv) may trigger the exercise of disciplinary powers. However, stating that the ECB has become “the” banking supervisor is an oversimplification, since Bank of Spain, further to cooperating with the ECB in its supervisory tasks, still holds regulatory powers, may issue regulations on solvency, conduct, accounting and other matters relating to banks and is the sole supervisor for certain other financial intermediaries.

Being the most important, Bank of Spain is not the only national public authority of relevance to banks. Apart from the Ministry of Finance:

- The National Securities Market Commission (Comisión Nacional del Mercado de Valores – CNMV) holds authority over banks, whether listed or not, as providers of investment services.
- The SEPBLAC is the Spanish financial intelligence unit and controls the application of anti-money-laundering and terrorist financing prevention rules in accordance with FATF standards (to which banks are subject). It holds supervisory capacity of its own and may exercise disciplinary powers in its field.
- The Deposit Guarantee Fund (Fondo de Garantía de Depósitos en Entidades de Crédito – FGD) is privately ex ante funded by banks via compulsory periodical contributions, and is governed by a committee which is split on a 50/50 basis between representatives of the banks themselves and Bank of Spain. The Spanish FGD is like the US FDIC and has wide capacity to adopt preventive measures rather than acting like a mere deposit paybox.
- The Fund for Orderly Bank Restructuring (Fondo de Reestructuración Ordenada Bancaria – FROB) is a public institution, created in 2009 to cover the FGD’s lack of financial capacity to deal with a systemic crisis. Its function was to provide support to (and eventually take over) banks in need for restructuring. In 2012 its legal status was re-shaped to turn it into a resolution authority within the meaning of the EU Resolution Directive. In addition, Spain is part of the EU Single Resolution Mechanism, which is now being implemented.

Spain is a member of the EU and the Eurozone and, therefore, most banking legislation and regulations –when not directly in the form of EU regulations – are based on directives or adapted to them. Thus, in many areas, Spanish banking law is entirely similar to other EU jurisdictions. The primary EU statutes applicable, as amended from time to time, are:


EU legislation, in turn, is mostly framed on international standards issued by relevant committees and organisations, among which is the Basel Committee on Banking Supervision. CRD IV and CRR implement Basel III.

In 2011, the EU upgraded its supervisory framework by turning the pre-existing “level III” committees into as many EU supervisory authorities. For the banking sector, the relevant authority is the EBA, which has taken over the role of the CEBS. The EBA performs an array of tasks, including the issuance of guidance on supervisory policy matters. During its three first years of operation, EBA, further to maintaining CEBS’s standards, has produced many significant documents that have either regulatory content on their own or are applied as interpretation criteria not only for EU but also for national law.

In 2013-2014 Spain carried out a significant effort towards a systematisation of its banking law. For many years the country lacked a comprehensive source of banking legislation that could mirror the Italian or French Banking Codes. In addition, between 2008 and 2012 the regulatory management of the crisis resulted in a very high number of pieces of legislation (mostly executive), amended multiple times within a short timeframe, which also needed to be re-cast. While banking law is still a vast domain, the most relevant statutes further to those directly applicable EU laws, are:

- Royal Decree-law 16/2011, of October 14, on the Credit Institutions Deposit Guarantee Fund (merged the previous schemes into a single FGD).
- Credit Institutions Restructuring and Resolution Act 9/2012 of November 14 (gives the FROB its present legal status and institutes a comprehensive restructuring and resolution framework).
- Savings Banks and Banking Foundations Act 26/2013 of December 27.

As stated, these acts and other relevant legal provisions are developed by a high number of specific regulations. Due to the technical nature of the matters, it is not unusual that the development is not completed in a single step but requires a multiple-tier set of regulations from different authorities. Highly complex parts of the rulebook or matters that require a very detailed degree of specification are frequently left for Bank of Spain’s regulations (Circulares) which, while forming the lowest tier in the cascade of regulations become the most directly applicable and are thus perceived by the banks as essential.

Finally, mirroring EBA guidance, in recent times there is yet another tier of (albeit “soft”) regulation being developed, named “Bank of Spain Guidelines” and other “good
practices” codes. These may be direct adoptions of EBA Guidelines (most frequently) or developed ad hoc by the Bank.

