
Financial Iberian Newsletter

Banking and Financial Institutions

January – March 2019



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SPAIN

Banking

Act 5/2019, on real estate credit agreements (*Ley 5/2019, de 15 de marzo, reguladora de los contratos de crédito inmobiliario*). [Access link](#)

This Act implements the Directive 2014/17/EU into Spanish law.

I. PURPOSE

It provides rules for the protection of natural persons who are debtors or guarantors in loans secured by mortgage or other security rights on residential immovable property or whose purpose is to acquire, or retain, property rights in land or in an existing or projected building.

II. SCOPE

The Act applies to loans granted by natural or legal persons who carry out such activity professionally, when the borrower or guarantor is a natural person and the purpose of said loan agreement is:

- a) the granting of loans secured by mortgage or other security rights on real estate assets for residential use; or
- b) the granting of loans aimed at acquiring or retaining property rights in land or in an existing or projected building, provided that the borrower or debtor is a consumer.

The Act does not apply to other types of financing, such as interest-free loans or reverse mortgages.

III. PROTECTION OF THE BORROWER

The Act seeks to ensure formal and material transparency by limiting the use of certain unfair clauses, on the one hand, and by reinforcing pre-contractual information, on the other hand.

In relation to the limitation of unfair clauses, paragraph 3 of Article 21 states that “*in transactions with variable interest rate, a downward limit on the interest rate is not permitted*”. Likewise, it is unnecessary to foresee a minimum rate interest of 0%, since “*the remunerative interest in such transactions shall not be negative*”.



Additionally, the Act provides that, in foreign currency loans, consumers must be offered the possibility of changing the currency of the loan to the one in which the consumer receives most of his income or to the currency used where he has his residence on the execution date of the loan agreement or at the time the conversion is requested.

In relation to the pre-contractual phase, both the Court of Justice of the European Union and the Spanish Supreme Court have pointed out that, in order for the transparency requirement to be met, it is not only necessary for the borrower to know and understand the economic and legal conditions and effects of the loan, but also to understand such conditions sufficiently in advance in order to compare the loan conditions with other loans in the market. Article 10 of the Act provides a term of at least 10 calendar days before the borrower is bound by any loan agreement.

Article 15 provides that Notaries will impartially advise borrowers, clarifying any doubts they may have in relation to the agreement and verifying that all mandatory documents have been provided in advance.

IV. CODE OF CONDUCT

Practices of linked loan sales are, in general, prohibited. Limits are also imposed on the remuneration policy of the personnel responsible for assessing solvency and granting loans.

The activity of advisory on mortgage loans is limited, as it may be only carried out by lenders and mortgage loans intermediaries.

V. TRANSITIONAL REGIME

The Act will enter into force 3 months after its publication in the Official Gazette.

The fourth transitory provision of the Act establishes that the Personalized Information Sheet (FIPER) of the Order EHA/2899/2011 may be used until March 21, 2019, date from which the European Standardised Information Sheet (ESIS), which the Act introduces, must be used.

Securities market and collective investment

Supervision criteria

CNMV Communication on the obligation to adopt measures aimed at ensuring the trustworthiness of the information obtained from the clients for the appropriateness or suitability of their investors. [Access link](#)

In this communication, the CNMV confirms that it has identified certain cases where the information obtained by the entities in order to assess the appropriateness and suitability of their



retail clients' transactions significantly overestimates their financial knowledge and investment experience.

The aspects that must be analyzed in this regard are:

- (i) whether is reasonable or not the information on the academic background of retail clients;
- (ii) whether is reasonable or not the information regarding clients with a high level of financial knowledge (in particular, in the case of groups of clients who do not have previous professional or investment experience or a level of academic background consistent therewith);
- (iii) whether is reasonable or not the information on customers with previous investment experience in complex instruments unfrequently delivered to retail clients, in particular, when the customers' experience does not correspond to their transactions in the relevant entity.

