

corporate

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UPDATES CORPORATE 4/2013
ROYAL DECREE-LAW 6/2013, OF MARCH 22, 2013, ON PROTECTION FOR
HOLDERS OF CERTAIN SAVINGS AND INVESTMENT PRODUCTS AND
OTHER FINANCIAL MEASURES

1. INTRODUCTION

Royal Decree-Law 6/2013, of March 22, 2013, on protection for holders of certain savings and investment products and other financial measures was published in the Official State Gazette on March 23 and entered into force on March 24, 2013.

The essential aim of this piece of legislation, in the context of the so-called hybrid instrument (mainly preferred shares) and subordinated debt burden-sharing exercises envisaged in Law 9/2012, is twofold: (i) to monitor any claims filed by customers against financial institutions owned by the FROB (*Fondo de Reestructuración Ordenada Bancaria*), owing to the misselling of those complex products, and to make available in certain cases expeditious dispute settlement mechanisms, primarily through arbitration; and (ii) to provide, in exceptional cases, liquidity to the shares that the holders of those instruments will receive in exchange, considering that those shares will not trade on a regulated market, involving for that purpose the Deposit Guarantee Fund.

Moreover, in the additional and final provisions of the new royal decree-law, various financial provisions have been amended to meet different goals, for instance to comply with international commitments assumed by Spain, or to adopt measures required urgently (as they relate to the credit institution restructuring or resolution processes, or due to their particular significance in the present economic climate). A number of specific legal changes have also been made, affecting the Central Credit Register and allowing Spanish insurance companies to use underwriting agencies, along with certain changes to Law 9/2012, some relating to insolvency, to allow asset management company SAREB (*Sociedad de Gestión de Activos Procedentes de la Reestructuración Bancaria*) to operate more effectively.

2. HYBRID CAPITAL INSTRUMENT AND SUBORDINATED DEBT MONITORING COMMITTEE

Royal Decree-Law 6/2013 regulates the creation, composition and operating procedures of the hybrid capital instrument and subordinated debt monitoring committee.

As indicated, the aim is that this committee, which will have institutional representation at the highest level, will coordinate and drive the work needed to follow up on certain incidents that may have arisen from the sale of hybrid capital instruments and subordinated debt by institutions owned by the FROB. The committee will issue various reports and will establish the basic criteria to determine when institutions should ask their customers to agree to arbitration.

2.1 Creation of the committee

The committee has been created as a collective body attached to the Ministry of Economy and Competitiveness through the Office of the Secretary of State for the Economy and Business Support.

The committee will be formally organized within 20 days from the date of entry into force of Royal Decree-Law 6/2013 and will be extinguished two years later, unless its term is extended by the Council of Ministers.

2.2 Composition and operating procedures of the committee

The committee will have the following members:

- Chairperson of the National Securities Market Commission (CNMV), who will be the committee chairperson.
- Deputy Governor of the Bank of Spain, who will be the deputy chairperson.
- Secretary-General for Health and Consumer Affairs.
- Secretary-General for the Treasury and Financial Policy.
- Chairperson of the Consumer and User Council.

The committee will have a secretary, to be appointed by the CNMV, who will participate in its meetings with the right to speak but not to vote.

The committee will also invite to its meetings, with the right to speak but not to vote, representatives appointed by the consumer affairs authorities of the autonomous communities and of the National Consumer Affairs Institute who have taken part, or will in future take part, in the arbitration procedures envisaged.

A representative appointed by the FROB will also attend the meetings of the committee, with the right to speak but not to vote.

The committee may invite experts from public agencies or private entities to attend its meetings and provide advice, where their participation may help it to perform its functions.

The committee will set its own operating rules, which will have to conform to the provisions of the Public Authorities and Common Administrative Procedure Law.

The committee will meet at least once a quarter and whenever called by the chairperson, at his/her own initiative or when so requested by three of its members.

