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INVESTOR PROTECTION IN TIMES OF CRISIS OF FINANCIAL INSTITUTIONS IN SPAIN IN LIGHT OF EU REGULATIONS

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I. INTRODUCTION - A BRIEF OVERVIEW OF THE FINANCIAL CRISIS

The origins of the financial crisis can be traced back to the United States, where a policy of deregulation dominated from the year 2000 on. This entailed easy access to low-interest loans and weak oversight of the sale of high-risk financial products.[1] New technologies fostered a rapid spillover of the crisis, as they facilitated operations whose impact was practically immediate, including that of toxic products: the scale to which the current financial crisis has spread is certainly one of the factors which sets it apart from previous similar phenomena. The gravest problems accumulate in the financial sector, although the degree to which the real estate and automotive industries have been affected is not to be neglected.

The scale of the unfolding events is inherently associated with the term "globalization", which applies both to the size of countries affected and to the nature of the response by the international community (G-20 forum or the IMF).[2] The velocity at which decisions were made and of the reactions in response to these developments is also without precedent. The financial crisis is sweeping through Europe, which is also one of the consequences of its political and legal system – the division between monetary policy (administered by the ECB), fiscal policy and strictly economic policy, the last of which is a matter for the individual Eurozone member states[3] and which may cause diverging levels of public and private debt across various countries

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[1] See also Juan Ignacio Signes de Mesa, *Derecho de la Competencia y Crisis Económica. El règimen de ayudas públicas y de concentraciones en el sector financiero* (Thomson Reuters Aranzadi, Pamplona 2013) 32-37.

[2] The key characteristics of the financial crisis have been detailed by, among others, Antonio Embid Irujo, 'El derecho pùblico de la crisis económica' in Avelino Blasco Esteve (ed), *El derecho pùblico de la crisis económica. Transparencia y sector pùblico. Hacia un nuevo derecho administrativo, Instituto nacional de administraciòn pùblica* (Madrid 2011) 32-35.

[3] See also: Antonio Embid Irujo, *La constitucionalizaciòn de la crisis econòmica* (Iustel, Madrid 2012) 22 ff.

that are simultaneously encompassed by a uniform monetary system. The normative response to the crisis, sometimes marked by short-term solutions, can be said to be fixed in most cases: long-term reform of financial systems, of financial supervision models and the manner in which certain public services are rendered are all a fitting example of this.

A significant part of the Spanish "legislation of the economic crisis" has been adopted in line with EU regulations[4]; this course of action has been endorsed from the very outset of the crisis, and all the more so from the beginning of the second stage of crisis-countering measures, that is May 2010. During the struggle with the crisis in Spain virtually all measures available to the authorities as regards intervention in the state's economic system have been employed. Thus we may observe that the government has availed itself of tax-related solutions (increased VAT and personal income tax rates[5], as well as other special taxes), fixes meant to boost the activity of certain sectors of economy have been implemented, and austerity or privatization measures have been introduced, as well as a host of steps regarding the labour market and the retirement pension system.

The principal act of law employed in countering the financial crisis in Spain is the decree with the force of law (Decree-Law; *Decreto-Ley*), alongside which the role of the Parliament has been significantly curtailed to the adoption of Decree-Laws.[6] The key role has been assumed by the national government, with autonomous communities taking a back-seat, pursuant to the model of separation of powers regarding matters of an economic nature in the Spanish legal order (fundamental laws are a matter for the central authorities).[7]

The principal focus in Spains battle against crisis has been placed a the comprehensive reconstruction of the entire financial system; the most crucial element has been the process of restructuring savings banks (*Cajas de Ahorros*), blamed for having seriously tipped the financial system out of balance. The question arises of whether, over the course of introducing systemic reforms and with the intense focus on public debt reduction measures, the dimension of customer and investor protection has not been neglected, with the authorities having concluded that sufficient measures in this respect will be taken at the EU level; this, in turn, made the restructuring of the defective system and rescuing the crumbling financial institutions the national priority. It remains arguable whether the implemented solutions accounted for the long-term horizon, or were only dictated by requirements imposed at the EU level, driven by political struggles or the will to rescue failing banks at all costs.

The relevant subject literature points to two primary factors determining the necessity to protect customers and investors on financial markets: on the one hand, it results from consideration given to the risk of a given institution (bank, fund, etc.) defaulting on its obligations, while on the other hand, to the disadvantageous treatment of customers by a given

[4] ibid 28.
[5] VAT and personal income tax.
[6] Antonio Embid Irujo (n 3) 26.
[7] For more on the model of division of legislative competences in Spain, see Maja Kozłowska, *Model państwa regionalnego w Unii Europejskiej (we Włoszech i Hiszpanii)* (Kolonia Limited, Wrocław 2012).

institution.[8] The collapse of a financial institution may have serious repercussions for the entire system, and it may damage the trust of investors, resulting in massive capital flight.

In the face of the financial crisis, measures taken by the Spanish legislator were directed at rescuing banks that could no longer manage the loss of financial liquidity on their own. These actions were implemented with the use of enormous amounts of public assistance, and they entailed such mechanisms as comprehensive restructuring processes of indebted credit institutions (the so-called bancarization of Spanish savings banks); mobilization of assistance funds (restructuring fund – *Fondo de Restructuraciòn Ordenada Bancaria*), and of the deposit guarantee fund (*Fondo de Garantía de Depósitos*), which was primarily meant as a measure to ensure systemic stability and cooperation in remediation processes.

Comprehensive reforms, meant to restore the trust of inventors, were an important aspect in the process of reconstructing the precarious system of financial institutions in the EU – these measures focused on providing customers with clear and unambiguous information (particularly regarding investment risk profiles and the nature of financial products)[9], on ensuring a safe deposit and investment funds protection system[10], and on adequate financial advisory services to limit risks taken by customers through appropriate adjustment of investment levels to customer profiles (entailing reliable information and guarantee that the customer could accurately evaluate the risk profile of a given investment).[11] These reforms are designed to achieve a degree of relative balance in the relations between customers and financial institutions, principally as regards the issue of transparency and reliability of information, as well as activities pursued in customers' best interests.

Intensive political, economic and legislative initiatives aimed at countering the financial crisis do not only concentrate on the above-mentioned substantive aspects: another indispensable element is reform of the structure of supervisory institutions (the so-called institutional responses to crisis).[12]

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[8] Mariano Carbajales, *La regulación del mercado financiero. Hacia la autorregulación del Mercado de Valores* (Marcial Pons, Madrid-Barcelona 2006) 14.

[9] See eg regulations on Key Investor Document as regards structured products (KID) <www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2012/0169(COD)> accessed 1 June 2015 or review of the Prospectus Directive (Directive 2010/73/EU). Cf Juan J. Gutièrrez Alonso, Emilio Guichot Reina, 'La transparencia en la regulación bancaria' in Santiago Muñoz Machado, Juan Manuel Vega Serrano (eds), *Derecho de la regulación económica. Sistema bancario* (Iustel, Madrid 2013) 209-259.

[10] Review of the Deposit Guarantee Schemes Directive (2010/0207(COD). <www.europarl.europa.eu/oeil/popups/ficheprocedure.do?id=586512> accessed 1 June 2015.
See also review of the Alternative Funds Managers Directive (2011/61/EU).

[11] Review of the MiFID: The European Parliament adopted the amendments of the MiFID directive (so-called MiFID II – Markets in Financial Instruments Directive) and of Markets in Financial Instruments Regulation (MiFIR) in plenary on 15 April 2014.

[12] María Amparo Salvador Armendàriz, 'El riesgo sistèmico en la regulación bancaria: respuestas tras la crisis' in Juan Miguel de la Cuètara Martinez, Josè Luis Martínez López-Muñiz, Francisco J Villar Rojas (eds), *Derecho administrativo y regulación económica* (Wolters Kluwer, Madrid 2011) 1373 ff. The author, in analyzing the attempts to respond to the financial crisis, explores global solutions (International Monetary Fund, G-20, the Basel

The objective of this paper is to explore selected strategies of countering the financial crisis in Spain, with a special focus on the issue of investor protection. I will attempt to highlight good solutions and the most significant mistakes made in the struggle to tackle the crisis, based on comments provided by experts in the field - both scholars and practitioners. Owing to the great complexity of the subject, in this work I focus on aspects connected with the restructuring of Spanish banking institutions and with the deposit guarantee system, and I discuss the efforts to overcome the financial crisis in Spain within the context of new challenges to public law (especially in light of the new European supervision system).

II. ATTEMPTS TO RESPOND TO THE FINANCIAL CRISIS IN SPAIN AND NEW CHALLENGES TO PUBLIC LAW. THE EU'S REACTION TO CRISIS - AN OVERVIEW WITH SPECIAL FOCUS ON INVESTOR PROTECTION MECHANISMS

The financial crisis has not only demonstrated the necessity of enhanced regulation of the financial sector, but it has also set a new direction for the development of public law, including administrative regulations. Santiago Muñoz Machado has advanced the irrefutable argument that the state is withdrawing in its relation with the society from its function of direct sectoral administrator and provider of services, taking on the role of regulator (also self-regulator) and guarantor of services which citizens should have access to, as well as of public interests.[13] This is doubtlessly bringing about a radical change in the perception of administrative law, where the intervention of the state in a sector of economy, organizational techniques and provision of public services are all subject to modification. In observing the changes taking place, we may return to the still-relevant remarks of Otto Mayer, who once said that "*constitutions come and go, administrative law remains*".[14]

The final two decades of the 20th century were a time of profound changes in the economy, marked by an increased tendency towards liberalization, based primarily on the principles of free competition and privatization of public services.[15] This transformation resulted in the provision of goods and services in economic sectors becoming contingent upon the appropriate behaviour of the main actors, that is, private enterprises conducting activities for the public good. The role of the state, in turn, is to watch over the behaviour of market operators, and to guarantee that they

Committee on Banking Supervision). At the same time, she points to the problems posed by the legal forms of global reaction to the crisis – "soft law". It is therefore difficult to speak of an international banking law in the strict sense of the term. The author also distinguishes between substantive, institutional and national measures (regarding the reforms of the Spanish financial sector).