Recent regulatory themes and key regulatory developments in your jurisdiction

As stated above, the years since the outbreak of the crisis have seen unprecedented regulatory activity in Spain. As a result, a deep reform of the financial sector (banks, investment firms and insurance companies) is a reality. Regulation has addressed multiple issues, most remarkably:

A very relevant and long-lasting set of measures had to do with the legal status of savings banks. As commented above, these institutions are a particular type of foundation, thus unable to issue shares or any other vote-bearing securities (a fact that, among other implications, made it impossible for them to merge but with another savings bank). Reform has been implemented in successive stages, ultimately leading to the de facto disappearance of savings banks. Current regulation is contained in the Savings Banks and Banking Foundations Act 26/2013 of December 27. Savings banks may (and do) still exist under their traditional status as slightly amended. However, keeping such traditional status now carries significant limitations: the geographical scope of activities is limited and the balance sheet may not exceed €10 billion. If those conditions are not met, the savings bank must transfer its business to a bank and become either an ordinary foundation (if its participation in a bank falls below 10%) or a “banking foundation”. Banking foundations are under Bank of Spain’s supervision and the higher their stake in a bank, the more stringent their obligations. Banking foundations holding 50% or more of the capital of a bank must create a reserve fund in their own books to meet possible capital needs at the level of the bank.

As commented, only two institutions keep their original savings bank form. All others have either disappeared entirely or become foundations. All banking business is now carried out by banks.

Regarding solvency and resilience Spain fared through the crisis by implementing successive ad hoc measures anticipating, or going beyond, Basel III rules. All such measures are now abrogated and the country operates within the general CRD IV-CRR framework.

The regulatory, supervisory and crisis management architecture of the country was upgraded by the creation of the FROB. The FROB was created by Royal Decree-law 9/2009 of June 26, and initially conceived as a financial tool. The Credit Institutions Restructuring and Resolution Act 9/2012 turned it into a fully-fledged resolution authority, widely empowered, capable of issuing administrative decisions binding on third parties. From its creation, the FROB has gained remarkable experience in crisis management, resolving, nationalising and re-privatising a relevant number of institutions.

Another of the results of the Credit Institutions Restructuring and Resolution Act 9/2012 was the introduction, pursuant to the requirements set forth in the MoU, of a comprehensive restructuring and resolution framework.

The FROB role and the restructuring and resolution framework are now close to receiving a new upgrade with the expected replacement of Credit Institutions Restructuring and Resolution Act 9/2012 by the new act implementing Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014. Although Act 9/2012 was in line with fairly advanced drafts of the directive (those available by mid-2012), the new rules will be more comprehensive and go beyond the existing ones, such as the bail-in processes. In addition, Spain will be part of the Single Resolution Mechanism created by the EU Parliament and Council Regulation (EU) n° 804/2014 of 15 July 2014.
One of the elements in the “resolution and restructuring toolbox” are the so-called “asset management companies” (AMC), commonly nicknamed “bad banks”. If the FROB deems it appropriate, under the terms of a restructuring or resolution plan, a bank may be required to transfer damaged assets into an AMC to be managed separately. The MoU specifically requested that a first, large scale AMC had to be created to deal with damaged assets of the banks that, at the time of its execution (July 2012) were already in the hands of the FROB and others that may need State aid in the near future (up to June 2013). The additional provisions of Royal Decree-law 24/2012 foresaw the creation of an AMC (incorporated as a public limited company) which should trade under the name of Sociedad de Gestión de Activos Procedentes de la Reestructuración Bancaria (shortened to “SAREB”) and hold impaired assets from banks subject to State control or that have received State aid with a view to divesting them, maximising value, over 15 years. SAREB’s legal regime was completed by Royal Decree 1559/2012 of November 16 and the company was effectively incorporated shortly before year-end 2012 and received a first, and the most relevant, transfer of assets on December 31. Over the less than two-and-a-half years from its implementation, SAREB has become a very relevant actor in the market. It is already fulfilling its task of disposing its immense amount of legacy assets and its legal regime, without minor amendments, seems to have proven successful.