2.3 Duties

The committee's duties will be to:

- a) Analyze the factors behind judicial and nonjudicial claims filed by holders of hybrid capital instruments and subordinated debt against credit institutions owned by the FROB.
- b) Submit a quarterly report to the Lower House of Parliament on the fundamental aspects of the claims referred to in paragraph a) above, without prejudice to the powers of other agencies, bodies or institutions in this respect.
- c) Determine the basic criteria to be applied by institutions owned by the FROB to allow their customers to have any disputes arising in connection with any hybrid capital instruments or subordinated debt submitted to arbitration, permitting them, if the arbitration award is in their favor, to receive appropriate compensation for any economic loss caused.

Moreover, and within the above-mentioned criteria, the committee will determine the criteria to be used to identify the customer groups whose claims should receive priority treatment by FROB-owned institutions in light of their particular personal or family difficulties.

The committee will convey these criteria to the FROB, which will issue the necessary instructions in order for them to be adopted by the FROB-owned institutions.

The committee will adopt the above-mentioned criteria at its founding meeting and may review them each quarter.

- d) Lastly, the committee will prepare, within its first month of operation, a report to be submitted to the Lower House of Parliament on:
 - The essential characteristics of the sale of hybrid capital instruments and subordinated debt to retail customers in recent years.
 - The key statistical data relating to that sale.

- The regulatory and supervisory framework of retail customer protection in the sale of those products.
- The claims filed and the results of those claims.

3. LIQUIDITY MECHANISM FOR SHAREHOLDERS OF INSTITUTIONS UNDERGOING RESTRUCTURING

In the framework of the ongoing restructuring of the Spanish financial industry under the provisions of Law 9/2012, as hybrid instrument and subordinated debt burden-sharing exercises (endeavoring to ensure that creditors of financial institutions bear their correct share of the restructuring or resolution costs), subordinated debt instruments and preferred shares are shortly to be swapped for capital (shares) of institutions undergoing restructuring whose shares are not traded on secondary markets, i.e. Catalunya Banc (CX) and Nova Galicia Banco (NCG).

In this context, and as an exceptional measure, the Government has deemed it necessary to provide liquidity to the shares that the holders of those instruments will receive in exchange, given the illiquid nature of those shares and the consequent difficulties this creates for retail customers.

Accordingly, the remit of the Deposit Guarantee Fund has been extended, by authorizing it to create market mechanisms to provide alternative liquidity for these shares, and to acquire, at market price, the unlisted shares resulting from the compulsory swap of hybrid capital instruments and subordinated debt of the above-mentioned institutions.

3.1 Extension of remit of Deposit Guarantee Fund

Within its remit and considering the benefit for the financial system overall, the Deposit Guarantee Fund may adopt measures to ease the implementation of the European financial assistance for the recapitalization of Spanish credit institutions.

In addition to the guarantees the Fund can provide for these purposes, it has been authorized to subscribe to or acquire:

- a) Shares or subordinated debt instruments issued by the SAREB.

For this purpose a favorable report will be needed from the Ministry of Finance and Public Administration assessing the effect that the planned transaction may have on the classification of that company for the purposes of the national accounts, or on the deficit and public debt.

- b) Ordinary shares not admitted to trading on a regulated market issued by any of the institutions that are majority-owned by the FROB or that have applied for a restructuring or resolution process to be set in motion, in the framework of the hybrid instrument and subordinated debt burden-sharing exercises.

The Fund will acquire, as a first priority, the shares of credit institutions' customers included in the group of customers with particular personal or family difficulties.

In any case, it is important to note that the above-mentioned instruments will be acquired at no more than market price and in accordance with European Union state aid legislation. To determine that market price, the Fund will have a report drawn up by an independent expert. The acquisition will have to be made within a limited term, which will be set by the Fund itself.

Lastly, a generic provision has been included to determine the maximum cost for the Fund of these subscriptions and acquisitions, stipulating that, in any case, the cost of these measures will be lower than the total payments that the Fund may have had to make pursuant to its regulations, in the context of the processes of orderly restructuring and strengthening of equity at the concerned credit institutions, had the guaranteed amounts been paid when the corresponding restructuring processes were set in motion.