[13] Santiago Muñoz Machado, 'Hacia un nuevo derecho administrativo' in Avelino Blasco Esteve (n 2) 199.

[14] ibid 192.

[15] For more about privatization of public services, globalization and the new role of the state, see Juan Cruz Alli Aranguren, 'La privatizaciòn de los servicion públicos como efecto de la globalización' in Juan Miguel de la Cuètara Martinez, Josè Luis Martínez López-Muñiz, Francisco J Villar Rojas (n 12) 844 ff.

comply with the standards and programs laid down by organs of public administration authorized to protect the public interest.

The crisis has also laid bare the weak spots of the welfare state model, while at the same time forcing the state to react to a host of problems of a social and economic nature. The ensuing interventions were mostly met with disapproval by society at large. The financial law sector is a domain in which the "internationalization" of administrative law is particularly noticeable. This, as asserted in the relevant subject literature, is gradually giving rise to the emergence of international or global administrative law.[16] At the same time, regulation and oversight of financial markets, especially in times of crisis and a growing tendency towards comprehensive regulation of the sector, requires the cooperation of various organizations (that set the relevatnt standards and norms), as well as of national and EU legislators.

I concur with the thesis that the market is incable of self-regulation, and therefore that it requires regulation and oversight exercised by the state.[17] This, of course, must be done to the extent that the circumstances demand, so as to avoid what is referred to as "over-regulation". Gaspar Ariño Ortiz outlines the limits of such regulation, asserting that "*the purpose of regulation is not so much to control companies, but rather to protect society as regards activities that are of vital importance for its life and well-being. For this reason, the two fundamental aspects it should orient itself towards are guaranteeing the provision of services (now and in the future) and to establish the appropriate quality to price ratio, in accordance with the degree of development and priorities of a given society"*.[18] Therefore, the state must reform its role without falling in the trap of either extreme interventionism or excessive passivity. Certainly, striking a rational balance poses one of the most formidable challenges faced by states in times of financial crisis. The preceding also applies to initiatives undertaken at the EU level, where an increasing tendency can be observed to make provisions overly detailed, alongside attempts at comprehensive regulation, which often lead to a number of justified interpretational doubts that imply practical problems for the primary players on the market.[19] As a result, what comes to the fore are the

[16] For more on international administrative law, see Barbara Kowalczyk, 'Międzynarodowa właściwość organu administracji publicznej (wybrany przykład)' in Jerzy Supernat (ed), *Między tradycją a przyszłością w nauce prawa administracyjnego. Księga jubileuszowa dedykowana Profesorowi Janowi Bociowi* (Wyd. Uniwersytetu Wrocławskiego, Wrocław 2009) 377-391; Maja Kozłowska, 'Dywersyfikacja prawa międzynarodowego i europejskiego a problem międzynarodowego prawa administracyjnego' (2008) 3/2007 Pro Publico Bono, DWSSP Asesor 43.

[17] Cf Alberto M Sánchez, 'El derecho administrativo y sus equilibrios básicos' in Juan Miguel de la Cuètara Martinez, Josè Luis Martínez López-Muñiz, Francisco J. Villar Rojas (n 12) 94-95.

[18] Gaspar Ariño Ortiz, *Economía y Estado* (Adeledo Perrot, Buenos Aires 1993) 40, quoted after: ibid 94.

[19] Some fitting examples include regulations regarding UCITS funds (UCITS V, UCITS VI), reviews of requirements on pre-contractual disclosure in reference to structured products (Key Investor Document Regulation – for more on this topic, see Maja Kozłowska, 'Consumer protection in financial services – towards greater transparency with Key Information Document for Packaged Retail Investment Products' (2013) 2 (2) Wroclaw Review of Law, Administration & Economics 1.

measures pursued at the EU and international level - we are witnessing a progressive globalization of the economy and, in consequence, the internationalization of law as well, going beyond national boundaries. More so than ever before, states are acting in cooperation with one another and are increasingly bound by standards set out by international financial sector organizations.[20]

An interesting approach to the nature of the financial crisis and the role of the state has been presented by Alejandro Pèrez Hualde, whose focus is primarily on the legal and ethical domain, rather than on the economic and financial.[21] The purpose of regulation of the financial sector is to restore lost confidence and trustworthiness.[22] This has determined the necessity to take a comprehensive look at the financial sector and to impose a regulatory framework on banks, the insurance and the stock exchange market, always accounting for the comprehensive nature of of services and products offered by financial intermediaries.

One of the effects of the transformations underway is certainly the co-existence of diverse legal systems (national and supranational), tightly coupled with one another in conditions of globalization affecting both the law and the economy. Thus, the thesis advanced by J. Chevallier still holds. He wrote that "complexity must be first measured by the number of sources of law, manifested in various forms, which turn the legal order into something akin to a baroque structure".[23]

Political transformations, development and constitutional frameworks crystallize a decentralized system of institutions sharing sovereign competences and a monetary system at the European supranational level. The application of principles of free competition, freedom of movement of people, services and capital imply changes in the institutional dimension through the deregulation of economic sectors, privatization of public services and the necessity to guarantee a uniform monetary system.[24]

The financial crisis has raised many questions - not only about its underlying causes, but also about the role of the state, the extent and methods of market regulation, and new challenges to public law. The dominant opinion is that markets alone are to blame, since they have proved unable to reconcile private interests with public ones, which was subsequently aggravated by the

<http://wrlae.prawo.uni.wroc.pl/index.php/wrlae> accessed 1 June 2015 or review of the MiFID I directive.

[20] Among these we may indicate: International Organization of Securities Commission (IOSCO), Basel Committee of Banking Supervision (BCBS), The Organisation for Economic Co-operation and Development (OECD).

[21] Alejandro Pèrez Hualde, 'La crisis mundial y el derecho público (El Estado, otra vez protagonista)' (2009) C La Ley 933.

[22] More on this topic Joan Ramon Sanchis Palacio, *La banca que necesitamos. De la crisis bancaria a la banca ètica. Una alternativa socialmente responsable* (Universitat de València, València 2013) 116 ff.

[23] J Chevalier, 'Vers un dront post-moderne? Les transformations de la règulacion juridique' (1998) 3 Revue du Droit Public 672, quoted after Juan Cruz Alli Aranguren (n 15) 837.

[24] Gaspar Ariño*, Principios de Derecho Público; Económico. Modelo de Estado, Gestión Pública y Regulaciòn Econòmica* (3rd edn, Edit. Comares, Granada 2004), quoted after Ángel Sanchez Blanco, 'Modelos económicos y sistema administrativo. De las instrucciones de fomento a la economía global' in de la Cuètara Martinez, López-Muñiz, Villar Rojas (n 12) 1244.

policy of deregulation.[25] Legal instruments traditionally employed to reduce the asymmetry in the model under which the free market functions included protection against monopolies, **consumer protection (customers or investors)**, and safeguarding the stability of the financial system.[26]

Although issues related to economic theories and models of market regulation fall outside of the scope of this work, it must be stressed that public law is presently facing complex challenges. The issue of the objectives to be achieved by the new model of financial sector regulation based on efforts to restore consumers' confidence, but also on comprehensive restructuring of the system, seems to be more pressing now than the question of who or what is to blame for the crisis: the state itself, the markets or the very regulatory regime.[27]

The onset of the financial crisis in Spain was officially confirmed in the summer of 2008, and some of the earliest acts of law adopted in response to the deteriorating economic situation of the country included Royal Decree no. 9 dated 28 November 2008, establishing *Fondo Estatal de Inversión Local y un Fondo Especial para la Dinamización de la Economía y el Empleo* (which approved extraordinary credit instruments to finance them), followed by Decree-Law no. 13 dated 26 October 2009, which established *Fondo Estatal para el Empleo y la Sostenibilidad Local*. These acts of law are part of the action plan undertaken by the state in line with the G-20 summit of 15 November 2008, which laid down the guidelines for the European plan of economic reconstruction.[28]

The next step in Spain's efforts to reverse the negative trends in its economy was the Decree-Law no. 6 of 9 April 2010 on measures to promote economic recovery and employment (the decree combines various methods of boosting the economy, ranging from tax relief, through support for

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[25] R A Posner, *A failure of capitalism: the crisis of '08 and the descent into depression* (Harvard University Press, Cambridge 2009). More on regulation of financial markets Carbajales (n 8). The author, much in the vein advanced by D Lewellyn, points to the main problems that could be brought about by the prescriptive approach to external market regulation: *excessively detailed regulation may render it impossible in practice for market operators to comply with all the rules; the risks may turn out too complex for basic norms to prevent them; balance sheets of financial institutions, and especially of banks, reflect their situation as at a specific moment in time, but this situation is subject to great changes over short periods of time; detailed regulation shows a tendency to focus on "processes" and not on outcomes (this may negatively affect compliance with regulations as regards their main objectives); regulation may give rise to "confrontations" between the regulator and the regulated (at times leading to excessive focus on conformity with rules so as to avoid a potential confrontation with the regulator); enforcement of a high degree of conformity with rules imposed by the regulator may result in loss of information from other sources (market analysts, professional investors); excessive regulation may prove inflexible in responding to changes; there is the risk of 'moral hazard', as companies tend to assume that if something is not explicitly covered in regulation, there is no regulatory dimension to the issue.* These risks are identified as stemming from external regulation (the 'command-and-control' model). It has often been emphasized that the free market needs a specific internal structure and self-regulation in order to function effectively (and to minimize the transaction costs). As proved by the financial crisis, informational asymmetry and moral hazard, as well as negative external factors, have had catastrophic consequences.

[26] Carbajales (n 8) 13.

[27] María Amparo Salvador Armendàriz, 'El riesgo sistèmico en la regulación bancaria: respuestas tras la crisis' in Juan Cruz Alli Aranguren (n 15) 1361.