Bank Governance and Internal Controls

1. **External controls**

As in many other jurisdictions, Spanish credit institutions’ conduct and activities are specifically regulated and supervised by public administration authorities. This special regime for credit entities is mainly developed in Act 10/2014 of June 26, on Ordination, Supervision and Solvency of Credit Institutions and Act 9/2012 of November 14, on Restructuring and Resolution of Credit Institutions. Similarly to other EU jurisdictions, the aim is to set up mechanisms to allow the supervisor access to critical information about the situation and evolution of financial entities and restrict or prohibit practices or operations which increase insolvency risks or reduce liquidity and to reinforce the capital structure and protect their customers. Such regulation is applicable both to Spanish entities and other foreign institutions operating in Spain (with limitations to those acting through an EU passport, under the home country control principle). Breaches of regulation are subject to sanctions (among others, penalties, disqualification, temporary intervention, revocation of licence).

The day-to-day credit institutions surveillance is now in a process of change as primary responsibility shifts from the Bank of Spain to the ECB. Within the cooperation framework provided by ECB Regulation (EU) nº 468/2014 of 16 April 2014, banks are now being supervised by teams composed of both Bank of Spain and ECB officials.

Although the ECB now concentrates most functions on filing, control, monitoring, surveillance and inspection of all credit institutions in order to foster the solvency, stability and efficient operation of the financial sector and assure full compliance of the banking regulation, enforcement needs the cooperation of national authorities. Under Act 10/2014 credit institutions and their directors, senior managers or any other individual holding a management position, which breach the regime ruling conduct and discipline, will be subject to administrative liability. Breaches are classified as very serious, serious and minor offences.

Credit entities if listed in capital markets would also be subject, as issuers, to the Securities Market Act 24/1998, which imposes obligations on disclosure of information in connection with the publication of the annual report on corporate governance and the
annual report of directors’ remuneration. This is, of course, without prejudice to their duties, also under the same act, as investment services providers.

2. Internal controls

Act 31/2014 of December 3, amended the Spanish Companies Act (Royal Legislative Decree 1/2010 of July 2) on corporate governance matters and already came in force on December 2014 strengthening the legal requirements that companies have to comply with in regard to the structure and dynamics of its governing bodies: the board of directors and the general shareholders meeting. In addition, more specifically for Credit Institutions, Act 10/2014, has introduced substantial developments in corporate governance matters in order to promote efficient practices, establish internal control mechanisms and develop remuneration policies aligned with the risks taken by credit institutions in the medium term. Finally, a new Spanish Code of Good Practices in Corporate Governance for listed companies has just been released by the Spanish supervisor CNMV on February 2015.

The most relevant credit institutions in Spain are set up as special public companies (sociedades anónimas) subject to general corporate rules but also to particular requirements. Day-to-day management of banks, as in any other company, corresponds to their boards of directors. Pursuant to EU directives, however, the board and its members must meet certain adequacy requisites in order to assure prudent management and prevent conflict of interests. Under this regime, the board of directors is directly liable for the risks assumed by the credit entity.

The current main areas of concern from a corporate governance perspective are the composition, structure and dynamics of the board of directors, the remuneration of its members, and operations related to issuances of capital or debt which may impact on shareholders’ rights. In the case of financial entities, special attention is placed on the last two aspects, as well as in the risk and control areas and in the independence of the external auditor.

The board of directors of a bank shall be composed by a minimum of five members. According to Royal Decree 84/2015 which further develops Act 10/2014, all directors (members of the board), senior management of banks and those individuals responsible for the internal control should be individuals with broad expertise and a good professional track-record (meaning sufficient experience in banking and financial services from previous positions to be evaluated depending on the level of responsibility required) and with an outstanding reputation and honorability in order to perform adequately their duties (meaning no criminal records, not being declared bankrupt and not having been disqualified to conduct public or private activities due to judicial resolutions or convictions). The chairman of the board of directors cannot be the CEO except if the size and complexity of the financial entity so justifies it and the Bank of Spain authorises it. Members of the board, general managers, senior directors and the like are subject to the regime on discipline of Act 10/2014, so they can be sanctioned in case of breach of their duties (the administrative regime does not waive the general liability principle set forth in the Companies Act, but applies in addition to the latter). These individuals are also subject to the incompatibilities regime by which they cannot hold similar positions in other banks and have certain restrictions to be members of the board at other companies. Finally, members of the board and senior management should be identified and filed at the Official Register of Senior Banking Officers (Registro Oficial de Altos Cargos de la Banca) which is managed by Bank of Spain.