Entities must establish procedures during contracting (to detect atypical situations, such as automatic alerts), the periodical review of information (to detect whether there are groups of customers whose general level of academic background or experience is not adequately reflected) and for the rectification of incidents (which include alternative ways other than merely verifying that the information corresponds to that reflected in the questionnaires).

Communication on fundraising operations through Initial Coin Offerings (ICOs). [Access link](#)

In this communication, the CNMV clarifies that it has neither approved any prospectus nor verified any operation to raise funds from investors through ICOs so far.

It also explains that “the CNMV’s actions in relation to certain projects of this kind have been limited to confirming that, if the requirements set out in paragraph 2 of Article 35 of the Spanish Securities Market Act are met, the transaction would not require approval of the prospectus or be subject to prior verification or intervention of any kind by the CNMV”.

Proposals

Technical Guide Draft on the performance of ancillary activities by Investment Services Companies. [Access link](#)

This Technical Guide Draft prepared by the CNMV will apply to investment firms that provide investment or ancillary services in relation to assets other than financial instruments referred to



in Article 2 of the Spanish Securities Market Act or that carry out other ancillary activities implying an extension of their business.

The purpose of the Guide is to help firms when including ancillary activities in their program of activities, as well as to provide the interpretation of the CNMV in this topic.

It establishes that the performance of these activities must be communicated to the CNMV, and the firms must provide a brief explanatory report on the ancillary activities they intend to perform, together with other relevant information.

Common

Royal Decree-law 5/2019 (*Real Decreto-ley 5/2019, de 1 de marzo, por el que se adoptan medidas de contingencia ante la retirada del Reino Unido de Gran Bretaña e Irlanda del Norte de la Unión Europea sin que se haya alcanzado el acuerdo previsto en el artículo 50 del Tratado de la Unión Europea*). [Access link](#)

On March 1, 2019, the Spanish Government approved the transitional measures which would be applicable from the date on which the United Kingdom (“UK”) eventually withdraws from the European Union (“EU”) (the “**Brexit Date**”), through the Royal Decree-law 5/2019 (the “**Decree**”).

The Decree covers different aspects related to UK citizens residing in Spain, employment agreements, healthcare or customs.

Regarding financial institutions, the transitional regime is mainly focused on keeping the effects of the existing agreements with UK institutions, establishing the following measures:

- (i) Those agreements on financial services (banking, investment services, insurance and others) executed before the Brexit Date (the “**Existing Agreements**”) with an UK financial institution providing the services (including branches) may be in force after the Brexit Date, keeping their effects for the parties.
- (ii) After the Brexit Date, UK financial institutions will be treated as third country institutions; therefore, they will be required to obtain a new license in order to renew or amend the Existing Agreements, or to subscribe new agreements in Spain.
- (iii) The regulatory license of UK financial institutions to operate in Spain before the Brexit Date will remain valid for a 9-month period after the Brexit Date, **but only in relation to the Existing Agreements**, with a view to:



- > either terminate the Existing Agreements or assign them to another financial institution duly authorized to operate in Spain; and
- > apply for a new license to operate in Spain under any of the relevant regimes for third country institutions, including the incorporation of a Spanish licensed subsidiary. This would rule out the possibility of using the transitional period for operating in the future through an EU licensed institution passported into Spain.

Therefore, UK financial institutions will not be permitted to commercialize new financial services and investment funds, or to approach prospects, in Spain during the transitional period. Any situation should be treated, however, on a case-by-case basis.

The measures will enter into force on the date on which the European Union Treaties cease to apply to the UK without a withdrawal agreement between the UK and the EU. They will be suspended, however, if the UK authorities do not grant a reciprocal treatment to the Spanish institutions.

In case of the securities market, the CNMV has confirmed that it may require, on the basis of the volume of activity, the complexity of the products or services or for reasons of general interest, that a third-country firm establishes a branch even if it intends to trade only with eligible counterparties and professional clients per se. Additionally, it says that *“the CNMV considers that the normal scenario will be the requirement to establish a branch”*.