[28] <http://ec.europa.eu/economy_finance/crisis/2008-11_en.htm> accessed 1 June 2015.

companies and modifications of VAT, to reforms of the energy and financial sector, such as establishment of IPS systems and an expanded role for the FROB fund).[29] Decree no. 8 dated 20 May 2010 provides for some extraordinary measures for reducing the budget deficit, focusing also on local governments (reduction of staffing costs or restrictive conditions for incurring debt by local government entities). Additionally, the Decree-Law no. 13 of 3 December 2010 places emphasis on reduction of public deficit (this act, however, contains some solutions designed to promote employment and the recovery of certain sectors, such as aviation, by way of ongoing privatization).[30]

This veritable "legislative deluge" aimed at reducing the public deficit, at reforming certain specific sectors (e.g. Decree-Law no. 14 of 23 September 2010, on the electricity sector) and focusing on ongoing privatization processes, has also included some measures designed to reform public administration, including government administration (e.g. Decree no. 1313 of 20 October 2010 on restructuring certain ministerial departments). Summarizing the primary objectives of reforms adopted with a view to shoring up the Spanish economy, we can identify the following primary areas of intervention: reduction of the budget deficit and public debt, enforcement of austerity measures (public sector pay caps, freezing of retirement pensions and certain other public benefits), mobilization of resources from taxes (VAT, personal income tax or support of selected sectors through tax-related reforms), "liberalization" processes (intensive privatization)[31] and, of course, legislative interventions in the labour market.

It must be noted that the privatization of the public sector is accompanied by the processes of bank nationalization, which raises justified criticism and doubts as to not only the economic, but also ethical, aspects of such measures (the value of bailout funds earmarked for Spanish banks by December 2011 stood at €20.6 billion; this, added to the €1 trillion from the European Stability Facility, approved on 11 June 2012 to cover insolvencies in the banking sector, totals €1.2 trillion. This sum was allocated to supporting banks that had joined ISP systems, or transferred to failing institutions financed through FROB).[32] It became standard practice to nationalize banks for public money, and to then sell them for a much lower amount to another credit institution. Such was the case of Caja Castilla-La Mancha, a savings bank ultimately bought by Cajasur following an earlier intervention by *Banco de España* and a failed attempt at a merger with Unicaja. The scenario was similar for Caja del Mediterràneo, CAM. *Banco de España* intervened on 22 July 2011; FROB provided EUR 5.8 billion, and CAM was subsequently sold

[29] A host or regulations pertaining to the tax system has also been adopted, for example Law no. 26 of 23 December 2009 on the General State Budget, which directly provides for an increase of personal income tax and VAT rates.

[30] Antonio Embid Irujo, 'El derecho pùblico de la crisis económica' (n 2) 45-46.

[31] For more on the subject of privatization of public services as an effect of globalization, see: Juan Cruz Alli Aranguren (n 15) 844.

[32] Joan Ramon Sanchis Palacio (n 22) 99. The author gives examples of assistance provided to Spanish banks: from July 2011 to February 2012, *Banco de España* disbursed EUR 9.6 billion for mergers of savings banks; EUR 4.75 billion was allocated by FROB to recapitalization of newly established banks following the restructuring of savings banks (the case of Bankia, for example). FROB launches credit lines – EUR 3 billion granted to Banco CAM.

to *Banco Sabadell* on 1 July 2012. On 21 November, a similar intervention took place involving *Banco de Valencia*, a savings bank over 100 years old; this was the first time when such interventions directly affected small shareholders, and family enterprises lost financing as an indirect consequence.[33] The government's program to reduce the budget deficit at all costs (namely, at the cost of drastic cuts in the sectors of education, healthcare and social services) largely ignored another problem – soaring private debt and the collapse of small private entrepreneurship.

Attempts were also made to restructure the state's financial system. The key piece of legislation in this respect was Royal Decree no. 1642 of 10 October 2008 (establishing the amount of guarantee deposits stipulated in Royal Decree no. 2606 of 20 December 1996 on the Deposit Guarantee Fund of Credit Institutions, and in Royal Decree no. 948 of 3 August 2001 on investor compensation systems up to EUR 100,000). Decree-Law no. 6 of 2008 established a fund controlled by the Ministry of Economy and Treasury, whose purpose was to purchase asset-backed securities issued by credit institutions in order to strengthen their capital buffers[34]; Decree-Law no. 7 of 13 October 2008 was adopted with similar objectives. It provided for extraordinary economic and financial measures in conjunction with the integrated action plan of the Eurozone countries. Another legal act with a similar purpose was the Royal Decree no. 10 of 12 December 2008, enacting financial solutions aimed at improving the liquidity of small and medium enterprises, as well as some other complementary measures. The government's objective was to tackle the liquidity crisis and to unfreeze the interbank lending market following the bankruptcy of Lehman Brothers.

One of the most significant measures in the state's fight against the growing crisis was Decree-Law no. 9 of 26 July 2009 on bank restructuring and credit institution equity reinforcement, which established the Fund for Orderly Bank Restructuring (*Fondo de Reestructuración Ordenada Bancaria* – FROB).[35]

As regards the degree of consumer protection, of key importance is Law no. 16 of 24 June 2011, the *Ley de Contratos de credito al consumo*, transposing Directive 2008/48/EC on consumer credit agreements into Spanish national law. Rules pertaining to the provision of financial services were established pursuant to the provisions of the MiFID I Directive, obliging financial institutions to analyze the level of risk taken on by their customers

[33] ibid 103-104.

[34] More on this topic: A Nàjera Pascual, 'El funcionamiento del Fondo para la Adquisición de Activos Financieros' (2009) 4 Revista de derecho del mercado de valores 407-427.

[35] More on FROB Embid Irujo, 'El derecho pùblico de la crisi económica' (n 2) 56-68, and: Francisco Josè Villar Rojas, 'Un nuevo caso de huida al derecho privado: Fondo de reestructuración ordenada bancaria', in Juan Miguel de la Cuètara Martinez, Josè Luis Martínez López-Muñiz, Francisco J Villar Rojas (n 12) 1391-1418. The primary functions of the fund were to manage the credit institution restructuring processes and to reinforce equity. The fund received a mixed allowance of EUR 9 billion, of which EUR 6.75 billion was allocated from the state budget and EUR 2.25 billion was contributed by the deposit guarantee funds. The fund has juridical personhood and is an institution controlled and managed by *Banco de España*, which channels public assistance to support Spanish banking entities. It is managed by the Governing Committee (*Comisión Rectora*) which has 9 members, appointed by the Ministry of Economy and Treasury for a renewable term of 4 years.

in respect of both consumer credits and investments. Moreover, *Ley de Economía Sostenible* (Art. 29.1, point 4) stipulates that financial institutions are obliged to furnish their customers with "appropriate information concerning the offered banking products, (...) taking account of their interests, needs, financial situation (...)".

The next step was a series of endeavours designed with the aim of a comprehsneive restructuring of the system of Spanish financial institutions – these measures were primarily directed at solving the problematic situation of savings banks by effecting their bancarization.

III. THE FINANCIAL CRISIS AND THE RESTRUCTURING OF SPANISH FINANCIAL INSTITUTIONS (WITH A FOCUS ON THE ISSUE OF SAVINGS BANKS – CAJAS DE AHORROS)

a) Powers of the state and of autonomous communities as regards the regulation of cajas de ahorros

Article 149.1.11 of the Spanish constitution stipulates that "bases for regulations concerning credit, banking and insurance" are matters state jurisdiction; at the same time, pursuant to the Spanish model of division of legislative powers, the autonomous communities are empowered to "enact more detailed legislation and to execute it". As regards the aforementioned constitutional provision, Juan Manuel Vega Serrano cites judgement no. 235 of the Constitutional Court dated 16 December 1999[36], in which the Court, while highlighting the importance of the financial system for the overall functioning of the economy, asserts that the state competence in question may not extend to include every single economic endeavour (unless it has a direct and significant influence on the general economic condition of the country), as this would result autonomous communities being deprived of their more detailed competences.

The breadth of the state's authority regarding credit regulations was interpreted by the Constitutional Court in judgement no. 1 of 28 January 1982, in which it was emphasized that the grounds of regulations concerning the credit system should contain not only provisions on the structure, internal organization and functions of financial intermediaries, but also norms regulating the basic aspects of activities undertaken by such intermediaries. Thus, the state-prescribed rules specify institutional elements of the financial system, as well as functional and operational aspects concerning the general interests that extend beyond the territory of a given autonomous community.

In respect of fundamental norms, we may turn to judgement no. 91 of the Constitutional Court, dated 9 October 1984. It asserts that although such norms are by their very nature constant, they may not be in any case immutable, which would render them incompatible with the evolving legal system and, in particular, with the dynamic nature of the economic sector which they concern.[37] The fundamental norms prescribed by the state are,

[36] Juan Manuel Vega Serrano, 'La regulación bancaria española' in Santiago Muñoz Machado, Juan Manuel Vega Serrano (n 9) 161.
[37] ibid 162.

thus, the source of the authority of both *Banco de España*[38] and state administration in general.[39]

Regulation of the Spanish savings banks sector reflects this country's model of division of powers between the state and autonomous communities.[40] Pursuant to Article 149.1.11 of the Constitution, the basic legal framework of the credit system and banks fall within the authority of the state, which lays down fundamental norms that are then elaborated through legislation adopted by individual autonomous communities.[41] The operations of savings banks are governed by Law 31/1985 (*Ley de Organos Rectores de las Cajas de Ahorros – LORCA*) and by numerous regional laws. An analysis of the scope of powers regarding regulation of savings banks calls for reference to the judgements of the Constitutional Court no. 48 and 49, dated 22 March 1988, pursuant to which provisions of the mentioned national law are not exhaustive, and thus could be subject to supplements or modification, albeit, of course, with observance of the fundamental tenents. These and similar legal considerations concerning savings banks resulted in all of the autonomous communities, with the exception of the Balearic Islands, adopting laws governing the functioning of savings banks, with various types of casuistic modifications.[42] Furthermore, the Constitutional Court has emphasized time and again that autonomous communities enjoy legislative and executive prerogatives as regards both savings banks with registered seats on their territory and, in certain cases, also those that conduct their operations within their boundaries.[43] The diverse legal character of savings banks and the heterogeneous forms of their management have spurred a number of regulatory difficulties, additionally aggravated by interference on the part of the authorities of autonomous communities in their operations.[44] The "autonomization" of legal regulations concerning savings banks has, for obvious reasons, produced close relations with regional authorities, consequently leading to savings banks financing public activities, often tied to some specific political interests. Some notable examples are provided by the cases of Caja Madrid, which acted as promoter of Parque Warner, or of