The internal requirements imposed to banks aim to guarantee that the directors of credit institutions are properly informed of all significant facts related to the banks so they can
comply properly with all their obligations and can assume their liabilities. Banks shall have a good administrative organisation and accounting services, as well as internal control procedures to assure sound and prudent management. In addition, Royal Decree 84/2015 of February 13 also establishes that banks shall set up adequate bodies and proceedings for internal control purposes in order to prevent and avoid any transaction which may trigger anti-money-laundering provisions.

Particular attention is paid to risk management and control, and the remuneration policies. Financial entities shall set up procedures to identify, manage, control and communicate existing or potential risks. Articles 32 to 34 of Act 10/2014 regulate the remuneration policies, its main general principles and the variable elements of salaries which shall reflect a steady performance and duly adjusted to the risks involved. The remuneration of directors and top management of financial entities is scrutinised with special emphasis (approval requirements and disclosure of data), but also the executive director’s remuneration schemes. As a result of the above, together with the board of directors, the bank organisation also comprises certain separated and delegated commissions and committees to inform periodically the board and take care of key aspects such as internal audit and control, remuneration and risk management. Best practices in corporate governance also imply improving the level of independency of the board of directors, the adequate composition of its key Committees (Executive, Audit and Control, Remuneration, Nominations, Investment and Risk), an efficient evaluation process, and the existence of a solid succession plan.

Bank Capital requirements

As stated before, since Spain is a member of the EU, capital requirements (and limits to large exposures) are governed by the CRD IV and the CRR. The Bank of Spain, by mid-2014, dictated a supplementary regulation to cover the few matters the CRR leaves to national discretion. It is to be remarked, however, that the CRR sets the absolute minimum all banks must comply with (the so-called Pillar I). Banks may face tighter capital requirements from the application of institution-specific ratios under national legislation implementing the CDR IV (Act 10/2014), if decided by the ECB/Bank of Spain.

The CRR replaced a complex set of national rules, designed to restore confidence in the banking sector, introduced during the crisis. By means of such rules Basel III was somehow anticipated in Spain. Nevertheless, the adaptation to the new standards is as demanding as in other jurisdictions throughout the EU.

Unlike other EU jurisdictions and following a model which is closer to the US, Spain has quite a quite prescriptive framework of provisioning standards. General provisions and rules to account for asset impairment are ultimately set in Bank of Spain’s Circular 4/2004 of December 22. Regulations set minimum amounts for provisions depending on the type of loan, guarantee and time of arrears. In addition, banks are obliged to account for supplementary, generic provisions which are forward-looking in essence and operate counter-cyclically (i.e. the buffer of provisions may decrease as assets get impaired – and thus specific provisions are allocated – and the other way around). Historically, the framework has been deemed to be over-prudent and, therefore, it has been said that provisioning rules create a buffer of hidden capitalisation.

The depth of the crisis and the damage to assets, especially related to developers, raised serious doubts as to whether the abovementioned statement still held true. Market values were deemed to be below book values for a good number of assets and that undermined confidence. Independent valuations over banks’ assets were conducted and “bottom up” exercises per institution in order to determine the true financial image of the banking sector. Higher capital ratios were not the right response, since capital
calculations depart from a given asset valuation, therefore, regulatory policy shifted in early 2012 to ask for much more demanding provisions (one-off) for certain assets.

Rules governing Banks’ relationships with their customers and other third parties

Spanish law provides in general a protective regime to consumers. When consumers are dealing with credit institutions there is also a special regime to protect the banking customer, both as debtor in loan or credit operations and as a creditor for its deposits (Ministerial Order EHA/2899/2011 of October 28, on Banking Services Transparency and Customer Protection; Bank of Spain’s Circular 5/2012 of June 27, on Transparency of Operations and Customer Protection; and Act 10/2014 of June 26, on Regulation, Supervision and Solvency of Credit Institutions). The rationale is that improving the information provided to customers will increase competition among credit entities. As a result, the set of rules applicable only to individuals mainly (i) requires a written formalisation of the contracts, their delivery to the customer and book-keeping duties, and (ii) assures transparency of the terms and conditions applied to financial products (i.e., fees, interest rates, etc.) by disclosing such information to Bank of Spain and to the general public. Such description of characteristics shall be complete, accurate, comprehensive and clear.

Spanish banks as investment services providers are also subject to MiFid. MiFid covers nearly all transactions on financial products and, among other matters, deals with customer protection. According to MiFid, customers are classified according to their knowledge and experience (investor categorisation) in order to assess their suitability for each financial product. During the last years Spanish financial entities have developed significant efforts to deliver appropriate information of their offered products to customers and to get a better understanding of their clients’ profile in order to classify them according to their characteristics, background and investment goals.