3.2 Contribution of funds

3.2.1 Ordinary contributions

To bolster the Fund's assets for the purposes described above, an exceptional one-off contribution equal to 3‰ will be required, in addition to the annual contribution to be made by the member institutions based on the deposits held as of December 31, 2012.

This special contribution will be paid in two tranches:

- a) A first tranche equivalent to 40% of the total additional contribution, to be paid in the first 20 business days of January 2014.
- b) A second tranche equivalent to the remaining 60%, to be paid on or after January 1, 2014, over a maximum term of seven years, in accordance with the payment schedule to be set by the managing committee.

Without prejudice to that payment schedule, the amount corresponding to the second tranche will be registered as assets of the Fund on the date of payment of the first tranche.

3.2.2 Reductions

In respect of the first tranche, and provided that the resolution is adopted by at least two-thirds of its members, the Fund's managing committee may agree to:

- Transfer to the second tranche up to 50% of the amount corresponding to the first tranche.

- Not apply this tranche to institutions that are majority-owned by the FROB or that have applied for a restructuring or resolution process to be set in motion.
- Reduce the contributions by up to 50% in the case of member institutions whose calculation base does not exceed €5 billion.
- Reduce the contributions by up to 30% of the amounts invested by the institutions, before December 31, 2013, to subscribe to or acquire shares or subordinated debt instruments issued by the SAREB.

The sum of the reductions envisaged in last two subparagraphs may not, under any circumstances, exceed 90% of the amount to be paid by each institution on the basis of their deposit balance as of December 31, 2012.

4. OTHER PROVISIONS OF ROYAL DECREE-LAW 6/2013

As we mentioned in the introduction, Royal Decree-Law 6/2013 includes certain additional and final provisions affecting international commitments assumed by Spain or measures that must be adopted urgently, as they relate to credit institution restructuring or resolution processes, or due to their particular significance in the present economic climate, among which the most noteworthy are as follows:

- Amendment of article 51.3 of Payment Services Law 16/2009, of November 13, 2009, to include as regulatory and disciplinary rules for payment service providers the provisions of Regulation (EU) N° 260/2012 of the European Parliament and of the Council of March 14, 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) N° 924/2009.
- Amendment of Financial System Reform Measures Law 44/2002, of November 22, 2002, to allow the Bank of Spain to set different thresholds for disclosure to the Central Credit Register according to the disclosure purpose (supervision or data recording). This change relates to the commitment to reforms acquired by Spain in the framework of the Memorandum of Understanding for European financial assistance for the recapitalization of credit institutions.
- Amendment of Private Insurance (Regulation and Supervision) Law (Legislative Royal Decree 6/2004, of October 29, 2004) to allow Spanish insurance companies to use underwriting agencies to arrange insurance. The purpose of this change is to remove the competitive disadvantage suffered by Spanish companies by enabling them to operate under the same conditions as insurance companies in other Member States.
- Amendment of Credit Institution Restructuring and Resolution Law 9/2012, of November 14, 2012, extending the privileges granted to the SAREB, as follows:

- The claims transferred to the SAREB will not be classed as subordinated claims in the event of an insolvency proceeding on the debtor, even if the SAREB is a shareholder of the debtor company. However, if the claim had already been classed as a subordinated claim before it was transferred, it will retain that status.
- In respect of the credit claims acquired by the SAREB after the insolvency order, it will have the right to sign up to the proposal(s) for an arrangement submitted by any person with standing, and the right to vote at the creditors' meeting.
- The SAREB may be the beneficiary of any maximum-sum mortgages, envisaged in article 153 bis of the Mortgage Law, that exist or that may subsequently be arranged on any assets transferred pursuant to Law 9/2012.
- The contractual netting and financial collateral arrangements regime contained in Chapter II of Royal Decree-Law 5/2005, of March 11, 2005, on urgent reforms to boost productivity and improve public procurement will apply to the SAREB.
- Amendment of Law 9/2012 to clarify that, in the case of hybrid capital instrument and subordinated debt burden-sharing exercises, when the FROB resolves that an institution should buy back the securities concerned, the FROB may determine the buyback price to be reinvested, not only to buy back the institution's own shares but also to acquire shares of other credit institutions owned by that institution.

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