[38] See: judgement of the Constitutional Court no. 135 dated 5 October 1992.
[39] See: judgement of the Constitutional Court no. 87 dated 11 March 1993.
[40] Fernando Garcìa Rubio, 'El preocupante presente e incierto futuro de las cajas de ahorro' in Manuel Rebollo Puig (ed), *La regulación económica. En especial, la regulación bancaria. Actas de IX Congreso Hispano-Luso de Derecho Administrativo* (Iustel, Córdoba 2012) 634.
[41] For more on the model of division of legislative powers in Spain, see: M. Kozłowska, '*Model podziału kompetencji legislacyjnych w Hiszpanii'* (2010) 2 (97) Przegląd Sejmowy 243.
[42] Some examples of legislation adopted by autonomous communities: Andalusia: Law no. 15 on Savings Banks in Andalusia dated 16 December 1999 (BOJA of 28 December): Catalonia: Legislative Decree no. 1 dated 11 March 2008, approving the restated text of the Law on the Savings Banks of Catalonia (DOGC of 13 March 2008); Madrid: Law no. 4 of 11 March 2003 on Savings Banks of the Autonomous Community of Madrid (BOCAM of 18 March); La Rioja: Law no. 6 dated 18 October 2004 on Savings Banks; Canary Islands: Law no. 13 on Savings Banks dated 26 July 1990; Castille-La Mancha: Law no. 4 on Savings Banks in Castille-La Mancha dated 10 July 1997 (DOCM of 18 July).
[43] Juan A Ureña Salcedo, 'La crisis del sistema financiero y la transformación de las cajas' in Santiago Muñoz Machado, Juan Manuel Vega Serrano (n 9) 371-383.
[44] Cf Marìa Cruz Mayorga Toledano, 'Transformación de las cajas de ahorro en un entorno de crisis. El proceso de bancarización' (2012) 125 January-March Revista de Derecho Bancario y Bursatil 95.

Bancaja and Caja Mediterraneo, the two main institutions providing financing for the theme park Tierra Mítica. Simultaneously, as pointed out by Fernando García Rubio, the savings banks are evidently engaged in a bid for power: on the one hand, to protect their regional interests (avoidance of cross-region mergers) by taking advantage of expansion options within individual communities (the example of Galician or Catalan savings banks), or on the other hand, in direct struggles for political power waged by various parties or political fractions (the intended merger of savings banks in Andalusia, promoted by an erstwhile member of the regional government, Magdalena Álvarez (*Consejera de Economía y Hacienda de la Junta de Andalucía*).[45] Within the savings banks themselves, there were power struggles concerning the number of representatives of the savings bank assembly (*asamblea de la caja*) in local authority structures (the case of Caja Madrid and the number of spots in the municipal government).[46] The complexity of the savings banks' functioning must be considered primarily with regard to their significant influence on the national monetary and financial system. In the case of Catalonia, the scope of powers of the autonomous community in respect of savings banks is governed by Art. 120 of Organic Law no. 6 dated 19 July 2006 (Statute of Autonomy of Catalonia), which lists, among others, the following powers of the regional authorities (*Generalitat*): determination of governing bodies of savings banks and of their legal status; of the legal system governing their establishment, mergers, liquidation and registration; exercise of administrative powers in relation to any foundations they might create; regulation of groups of savings banks with registered headquarters in Catalonia. Additionally, pursuant to the "*normas básicas*", that is the state's fundamental law, the *Generalitat* has power over regulation of the distribution of surplus and of the social activities of savings banks. The Catalan authorities are also to monitor the process of issuing and distributing owner share titles, with the exception of those aspects related to the system for public offerings, to financial stability and to solvency. The "shared power" (*competencia compartida*) also includes oversight and sanctioning of savings banks (in keeping with the provisions and standards implemented by the *Ministerio de Economía y Hacienda* and by *Banco de España*). Provisions of the Catalan Statute mirror the tendency to expand the scope of powers of regional authorities in respect of the system of functioning and management of savings banks.[47] The complicated system of savings banks oversight (control over the activities of a savings bank outside of the territory of its registered headquarters is exercised by the authorities of the relevant

[45] She was charged with misappropriation of public funds committed in the years 2001 and 2010 (2 July 2013). In March 2014, judge Mercedes Alaya ordered her to post a civil liability bond of EUR 29 million in this case.

[46] Fernando Garcìa Rubio (n 40) 629.

[47] Judgement no. 31 of the Constitutional Court, dated 28 July 2010, concerning the Statute of Autonomy of Catalonia from 2006 did not find the broad powers of Catalonia unconstitutional, and it asserts its shared powers as regards financial activities. The judgement only declared as unconstitutional the phrase "rules, regulations and minimum standards" included in Articles 120 (Cajas de Ahorros) and 126 (Crédito, banca, seguros y mutualidades no integradas en el sistema del la Seguridad Social), the intention of which was to limit, within the shared competences, the scope of state basic laws (*bases estatales*), quoted after: Xavier Arzoz Santisteban, 'La versatilidad de lo básico en materia económica, con especial referencia a la crisis financiera y las Cajas de Ahorro' in Manuel Rebollo Puig (n 40) 515.

territorial unit, and not by the state) and the jurisprudence of the Constitutional Court, which frequently favours autonomous communities, have resulted in competence disputes since the enactment of LORCA. This, in turn, has had not only political consequences, but also affects the stability of the entire financial system (considering that the state's supervision over savings banks is exercised by *Banco de España*, integrated with the European system through its relations with the ECB, and not by the central government, it is difficult to find a justification for the struggle to protect the scope of competences of autonomous communities that would be logical from the point of view of the state's overall interests). Juan A. Ureña Salcedo cites one of the judgements by the Constitutional Court, pointing out that, although it acknowledges autonomous authority concerning oversight and control over savings banks, *Banco de España* still bears the the brunt of this task.[48]
The resistance of autonomous communities against measures aimed at limiting their influence on the operations of savings banks weakened with the onset and subsequent gradual worsening of the financial crisis. The state assumed the leading role in the ongoing process of healing public finances and in the reform of the financial sector, andconsequently in the scope of regulation of savings banks as well.

b) Restructuring of the savings banks system (the bancarizacíon de las cajas de ahorro process)

Remedial measures to heal the financial system in Spain were first introduced in the years 2009-2010: Decree-Law no. 9 dated 26 July 2009 on bank restructuring and credit institution equity reinforcement (*restructuración bancaria y reforzamiento de los recursos proprios de las entidades de crèdito*); Decree-Law no. 6 dated 9 April 2010 on measures to promote economic recovery and employment (*medidas para el impulso para le recuperación económica y el empleo*); **Decree-Law no. 11 dated 9 July 2010 on governing bodies and other legal aspects of savings banks** (*de órganos del gobierno y otros aspectos del règimen jurídico de las cajas de ahorro*).

Decree no. 9 of 2009 transposed the guidelines laid down by the European Commission on 13 October 2008 concerning state aid and individual assistance to financial institutions, and it established an *ad hoc* structure for channelling this aid - a restructuring fund (*FROB – Fondo de Reestructuración Bancaria*). The fund's role is to support the functions normally performed by the Deposit Guarantee Fund in periods of short-term

[48] Juan A Ureña Salcedo (n 43) 380. Constitutional Court judgement dated 4 May 2010 (cassation no. 3856/2007), concerning the control of autonomous communities over savings banks. The government of the Basque Country, within its supervision over the activities of one of Basque savings banks, has formulated an order for this *caja* to take certain actions (*requerimiento de actuación*). Banco de España appealed against this order. The Constitutional Court, while acknowledging the powers of the autonomous community regarding supervision, found that the community was entitled to formulate "evaluations and supervisory recommendations" (*valoraciones y recomendaciones prudenciales*), but not any technical assessments as to their execution, and even more so, it was not competent to issue any orders. According to the ruling of the Court, the government of Basque Country should have notified *Banco de España.* It thus concluded that the revocation of provisions ordering savings banks to take certain action was correct.

crises of credit institutions,. Two tiers of assistance have been provided: one is the procedure for reorganization and consolidation of the sector, supporting the process of integration between healthy institutions (Art. 9) by strengthening their capital buffers. In addition, the assistance entails mergers of financially vulnerable institutions (Art. 6 and 7) and, in more complex cases, interventions in order for them to be absorbed by a stronger, stable institution.

Decree-Law no. 11 dated 9 July 2010[49] introduces some significant changes as regards restructuring of the Spanish financial system, particularly of savings banks. The fundamental objective of the reform is to strengthen the savings banks as well as the national financial system and general economy by enhancing credit flows. The doctrine refers to this process as "bancarization of savings banks" (*bancarización de las cajas de ahorros*).[50] Its purpose was to put savings banks and banks on equal footing in respect of issuing shares of the same category and the degree of specialization of governing bodies.[51] Concerning what was in essence non-voting equity securities (*cuotas participativas*), the reform provided for the transfer of voting rights (*derechos políticos*) to their future addressees, which bears an influence on the establishment of the governing bodies of *cajas*; it also removed the individual holding limit (*eliminación del limite a la titularidad de cuotas participativas por un mismo titular*). Savings banks could now also be listed on secondary markets. The restructuring plan for the savings banks organizational model also entailed permission for them to perform financial operations through commercial banks, pursuant to Art. 5.1 and 2 of the legislation. The law also envisages the transformation of savings banks into special foundations (Art. 5.3) when they do not hold at least 50% of voting rights in the newly established commercial bank to which they transfer their activities. This means that such savings banks may no longer function as credit institutions. Another method of restructuring savings banks was to merge or integrate them in order to establish IPS institutions (Institutional Protection Systems).[52] Savings banks that merged could then establish a new *caja de ahorros*. Their consolidation under IPSs resulted in the establishment of a new bank that acted as a central body of the IPS, while savings banks carried on with their activities. This central body is responsible for fulfilment of the regulatory requirements of IPS, its legal status is that of a corporation (*sociedad anónima*), and savings banks must hold at least 50% of its shares. This central institution could be one of the institutions composing the IPS or another credit institution which was an investee of all of them and which thus

[49] Órganos de gobierno y otros aspectos del régimen jurídico de las Cajas de Ahorros Real Decreto-ley 11/2010, de 9 de julio. RCL 2010\1913.