The effects of anti-money-laundering and anti-terrorism financing provisions in the relationships between banks (both Spanish and EU entities rendering services in Spain) and their customers are also worth mentioning. The third AML Directive was implemented by Act 10/2010 of April 28, but there is also a relevant series of provisions imposing multiple reporting obligations on various grounds, in particular, relating to transactions with foreign counterparties.

Bank secrecy and bank information have also become major issues under discussion. There is a traditional duty on credit entities and their senior management personnel to safeguard and preserve customers’ financial information (i.e., balances, products, movements and operations, transactions), keeping it strictly confidential, so it shall not be disclosed to third parties, which applies in addition to general personal data protection regulation. However, Spain does not have a strong “bank secrecy” regime since the customers’ privacy rights may be overcome by various public-interest, prevailing duties to report to the tax authorities, AML authorities and the supervisor (and, of course, the courts).

In this arena, Bank of Spain provides two additional independent public services: (i) Central Information Risk (Central de Información de Riesgos del Banco de España), in short, “CIRBE”, which is a database managed by Bank of Spain containing all financial transaction involving banks and individuals. As a result, any individual person may check before Bank of Spain about the information they have about himself. All banks members of CIRBE may check the data base in order to analyse the solvency of a specific customer and its suitability for a product; and (ii) Bank of Spain Claims Service (Servicio de Reclamaciones del Banco de España) which deals with queries and claims from customers in their relationships with credit entities derived from eventual breaches of transparency or customer protection regulation or of good banking practices and financial usages. However, before claiming at Bank of Spain Claims Service, customers
shall file their claims within the credit entity through its customer service or internal ombudsman in order to have the opportunity to solve the conflict at a previous stage. For these purposes, consumers may claim before credit entities for facts or events occurring within 2 years, and credit entities shall respond to such claims within 2 months.

During the financial crisis, the banking sector has also been hit by massive litigation involving customers. On one hand, due to the increase of default rates by individuals in residential mortgage loans, the enforcement of mortgages has rocketed in Spanish courts. These judicial proceedings order the eviction of tenants and the immediate sale of the property under an auction process. Evictions are unfortunately massive and have created social alert forcing the Government to enact a new framework to protect mortgagee debtors. As a result, mortgage enforcement could be suspended or avoided for 2 years provided that certain requirements are met by the debtor and its family, restructuring arrangements between debtor and creditor through extensions and write-offs are promoted in order to avoid insolvency situations, and banks have adhered to the Good Banking Practices Code in order to provide some flexibility to these dramatic social situations.

On the other hand, investors in participaciones preferentes (preferred quotas) issued by financial institutions have initiated class actions against banks (particularly the Cajas intervened by FROB) in order to recover the money invested. In the past, Spanish banks have marketed intensely among their retail customers highly subordinated securities. As the contractual clauses that provide for payment deferment started to apply and it was announced that, as a result of burden-sharing provisions, these securities may bear losses, and litigation started. Customers’ and consumers’ associations sued banks claiming unfair practices in the sale of these and other complex financial instruments. In many of these situations, the Courts have delivered judgments in favour of the claimants and imposed compensation against the financial institutions. As a result, it is expected that approximately 60-70% of the investment may be reimbursed to customers, as well as the investment made by investors in Bankia’s IPO.

As elsewhere in the EU, holders of cash deposits at Spanish credit entities are protected up to €100,000 per individual by the Deposit Guarantee Fund (Fondo de Garantía de Depósitos de Entidades de Crédito - FGD) according to Royal Decree-law 16/2011, of October 14.

The “Shadow Banking” system in Spain is an increasing phenomenon in Spain and, for the first time, we can confirm it is becoming an actual alternative source of financing to the traditional banking system. Although direct lending and secondary debt trades were common in other jurisdictions in the past decades, no doubt these are quite recent financial activities involving new players in Spain. While in other western jurisdictions the non-bank channels could comprise more than 50% of the financial system, in Spain it amounts to less than 20%, but has been growing significantly in recent years, particularly in the lending business. It is important to note that lending is not a reserved banking activity in Spain. As a result, neither a licence nor an authorisation is required to grant loans and credits (and consequently to become a beneficiary of any related security or guarantee in Spain). The severe crisis of the traditional Spanish banks and savings entities in need of recapitalisation led to an extraordinary process of integration in the financial sector which ended with few active financial players. In addition, Spanish debt capital markets are complex and not developed enough to fill this gap and the financial needs of the majority of Spanish companies, particularly SMEs. This situation proved to be the perfect combination for debt funds, hedge funds and other special situations and
distressed investors to emerge as a credible alternative by providing tailor-made funding structures and flexibility at reasonable financial costs.