PORTUGAL

Banking

Legislation

Law No. 23/2019 – Official Journal No. 51/2019, Series I of 13-03-2019. [Access link](#)

Implements into national law Directive (EU) 2017/2399, of the European Parliament and of the Council, of 12 December 2017, determining the rules so that certain debt instruments may be eligible for the purposes of TLAC (*Total Loss-Absorbing Capacity*) minimum requirements, further to granting general and special credit privileges to credits emerging from deposits not guaranteed by the Deposit Guarantee Scheme.



Law No. 15/2019 – Official Journal No. 30/2019, Series I of 12-02-2019. [Access link](#)

Amends the Legal Framework of Credit Institutions and Financial Companies clarifying the powers of the parliamentary committees of the Parliament as to the access to banking and supervision information, establishing also the duties of transparency and scrutiny to which are subject the transactions of capitalization, resolution, nationalization or liquidation of credit institutions with resort to, directly or indirectly, public funds.

Decree-Law No. 19/2019 – Official Journal No. 19/2019, Series I of 28-01-2019. [Access link](#)

Approves the regime of real estate management and investment firms, promoting also the second amendment to Decree-Law No. 77/2017, of 30 June 2017, which created stimulation measures for the capital markets aiming at the diversification of the financing sources of the companies.

Regulation No. 1/2019 – Official Journal No. 21/2019, Series II of 30-01-2019. [Access link](#)

Updates the legal framework of the Bank of Portugal on the accountability elements, defining the accountability elements which must be published and sent to the Bank of Portugal, as well as the terms and periodicity of the relevant publication and submission.

Instruction No. 5/2019 – Official Bulletin No. 1/2019, 2nd Supplement of 30-01-2019. [Access link](#)

Defines the information requirements to report periodically to the Bank of Portugal by entities subject to its supervision in the context of the prevention on money laundering and terrorist financing, including as an annex to it the template of the report on the prevention of money laundering and terrorist financing (AMLR).

Proposals

Draft Law No. 190/XIII of 20-03-2019. [Access link](#)

It has been submitted before the Parliament Draft Law No. 190/XIII, of the Government's authorship, aiming at the amendment of the financial supervision in Portugal in line with the existing model at the European level. This piece of legislation intends to create the National Financial Supervision System, also regulating its functioning, thus reorganizing the functions currently attributed to the regulatory and supervision authorities of the banking sector (i.e. the Bank of Portugal), of the pension funds and insurance sector (i.e. the ASF) and of the capital markets (i.e. the SMC).



Under the terms of this piece of legislation, the aim is to assure the reinforcement of the coordination between the national supervisory authorities which is to be ensured by the National Council of Financial Supervisors, entity that was created in 2000 and that might come to assume new functions in macro-prudential issues. On the other hand, the aim is also to segregate the resolution funds in order for the resolution to be entrusted to a new authority, the Resolution and Guarantee Schemes Management Authority which will have organic autonomy and that will also include the management of the guarantee schemes that may be activated in a resolution measure (i.e. the Resolution Fund, the Deposit Guarantee Scheme and the Investors Compensation Scheme).

It must be highlighted, however, that this is a piece of legislation still in legislative process and therefore is subject to amendments, meaning that its content and the rules provided for therein are not yet definitive.

Securities markets and collective investments

Legislation

Decree Law No. 42/2019 – Official Journal No. 62/2019, Series I of 28-03-2019. [Access link](#)

Establishes the simplified regime for the mass assignment of credits comprising innovative amendments in respect of the procedural qualification of assignees and the registry requirements, thus aiming at improving the processes and procedures connected with the mass assignment of credits transactions with resort to the appropriate technologic means.

SMC Regulation No. 2/2019 – Official Journal No. 59/2019, Series II of 25-03-2019. [Access link](#)

Deepens the Legal Regime of Securities Investment Firms for the Development of the Economy (SIMFE).

For additional information, please contact your usual contact person at Cuatrecasas.

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