[50] Marìa Cruz Mayorga Toledano (n 44) 107.

[51] *Informe de Estabilidad Financiera del Banco de España*, (March 2010) 48, quoted after: ibid.

[52] The Capital Requirements Directive (2006/48; CRD) transposed into Spanish law by Decree 216/2008 dated 15 February. This directive obliges Member States to ensure that their credit institutions have at all times sufficient capital resources as stipulated in the CRD, in accordance with the relevant credit risk profile. Pursuant to Article 80, the relevant authorities may exempt from some of these requirements the credit risk capital (0% risk exposure) of institutions that are members of an IPS; this provision is mirrored in Art. 26.7 of the Spanish Decree. See also: Antonio Embid Irujo, 'El derecho pùblico (IV Congreso de la Asociaciòn Española de Profesores de Derecho Administrativo, Palma de Mallorca, 11 y 12 de febrero de 2011)' in Avelino Blasco Esteve (n 2).

formed part of the system. Moreover, the decree stipulated that an institution may opt out of the IPS (the agreements have a minimum term of ten years, plus at least two years' notice should an institution want to leave the IPS, evaluation of financial liquidity of an entity planning to withdraw from the system).

Legislative Decree no. 2 dated 18 February 2011 (for the strengthening of the financial system) intensifies the ongoing restructuring process, and its fundamental objectives were to oblige credit institutions to meet higher solvency and credit stability levels, to encourage private investors to invest in the capital of institutions, and to oblige all entities receiving aid from FROB to transfer all of their financial activities (*actividad de intermediación*) to commercial banks. There are also plans to employ the requirements established in Basel III regarding financial institutions solvency in order to expedite the process of savings banks restructuring. The Decree obliged savings banks to spin off all of their banking activities to newly-created bank institutions (it also required them to increase their core capital to a level in excess of the requirement that applied to banks).[53] **Decree-Law no. 2 dated 3 February 2012** on consolidation of the financial sector introduced some further changes in respect of restructuring of savings banks. Provisions under Title III apply to those savings banks which had transferred their financial activities to banks, or which had transformed into special foundations. Articles 5 and 6 of Decree 11/2010 have been amended (changes regard the requirements for joining an IPS). Moreover, the Decree introduces some changes concerning savings banks that had transformed into special foundations (the state reserves its supervision and control competences over those foundations, which operate in more than one autonomous community).[54] Decree 2/2012 introduces certain requirements concerning simplification of the organizational structures and operational aspects of savings banks that perform their activities indirectly. The law also specifies that a savings bank ought to relinquish its license to operate as a credit institution and be converted into a special foundation if its share of voting rights falls below 25 percent.[55]

c) Legal status of savings banks

As frequently emphasized in the Spanish subject literature, the savings banks have been the focus of lively disputes regarding their legal

[53] See: Juan Antonio Carrillo Donaire, 'Intervención de entidades de crèdito en crisis' in Santiago Muñoz Machado, Juan Manuel Vega Serrano (n 9) 796. 12 integration processes were finalized: 7 in the form of mergers or buy-outs; 5 in the form of establishment of IPSs, which reduced the number of savings banks from 45 to 17 (in early 2012, this number fell to 9). CatalunyaCaixa, established as a result of the merger of Catalunya, Tarragona and Manresa, was "rescued" by FROB in late September 2011. The fund transferred EUR 1.719 billion to increase the group's core capital.

[54] María Cruz Mayorga Toledano (n 44) 114 ff.

[55] Juan A Ureña Salcedo (n 43) 386. The author cites the example of Law 3/2010 dated 13 May, amending Law 4/1997 dated 10 July, concerning Savings Banks of Castille-La Mancha, which stipulates that Consejo del Gobierno de la Junta de Comunidades de Castilla-La Mancha will have to approve the decision of savings banks that want to withdraw from operations as credit institutions.

classification.[56] They have been categorized as public, private and *tertium genus*; they have been attributed the features of foundation-enterprises (*fundación empresa*) or of special foundations.[57] This debate was not definitively settled by rulings of the Constitutional Court: judgement 10/2005 of 20 January highlights the market nature of savings banks by subjecting them to local taxation, while in its judgement 49/1988 of 22 March, the same Court asserts that savings banks are special foundations, which is determined by their position as credit institutions. On the one hand, savings banks certainly originated as foundations (within the scope of their operations and assignment of profits)[58]; on the other hand, their activities have a clearly commercial purpose – they operate within the market system and they take risks and charge/cover interest from return on capital in the form of credits or financial assets (*asumiendo riesgos y cobrando y otorgando interesem por rendimientos de capitales en forma de crèditos o de activos financieros, con lo que quedan supeditadas al marco de la liberdad de la empresa recogido en el articulo 38 de la Constitución*). Savings banks doubtlessly operate as financial entities, as they accept deposits and grant credits, generating profits from such intermediation. It is also worth emphasizing that there exists a connection between these institutions and the territory of a given autonomous community. They are, in a way, "regionalized", which also follows from their "foundation" aspect – profits are channelled back to projects that fall under their social mandate, including public-benefit works. The complex legal status of savings banks has resulted in their diverse classification in the Spanish doctrine, which is nonetheless based on their public character. Savings banks were caught up in a public-private dichotomy. On the one hand, they pursued market activity, subject to the private regime which is based on parties' freedom of contract regarding deposits or credits; on the other hand, they were subject to administrative interventions (control, supervision), likening them to banks. The third aspect was related to their organization, which was also governed by the regulations of autonomous communities.[59] This situation ment that savings banks were subjected to three

[56] ibid 386. See also: Álvaro Cuervo and others (eds), *Manual del sistema financiero español* (Ariel Economía y Empresa, Barcelona 2012) 247-262.

[57] Spanish experts in the field, Martín Mateo, García Trevijano, Sosa Wagner, Perulles Basas tend to lean towards the public nature of savings banks, while Boi Raspall, Aurelio Guaita, F Núñez Lagos, De Miguel or Gonzàlez Moreno are more inclined to think of them as private entities. Sebastiàn Martìn-Retortillo and Ramon Tamames, on the other hand, are of the opinion that savings banks are hybrids of the two. Fernando Garcìa Rubio (n 40) 640.

[58] The first savings banks of Western Europe were established in the second half of the 18th century, in Germany and Switzerland. In Spain, they started to emerge in the first half of the 19th century. Historically, they originated from mount-of-piety-style pawn shops, which were set up to counter usury. The first *caja de ahorros*, Jerez, was established in 1834. The statute of savings banks (*Estatuto de las Cajas Generale de Ahorro Popular*), adopted on 14 March 1933, reinforced state interference in respect of investments and it confirmed the social mandate of these institutions. The Decree of July 1957 assigned all functions related to administration of savings banks to the Ministry of Treasury (*Ministero de Hacienda*). Decree 1838/1975 regulated the process of establishing new savings banks and the distribution of funds, thus stimulating mergers and the participation of receivers in governing bodies. The real breakthrough in the regulation of the legal system of savings banks was brought about by Decree 2290/1977 dated 27 August: the operations of savings banks were put on a par with those of banks, and the provisions regarding governing bodies were based on the principle of representation (*principio de representividad*).

[59] Fernando Garcìa Rubio (n 40) 645.

different regimes: the EU regime, the state regime, and that of the autonomous communities, which certainly aggravated problems related to organizational and financial issues. The state exercises its functions concerning control over solvency (financial liquidity, capital, risk) – these tasks are carried out by *Banco de España*. The autonomous communities, on the other hand, have powers regarding the organization and operations of the *cajas* – their establishment, mergers, expansion or liquidation.

d) Governing bodies of savings banks

Provisions concerning the functioning of savings banks are stipulated by the LORCA law of 2 August 1985, which has been amended a number of times since its first introduction.[60] The main governing bodies of savings banks are the General Assembly (*Asemblea General)*, the Board of Directors (*Consejo de Administración*) and the Control Committee (*Comisión de Control*). Moreover, they all have a General Director (*director general*), as well as Investment, Remuneration and Nominations and Social Welfare Committees (*Comisiones de Inversiones, Retribuciones y Nombramientos y Obra Benèfico-Social*).[61] The General Director, who must have appropriate professional expertise and experience, is appointed by the Board of Directors (*consejo*). This appointment is then subject to approval of the General Assembly (*asemblea*). The General Director may not combine this function with any other paid activities besides the administration of his or her own assets. The Board of Directors appoints a Committee of Remuneration and Nominations, composed of not more than five Board members, chosen by the Board itself. This Committee's functions are to report on the general policy of remuneration and incentives to the members of the Board of Directors and the Control Committee, as well as on all other management positions, and to monitor compliance with this policy. The Investment Committee, also established as part of the Board of Directors and composed of not more than three members, is in charge of reporting to the Board of Directors on the savings bank's strategic investments (taken up individually or through group members), as well as on the financial viability of those investments and their adequacy to the budget and to the strategic plan of the entity. The task of the Social Welfare Committee is to to guarantee that the savings bank's welfare projects are executed properly. Its members are appointed by the General Assembly (which may include a representative of the autonomous community in which the savings bank has its seat, as well as a representative of each autonomous community in which the savings bank has more than 10% of its total deposits). Moreover, an Audit Committee may be appointed (*Comitè de*

[60] Law of 22 November 2002 on measures to reform the financial system (*Ley de medidas de reforma del Sistema Financiero*); Law no. 62 dated 30 December 2003 on fiscal, administrative and social measures (*de medidas fiscales, administrativas y del orden social*); Law no. 5 dated 22 April 2005 and the already discussed Law no. 11 dated 9 July 2010 on governing bodies and other legal aspects of savings banks (LORCA). LORCA provisions are further elaborated in the Royal Decree dated 21 March 1986, amended with Decree no. 596 dated 27 May 1998. For more on governing bodies of savings banks and their functions, see: Alvaro Cuervo (n 56) 256 ff.