In this way, shadow banking is supplementing our traditional banking system and is impacting positively in the recovery process of the Spanish economy by providing liquidity to the financial system and by participating where traditional local banks could no longer be exposed. Therefore, we see more and more situations in Spain in which debt funds perform bank-like functions and compete directly with traditional lenders.

In Spain we primarily see these new highly specialised players and institutional investors in the acquisition of secured and unsecured loan portfolios (either performing or NPLs) sold by the Spanish “bad bank” (SAREB) or other sound financial institutions. In addition, they have a special interest on lending to SMEs and on short term financing due to the gap left by the Spanish savings banks. It is also now usual to see international debt funds and traditional local banks being part of sophisticated restructurings of Spanish large companies. Finally, they are also involved in corporate debt trading and securitisation structures. In summary, they act as traditional banks except for the collections of funds and deposits from the public.

Shadow banking is a global phenomenon which cannot be dealt with or regulated on an isolated basis in each jurisdiction. There is no specific regulation in Spain dealing with these new financiers that are acting without specific regulatory controls. Since they are not supervised as traditional banks are, it could eventually constitute a systemic risk and unfair competition compared to the status of other supervised financial institutions; in particular, because there are no limitations on leverage and liquidity transformation. Indeed, shadow banking is quite strongly connected with the regular banking system. This is why any approach to regulate the shadow banking to prevent any potential risk for the financial system shall be discussed broadly at EU level or even more globally following recommendations from the G-20, the International Monetary Fund (IMF) and the Financial Stability Board (FSB). The future framework should be accommodated for each category of participant and adjusted to the features and specific activities of these debt investors. Furthermore, any prudential regulatory approach shall be harmonised for implementation in each jurisdiction.

Having said this, any individual or entity entering into financial transactions or providing financial services in Spain could be required by the Ministry of Economy to disclose periodically any information in connection with its activities or be subject to inspections by Bank of Spain to confirm whether the activity performed is subject to supervision. No doubt we will have to follow closely how all these international principles and recommendations affecting these debt providers will be implemented in Spain within the following years. The transformation of the Spanish financial sector will continue and should be adequately monitored to detect business opportunities for international debt providers and investors.

Endnotes

1. This statement does not hold true if wholesale or investment banking activities are taken into account. Foreign banks play a very significant role in these segments.

2. Please consider that, unless otherwise stated, we use the term “bank” as meaning the three existing types of banking institution.

3. SAREB stands for Sociedad de Gestión de Activos procedentes de la Reestructuración Bancaria.


6. For more information, see the full latest report at:  
http://www.bde.es/f/webbde/Secciones/Publicaciones/ 
InformesBoletinesRevistas/InformesEstabilidadFinancera/14/IEF- 


8. For more information, check ECB and the Banco de España’s websites: 

9. Since one of the relevance criteria is size, virtually all Spanish banking groups of 
any material significance are under direct ECB control, since they exceed the total 
asset €30 billion threshold.

10. Bank of Spain rulings are in the form of Circulars, which develop laws under its 
regulatory scope.

11. If listed, or in case they issue listed securities of any kind, banks are subject to 
Securities Markets’ discipline and regulations on an equal footing with other 
issuers.

12. Pursuant to the EU directives, banks are, on the basis of their licence, enabled to 
provide investment services.

13. SEPBLAC stands for “Servicio Ejecutivo de la Comisión de Prevención del 
Blanqueo de Capitales e Infracciones Monetarias”. For more information check: 
http://www.sepblac.es.

14. For more information check: http://www.frob.es.

15. The Committee of European Banking Supervisors (CEBS), the Committee of 
European Securities Regulators (CESR) and the Committee of European Insurance 
and Occupational Pensions Supervisors (CEIOPS).

16. Please note that, save what will come next about savings banks, we omit 
references to acts governing structural matters relating to each type of banking 
institution (for banks, as companies, it would be the Companies Act).