[61] Title II *Órganos de Gobierno de las Cajas de ahorro*, Art. 3, Decree-Law no. 11 dated 9 July 2010, BOE 169 of 13 July 2010.

Auditorìa), which is responsible for hiring external auditors and is in charge of supervision of internal audits and control systems in place at a given entity.

Certainly one of the principal problems pertaining to management of savings banks, which came to the fore with the advent of the crisis, was to be found in their exceedingly strong political connections. The LORCA law, as well as legislation adopted by individual autonomous communities, created an elective system which favoured former members of the regional executive, provincial councilmen or deputies of autonomous communities, whose experience in the field of managing financial institutions left a lot to desire.

As underscored by Javier Guillèn Caramès, the 2010 savings banks reform concerning their organization and governing bodies was primarily aimed at strengthening the professional capacity of governing bodies of savings banks.[62] It was necessary to adjust the degree of specialization of members of those governing bodies to the difficult market conditions under which they had to make strategic decisions. Article 3 (11), in its part relating to the Board of Directors (*Consejo de Administración*) stipulates that its members are required to have the expertise and experience necessary for performing their functions *("deberán poseer, los conocimientos y experiencia específicos para el ejercicio de sus funciones"*).[63] The necessary experience is construed as having previously performed executive functions, or having held senior administrative, control or advisory positions in financial entities, private or public, of a similar profile.

Moreover, Article 3.2 of the Decree introduced a series of requirements related to the ethical aspect of management bodies (Assembly, Board of Directors and Control Committee), stipulating that members of these organs are to perform their functions exclusively for the good and in the interest of their respective savings banks, paying heed to commercial and professional integrity.[64] These are very general provisions and they require further elaboration.

The Decree also establishes fit and proper criteria regarding incompatibility of functions, especially of those of a political nature. Elected political representatives and employees of central, autonomous or local administration may not serve in the governing bodies of savings banks. They are also prohibited from holding posts in other entities of the private or public sector that are either controlled by the savings bank or belong to the same banking group. Another measure to curb undue political interference was to reduce the ceiling on voting rights of public administration entities to 40%, thus making space for the representation of chambers of commerce or foundations, which may hold up to 10% of voting rights. It warrants mentioning, however, that in the savings banks which have spun-off their banking activities to commercial banks, the share of "traditional" stakeholders may be higher.[65]

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[62] Javier Guillèn Caramès, 'Reflexiones acerca nuevo règimen jurídico de las cajas de ahorros' in Manuel Rebollo Puig (n 40) 623-624.

[63] Decree-Law no. 11 of 9 July 2010, BOE 169 of 13 July 2010.

[64] "Los componentes de los órganos de Gobierno ejercerán sus funciones en beneficio exclusivo de los intereses de la Caja a que partenezcan y del cumplimiento de su función social, debiendo reunir (...), los requsitios de honorabilidad comercial y profesional".

[65] More on this topic: Javier Guillèn Caramès (n 62) 624-625.

At the EU level, regulations regarding management executives focus primarily on aspects related to remuneration and incentive systems. One of the most notable documents regarding this issue are the Guidelines on Remuneration issued by ESMA[66] on 11 June 2013, which aim to ensure coherent and improved implementation of MiFID I[67] regulations concerning conflicts of interests and business practices related to remuneration. The document contains not only guidelines, but also examples of good and bad remuneration policies.[68] It obliges companies to implement and monitor appropriate remuneration policies[69], to introduce relevant control systems and business practices providing for the protection of customers' best interests.

Systems of remuneration for top-class executives of failing Spanish banks were far from rational, not to mention the ethical aspects of such conduct in the face of the difficult situation of the state and its citizens. Some fitting examples are supplied by the remuneration packages received by the director general of Caixa Galicia (EUR 18 million), the director general of Cajasur (EUR 4.3 million) or the director general of Caja Segovia (EUR 6 million).[70]

Pay packages of commercial bankers were also gargantuan, and this did not change with the onset of the financial crisis: the director general of Banco Santander made EUR 5.6 million, while the president of BBVA made EUR 5.3 million.[71] This situation was mirrored in savings banks – in parallel with restructuring processes, accompanied by soaring job cuts – the number of members of management bodies was successively increased (for example, a *consejero general* receives between EUR 300 and 1,500 for participation in each general meeting; according to estimates, total remuneration to *consejeros* stood at about EUR 10 million in 2010, plus EUR 15.6 million in allowances).[72]

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[66] The European Securities and Markets Authority (ESMA) with is seat in Paris is one of the three European Supervisory Authorities (ESA) appointed on 1 January 2011. ESA has replaced the Committee of European Securities Regulators (CESR), the Committee of European Banking Supervisors (CEBS) and the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS), which all operated until the end of 2010.

[67] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (MiFID). For more on the subject of regulation of the financial market in Spain and on functions fulfilled by regulatory institutions, see Carbajales (n 8).

[68] <www.esma.europa.eu/content/Guidelines-remuneration-policies-MiFID> accessed 1 June 2015.

[69] Directive 2010/76/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2006/48/EC and 2006/49/EC as regards capital requirements for the trading book and for re-securitisations, and the supervisory review of remuneration policies (the so-called CRD III). Law no. 2 dated 4 March 2011 (*de Economía Sostenible*) transposes the above-mentioned directive to the Spanish law. Article 27 of the law stipulates the necessity to properly manage the risk of financial entities as the basis for strengthening the requirement of remuneration systems transparency. As regards credit institutions and investment companies, the law tightens the transparency requirements in order to promote "stable and effective risk management" (Art. 27.2, "*una gestión del riesgo solida y efectiva*").

[70] Joan Ramon Sanchis Palacio (n 22) 107.

[71] ibid 108.

[72] ibid 108.

e) The future of savings banks

Savings banks were undoubtedly one of the weakest links in the Spanish banking system, and the process of their restructuring was directed at solving the most pressing organizational and competence-related issues. Therefore, only those which adhered the most faithfully to the reform regime stand a chance of survival, while the rest are bound to disappear from the map of Spanish financial institutions.[73]

Law no. 9 dated 14 November 2012 on the restructuring and dissolution of credit institutions, amending Decree-Law no. 11 dated 9 July 2010, was another step on the path toward the transformation of savings banks. This law focuses on the situation of those savings banks which had spun-off their banking activities to commercial banks: *cajas* that had lost control over such commercial banks, or which retained less than 25% of their voting rights, were obliged to transform into special foundations, thus definitively relinquishing their status of credit institutions.

The reorganization of the savings banks system is one of the key structural reforms of the Spanish banking sector. It remains to be determined whether the method, that is their "bancarization", was the correct one, as it failed to account for the special nature and function that savings banks should perform for their local communities. With the mobilization of enormous public funds, these entities have been practically eliminated, by way of restructuring measures that transformed *cajas* into institutions of a strictly banking profile. Certainly, savings banks, with their management model, political interference and deformation of social mandate which they were to exercise in the territory covered by their operations (as well as the blurred allocation of competences and supervisory powers to the state and the autonomous communities) aggravated the destabilization of the Spanish system of credit institutions.

An analysis of the implemented solutions leads to the conclusion that all of these measures were meant as *ad hoc* fixes, and that they often failed to account for the long-term perspective. The newly established institutions did not constitute "a new model", but rather merely a modified version of existing institutions (banks). The discussed reforms of Spanish savings banks, albeit entailing changes in the management system of savings banks and some measures to curtail political interference, focused primarily on their transformation into banking institutions – that is, into the very type of institutions whose insolvency and speculative activities had disrupted the stability of the Spanish banking system in the first place.

IV. PROTECTION OF INVESTORS IN THE LIGHT OF THE REGULATIONS ON THE SPANISH DEPOSIT GUARANTEE FUND OF CREDIT INSTITUTIONS AND OF THE DEPOSIT GUARANTEE SCHEMES DIRECTIVE

The basic function of any deposit guarantee fund is to shield deposit holders in a situation when a financial institution to which a deposit was

[73] María Amharo Salvador Armendáriz, 'Del concepto de entidad de crèdito en el derecho español' in Santiago Muñoz Machado, Juan Manuel Vega Serrano (n 9) 331-333.

entrusted is not able to fulfil its reimbursement obligation.[74] The mechanism of guaranteeing deposit reimbursement helps to prevent the risk of panic and mass withdrawal of cash by clients, which would lead to insolvency of financial institutions and the impossibility of asset recovery.

Funds that guarantee the reimbursement of deposits serve as one of the legal protection measures in a relationship between clients and financial institutions essentially based on information asymmetry. The funds serve to safeguard consumers in a situation involving potential loss of their deposits, in which they are left only with the right to claim reimbursement. These conditions raise uncertainty and risk which become even greater in the event of any adverse market movement.[75]

The Spanish Deposit Guarantee Fund (*Fondo de Garantía de Depósitos*) was created in November 1977 in order to guarantee the clients of banking institutions the possibility to recover a certain amount of money in the event of a liquidity crisis (suspension of payments, bankruptcy or loss of solvency).[76] Initially, the guarantee amounted to 500,000 pesos and was later raised to a sum of EUR 100,000.[77] There were three deposit guarantee funds operating in Spain – one for the banks, one for the savings banks and one for the *cooperativas de credito*.

The Royal Decree 16/2011 of 14 October merges those three funds, establishing the new Deposit Guarantee Fund of Credit Institutions (*Fondo de Garantía de Depósitos de Entidades de Credit*o). In addition, taking into account the difficult economic situation, it is pointed out that the Guarantee Funds, as an important tool to manage the problems of banking institutions, should extend their remit not only to guarantee the reimbursement of deposits in case of bankruptcy or insolvency but also to take part in the process of safeguarding the stability and proper functioning of credit institutions[78] (the functions in which the Fund for Orderly Bank Restructuring (FROB) is involved). The main function of the Fund was protection of deposit holders who are not always able to assess the activity profile and reliability of an institution to which they entrust their money. The Fund, however, as intended by the Spanish legislator, was to serve a somewhat dual function (which undoubtedly was something of a modification of the functions traditionally ascribed to such types of client protection mechanisms). In the preamble of

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[74] Jaime Ponce Huerta, 'Introducción a los mecanismos de protección de los clientes de servicions bancarios' in Santiago Muñoz Machado, Juan Manuel Vega Serrano (n 9) 659-652.

[75] See also: Pilar Gómez-Fernández-Aguado, Antonio Partal-Ureña, Antonio Trujillo-Ponce, 'Sistemas de Garantía de Depósitos: Impacto de la propuesta de la EU en el sector bancario español' [2013] Università Business Review 1.

[76] See Álvaro Cuervo (n 56) 269-273. See more on the Fund: J Antón, 'El Fondo de Garantía de Depósitos' (1980) 3 Papeles de Economía Española 184-191; I Fainè, 'La evolución del sistema bancario español desde la perspectiva de los fondos de garantía de depósitos' (May 2005) 8 Estabilidad Financiera 109-126; P Campos, M Yagüe and I Chinchetru, 'Un nuevo marco de seguro de depósitos para España' (May 2007) 12 Estabilidad Financiera 93-110, as cited in: ibid.

[77] The Royal Decree 1642/2008 of 10 October amending Art. 7.1 of the Royal Decree 2606/1996 of 20 December; the amounts were confirmed in Decree no. 628/2010 transposing Directive 2009/14/EC of 11 March.

[78] M Josè Bobes Sànchez, 'El fondo de Garantía de Depósitos' in Santiago Muñoz Machado, Juan Manuel Vega Serrano (n 9) 659-652.

Royal Decree 16/2011 it is also indicated that the Fund contributes to the solvency and proper functioning of banking institutions by avoiding the ultimate and most expensive operation which is the withdrawal of deposits.

According to Art. 3 of the decree, the Fund possesses juridical personhood and capacity to act in pursuit of its objectives. The Fund pursues public objectives (stability of the financial system and, indirectly, protection of deposit holders), and it mandates the membership of credit institutions, as well as their compulsory financial contribution to the Fund.[79] It is overseen by a managing committee consisting of 12 members, among which 6 of which, including the President, are to be designated by the *Banco de España*, while the remaining 6 members are chosen by various associations representing credit institutions participating in the Fund.

All Spanish credit institutions are required to join the Fund, while the membership of foreign branches of banks operating in Spain depends on whether they have been granted a licence in another EU Member State (and joined an equivalent Fund there). The banks of third countries will be required to join the Fund only if they are not members of a similar deposit guarantee scheme in their country of origin (or else they will be required to pay a supplementary amount if the sum guaranteed in their country of origin is lower than the sum secured at the EU level). The financial assets of the Fund come from annual payments by credit institutions, which vary depending on their type. The institutions are required to make contributions under pain of being excluded from the Fund.

In the case of an institution from another Member State, a lack of due payment to the Fund will result in the *Banco de España* notifying the national regulator (it will be possible to propose the exclusion of an institution from the Fund: after obtaining the approval of the regulator, the Fund will notify a foreign branch of its exclusion upon two months notice). It is also permitted that the financial assets of the Fund may originate from stock market operations, loans and other forms of debt.[80]

The guarantee granted by the Fund is EUR 100,000 (according to Directive 2009/14/EC, which was transposed into the Spanish legal system by Royal Decree 628/2010 of 14 May). The scope of the deposits covered by the Fund does not include *inter alia* bills of exchange (*pagares*) issued by credit institutions. The guarantee of reimbursement of deposits covered by the Fund is to be invoked when the conditions foreseen by the law are met.[81] The figure of EUR 100,000 is a result of the battle which took place at the EU level and of the panic caused by the crisis (the increase of the guaranteed amount was also motivated by the USA's activity in this regard). It is set as both the minimum and the maximum amount in order to avoid competition among countries in terms of guarantee conditions offered to clients.

Payment of the guaranteed sum to deposit holders is contingent upon the Central Bank's determination that a given institution is unable to immediately reimburse depositors for reasons related directly to its financial

[79] ibid 912.

[80] According to Art. 6 of Decree 16/2011 of 14 October, amended by Decree 19/2011 of 2 December and Decree no. 2/2012 of 13 February.

[81] See also: Manuel Izquierro Carrasco, 'Règimen jurídico de la protección de la clientela en los servicios prestados po las entidades de crèdito' in Santiago Muñoz Machado, Juan Manuel Vega Serrano (n 9) 730-732.

situation. The panic on the markets in 2008 led to the introduction of changes to the Fund consisting in shortening the time limits foreseen by the legislation – currently the Bank of Spain has five days upon receiving information on insolvency to issue a resolution. The payment of guaranteed sums should take place within 20 days from the Bank's decision (in the event of a large number of deposit holders, or in respect of accounts held in other countries, it is possible to prolong this period by another 10 business days).

The Law 9/2012 of 14 November, however, introduced changes in this respect which raised concerns that they undermined the principle of investor protection. Article 8.1. b) stipulates that the decision of the Bank of Spain shall be made in the "shortest time possible" (*tomará dicha determinación a la mayor brevedad posible y, en cualquier caso, deberá resolver dentro del plazo máximo que se determine reglamentariamente*), after determining that an institution is not able to pay out its deposits. The modification emphasized the second function of the guarantee fund, which is to safeguard the solvency and stability of functioning of financial institutions.[82] The Memorandum of Understanding (MOU) of 23 July 2012[83] (BOE of 10 December 2012) on financial-sector policy conditionality was entered into following a request for financial assistance from the Spanish government. In sections 20 and 28, the MOU lays down the requirement to separate the functions of the FROB and the FGD in order to avoid potential conflicts of interest between the Funds. Article 11 of the Law 9/2012 of 14 November details the functions of the FGD concerning support for financial institutions (in many different forms: through guarantees, granting loans, acquisition of assets or liabilities, exercising administrative functions or entrusting them to third parties). These functions may be exercised as part of an approved recovery plan. The FGD may also request the FROB to facilitate its participation in the measures foreseen by the recovery plan. In conclusion, the resolution functions are entrusted to the Fund for Orderly Bank Restructuring (FROB) while the Deposit Guarantee Fund (FGD) cooperates with it in this area[84]. FROB informs the Bank of Spain, the Ministry of Economy and Competition, and the FGD of launching the resolution process, while the recovery plan itself is supported by funding granted by the FGD.

When comparing the competences presented above with the regulations existing in other Member States concerning deposit guarantees and institutions responsible for recovery processes, it may be concluded that the Spanish legislator has not made a sufficiently clear distinction between the guarantee and the resolution functions. Royal Decree no. 6 of 22 March 2013 introduces subsequent changes, adapting the functions of FGD to the problem of preference shares ("preferentes"), allowing for *underwriting* of the debt of SAREB (*Sociedad de Gestión de Activos Procendentes de la Restructuración Bancaria*) by the Fund, and for buying the shares of institutions which have transferred their assets to SAREB.

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[82] M Josè Bobes Sànchez (n 78) 918.

[83] <www.bde.es/bde/en/secciones/prensa/infointeres/reestructuracion/> accessed 1 June 2015.

[84] Art. 57 of the Act 9/2012 of 14 November establishes the rules of cooperation of FROB with selected authorities such as the Bank of Spain, CNMV or the FGD.

The Deposit Guarantee Fund (FGD) (similarly to the majority of similar institutions) was established in order to ensure protection of investors and their savings. The Spanish legislator, however, foresaw an additional function which has become even more relevant over time – participation in resolution processes of financial institutions. Ultimately, the FGD has become the key instrument in safeguarding the financial system, initially by participating in funding of financial institutions, and subsequently by participating to the full extent in bank resolution processes.

The division of functions between the FGD and the FROB – the FGD being responsible for protection of deposit holders and FROB for restructuring and resolution measures addressed at banks – was blurred. The FGD became the main channel for funding to financial institutions which found themselves in a critical situation. It seems unjustified to assign this function to the Fund, which should first and foremost be the guardian of investor safety and the guarantor of the timeliness of deposit reimbursement in situations where a financial institution itself cannot meet its repayment obligations. This solution resulted from the need to adapt to the current situation (the growing problem of public debt and insolvency of banks, and then the problem of the so-called *preferentes*), but it did not take into account the functions traditionally ascribed to such financial institutions and the long-term effects of the adopted solutions (weakening protection of investors).[85] The solutions adopted in the process of counteracting the financial crisis prioritize measures and mechanisms aimed at rescuing banking institutions, but seem to forget about the clients and the safety of their investments.[86] The criticism targeting these solutions comes therefore as no surprise.

In order to increase the level of protection for investors, on 12 July 2010 the European Commission proposed harmonisation of the rules on funding mechanisms, scopes of activity and promptness of reimbursement by the national deposit guarantee funds.[87] The final objective is to establish a common deposit-guarantee scheme which will be the culmination in the formation of the European Banking Union. The Commission's proposal sets out that, until 2017, banks would be under an obligation to reimburse a deposit holder upon demand up to EUR 100,000 within one week. A bank's contributions to the system should be conditional upon the total amount of deposits of a given institution (the proposed share is 0.8%).[88]

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[85] See also: opinion of the European Central Bank of 10 April 2013 on the Deposit Guarantee Fund (CON/2013/25). In the opinion of the ECB, the assets of deposit guarantee funds may be used *to finance resolution* as this allows for synergies between such schemes and resolution financing, but it is of the utmost importance that this does not compromise in any way the core function of deposit guarantee schemes in protecting insured deposits, p. 2.

[86] Joan Ramon Sanchis Palacio joins in the criticism of the Spanish model of functioning of the Deposit Guarantee Fund (FGD). In this author's opinion, the FGD should not be used to revive sick assets or to cover the losses of the banks undergoing resolution processes only to be later sold to other private banks. FGD should guarantee the reimbursement of deposits held at the banks but should not cover losses of the bank's shareholders – this risk should not be covered by the Fund's guarantee (n 22) 91 ff.