17. It also implements the CAD for investment services companies other than banks.

18. Act 9/2012 has been developed by Royal Decree 1559/2012 of November 15 on 
The Regime of Asset Management Companies.

19. The most relevant of these are the accounting regulation (4/2004) and the credit 
register regulation (3/1995), but there are many others.

20. For further study we recommend to review the summary prepared by F. Vicent 
Chuliá in his Mercantile Law Manual (Introducción al Derecho Mercantil, Volume 

21. Until recently, saving banks (Cajas) and banks were the predominant players in 
the Spanish banking and credit market. However, as a result of the banking 
sector restructuring, all saving banks have been transformed either to banks or 
special foundations. Therefore, we will focus generally on management and 
corporate governance of banks.

22. Its Chapter IV introduces the corporate governance principles contained in 

23. In addition, it also applies to credit entities the general regime applicable under 
Spanish Companies Law (Royal Decree-law 1/2010 of July 2) and Act 31/2014 of 
December 3, amending RDL 1/2010 on corporate governance.

o.pdf.

25. As commented, since savings banks have virtually ceased to exist, the other only 
significant form of incorporation of credit institutions is as credit co-operatives. 
As the name indicates, these are co-operatives and thus subject to the corporate
governance structures of a co-operative. Notwithstanding, at least for the large ones, credit institutions governance rules supplement general co-operative rules (setting apart the fact that some of them are also issuers of listed fixed income securities and thus subject to Securities Markets’ discipline) so, in practice, corporate governance requirements are very similar to banks.


28. But for the recommendations of the Basel Committee, provisioning issues are treated in most jurisdictions as a purely accounting matter and thus left to accounting standards. In Spain, given that the Bank of Spain is also an accounting standards-setter for banks, the matter is de facto part of the supervisory/regulatory policy.


30. In addition, other special protective provisions are included in Act 16/2011 of June 24, on Consumer Credit Contracts; and Act 16/2009 of November 13, on Payment Services.


32. Section 29 of Act 2/2011 of March 4, on Sustainable Economy, has reinforced the protection to customers of financial services by requiring financial entities to provide them with all necessary pre-contractual information and adequate explanations to duly assess if the offered products match their requirements and the eventual effects in case of non-payment. This regime will be reinforced by the implementation of the Mortgage Credit Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property.

33. Act 2/2011 on Sustainable Economy regulates the bank’s liability as lender to consumers and imposes the duty to conduct adequate assessment on customers’ solvency following the criteria established by the Ministry of Finance (Order EHA/2899/2011 of October 28 on Banking Services Transparency and Customer Protection) in order to guarantee the protection to consumers and users of financial services provided by credit institutions. Bank of Spain’s Circular 5/2012 of June 27 deals with the same principles.

34. On anti-money-laundering and anti-terrorism financing see also Royal Decree 304/2014 of May 5, Bank of Spain’s Circular 4/2012 and Resolution dated on 10 August 2012 of the Secretary General of the Treasury and Financial Policy.

35. For more information, please review the Annual Report available at: http://www.bde.es/bde/es/secciones/informes/Publicaciones_an/Memoria_del_Serv/an/anoactual/.

36. According to Bank of Spain’s information, in 2013 there were 34,645 claims filed, 3,590 queries online and 43,231 phone queries.

37. Mainly: Royal Decree-law 6/2012 of March 9; Royal Decree-law 27/2012 of November 15; Law 1/2013 of May 14; Law 14/2013 of September 27; and Law
17/2014 of September 30. This regime would also be amended to implement the Mortgage Credit Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property.

38. Participaciones preferentes or preferred quotas are a sort of perpetual (subordinated) debt which was issued by many Spanish credit entities in order to obtain funding and improve their capital ratios. Retail banking intensely commercialised this product. Many investors were not aware of the risks involved and as a result of the financial crisis and collapse of some of the financial entities, the value of this product has plummeted.


40. However, note than non-credit entities could be subject to certain limitations when benefiting from certain types of security such the floating mortgages (article 153 bis of Spanish Mortgage Law).

41. According to Law 10/2014, there is a narrow concept of credit entity which even sets aside the Financial Establishment of Credit (Establecimientos Financieros de Crédito or EFC).


43. Vid., Updated G20 Roadmap towards Strengthened Oversight and Regulation of Shadow Banking in 2015.