[87] <http://ec.europa.eu/internal_market/bank/guarantee/index_en.htm> accessed 1 June 2015.

[88] <www.europarl.europa.eu/oeil/popups/summary.do?id=1340959&t=e&l=en >accessed 10 July 2015.
In the plenary session on the 15 April 2014 the European Parliament adopted in the second reading the draft Deposit Guarantee Schemes Directive.

V. SPANISH CREDIT INSTITUTIONS – OUTLINE OF THE SYSTEM

Together with Spain's accession to the European Union in 1986, an intensive process began of adjusting national legislation to EU requirements, including with regard to banking law.[89] The key act was Royal Decree no. 1298 dated 28 June 1986, in which the EU concept of a credit institution was adopted (*entidad de credito*).[90] According to the Decree, the notion of a credit institution referred to private banks, savings banks, cooperative banks and other credit institutions (registered in the register of the Department of Treasury and Financial Policy of the Ministry of Economy and Finance[91], mortgage loan companies and financial institutions).

Among the legal acts regulating the functioning of banking activity in Spain is Law no. 26 dated 29 July 1988 on discipline and intervention of credit institutions – its adoption marks an important milestone in the history of Spanish banking law. Law no. 3 dated 14 April 1994 adapts the Spanish regulations on credit institutions to the requirements of the Second Banking Directive. The provisions of this Law ultimately set up conditions enabling branch offices of foreign credit institutions from another Member State to be opened in Spain, and establish a system based on notifications submitted to the Bank of Spain, an essential element for the creation of the Single Market for financial services. By the same token an effective passporting system[92] begins to operate based on the rule that the duty of supervising the operations of authorised credit institutions belongs to the regulator of a Member State

[89] The First Council Directive 77/780/EEC of 12 December 1977 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (OJ L 322, of 17.12.1977 – the so-called First Banking Directive); Second Council Directive 89/646/EEC of 15 December 1986 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (OJ L 386 of 30.12.1989 – the Second Banking Directive). According to the definition contained in the above Directives, a credit institution is "an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account". The codifying statute was Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ L 126 of 26.05.2000), later recast by the effective Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (OJ L 177, of 30.06.2006): according to Article 4 of the Directive "credit institution" means: "an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account".

[90] More on the subject: F Sámchez Calero, 'Adaptación de la normativa de los establecimientos de crédito al ordenamiento de la CEE' (1986) 23 Revista de Derecho Bancario y Bursatil 463, as cited in: María Amparo Salvador Armendáriz, 'Del concepto de entidad de crèdito en el Derecho español: evolución y perspectivas' in Santiago Muñoz Machado, Juan Manuel Vega Serrano (n 9) 286.

[91] See Royal Decree no. 896 of 28 March 1967.

[92] The regulations of the Markets in Financial Instruments Directive recently adopted by the European Parliament concerning requirement of establishing by third countries (such as Switzerland or the USA) of branch offices in Member States of the EU in a situation of providing services to retail clients and elective professional clients raised much concern among global market participants.

from which a given institution originates, within a framework for cooperation between the regulators.[93]

After many changes in the Spanish legal regime which were not always consistent in terms of defining a credit institution, Art. 1 of Royal Decree no. 1298/1986 included the following entities in the definition of credit institutions: the Official Credit Institute (ICO), banks, savings banks and the Spanish Confederation of Savings Banks, as well as credit cooperatives (cooperative banks).[94]

Banks, savings banks and cooperative banks are the three traditional deposit institutions of the Spanish banking system.[95] Among the primary legislative acts regulating the functioning of these institutions, the following should be mentioned: *Ley de Ordenación Bancaria* of 1946, Law no. 2 of 14 April 1962 *Bases de Ordenación del Crèdito y de la Banca* (containing more comprehensive regulations, encompassing savings banks and agricultural savings banks, and drawing distinctions between issuing banks, national banks and private banks). The banking sector was liberalised, which facilitated access to the banking profession. Subsequently, in order to limit excessive bankarisation and specialization of businesses, two decrees were issued: one in 1962 laying down detailed provisions on industrial banks, and a similar one in 1963 on commercial banks.[96] As pointed out by Juan Manuel Vega Serrano, the main deficiency of LOCB was excessive liberalisation of the banking sector, which increased the level of systemic risk while it failed to equip the authorities with adequate legal and technical instruments indispensable for effective supervision.

In turn, Law no. 26 dated 29 July 1988 (LDIEC) sets out the rules for discipline and intervention of credit institutions.[97] As pointed out in scholarly works on the subject, regulations of the banking sector in Spain are not fully in compliance with the modern model of rule of law. Scholars point out that the competencies of the supervision authorities are limited, especially in the context of an insufficiently clear definition of the obligations of credit institutions. When compared with other models, the Spanish system displays many problematic aspects.[98] Spanish banking sector regulations do not also sufficiently respond to the demands of consumer protection. In order to protect clients of financial services, Law no. 44/2002 dated 22 November on reform measures of the financial system (medidad de reforma del sistema financiero) established three commissions: Commission for the Protection of Financial Services Clients (*Comisionado para la Defensa de Servicios*

[93] M Amparo Salvador Armendáriz points to the increased importance of cooperation between the regulators as one of the consequences of the financial crisis. With regard to the Spanish regulations, he invokes Law no. 6 of 11 April 2011 modifying Law no. 13 of 25 May 1985 de coeficientes de inversión, recursos proprios y obligaciones de información de los intermediarios financieros, Law no. 24 of 28 July 1988 del Mercado de Valores and Royal Decree 1298/1986 of 28 June (the Spanish legal order is adapted to the requirements of Directive CRD II; 2009/111/EC).

[94] Taking into account the modifications introduced by Royal Decree-Law 14/2013 of 29 November, de medidas urgentes para la adaptación del derecho español a la normativa de la Unión Europea en materia de supervisión y solvencia de entidades financieras.

[95] Álvaro Cuervo (n 56) 243-280.

[96] Juan Manuel Vega Serrano, 'La regulación bancaria española', in Santiago Muñoz Machado, Juan Manuel Vega Serrano (n 9)151.

[97] More on the subject: ibid 144-154.

[98] ibid 144.

Bancarios), Commission for the Protection of Investor (*Comisionado para la Defensa del Inversor*) and Commission for the Protection of the Insured and Participants of Pension Schemes (*Comisionado para la Defensa del Asegurado y del Partícipe en Planes de Pensiones*). The powers of these commissions, however, were very limited. They were explicitly defined as "bodies devoid of executive or enforcement competencies" and were closely linked to sectoral supervision authorities (their scope of powers was defined by these authorities). The commissions id not have their own administrative infrastructure and they were assigned to the "complaints services"[99] which had begun functioning earlier. Taking this into account, the commissions had practically no possibility to act independently. Moreover, their functioning remained a purely theoretical proposition as, in reality, they were never convened: they were suspended even before they started their operations pursuant to Law no. 2 dated 4 March 2011 *de Economía Sostenible*.

The lack of appropriate measures in this area, especially when taking into account the critical situation faced by Spanish clients of banking services, should be assessed negatively. The examples of other countries were not followed, such as that of the USA which reacted decisively to the increased need for client protection and introduced the Dodd-Frank Act, comprehensively reforming the American financial system and establishing the *Consumer Financial Protection Bureau*; its independence from the Federal Reserve was ensured by the appointment of the Bureau's Director by the President of the United States upon approval of the Senate for a term of five years. Moreover, specific regulations were introduced on the Bureau's autonomy (an explicit prohibition of the Federal Reserve Board of Governors from intervening in the activity of the Bureau's Director, including inspections and disciplinary proceedings carried out by the Director).

Royal Decree 24/2012 provides for reducing the limit set on the fixed component of the remuneration of managing directors (*presidente ejecutivo*), *consejeros delegados* to EUR 500,000 (the previous limit was set at EUR 600,000). The limit also included the directors of those institutions in which the FROB does not hold a majority stake but which receive financial assistance from the FROB. For a credit institution in which the FROB holds a majority stake, this limit is EUR 300,000 in respect of senior officers and EUR 50,000 for other management officers.

Law no. 9/2012 was passed in order to meet the conditions imposed on Spain as part of the financial assistance granted to the Spanish financial sector (the Memorandum of Understanding on Financial-Sector Policy Conditionality of July 2012). This Law distinguished problematic assets of financial institutions and required their segregation (an external Asset Management Company was established), set up restructuring and resolution mechanisms to provide liquidity to credit institutions, provided for downsizing of banks' exposure to the real estate sector and set up new mechanisms in order to avoid, diminish or manage risk in the future. The memorandum itself set out specific milestones to be achieved, including *stress tests* of Spanish banks and their subsequent qualification based on the test results. Four categories were distinguished, taking into account capital

[99] ibid 145.

requirements, recapitalisation, restructuring and/or resolution, according to the principles of viability (*viabilidad*) and *burden sharing*, in order to ensure the stability and flexibility of the Spanish banking sector. By the end of September 2012, stress tests of financial institutions were conducted covering over 90% of the Spanish financial system. The classification distinguished four groups: Group 0 were credit institutions for which no capital shortfall was identified, Group 1 were institutions covered with the FROB intervention, Group 2 consisted of institutions with capital shortfalls which were in need of state aid, while Group 3 was made of credit institutions with capital shortfalls which were able to regain liquidity thanks to recapitalisation plans and without recourse to state aid.

VI. FINANCIAL PRODUCTS AND PROTECTION OF SPANISH INVESTORS– THE PROBLEM OF PARTECIPACIONES PREFERENTES

One of the greatest problems experienced by Spanish investors was the sale of so-called preference shares (*partecipaciones preferentes*) by the banking and financial institutions to their retail clients. This process started in 2008 and intensified in 2009. The intensified sales of preference shares resulted from the difficult situation facing the banking sector. Banks were looking for every possibility of raising capital to increase their liquidity; through the sales of shares, their clients' deposits were transformed from liabilities into assets.

In the first years of their commercialisation, preference shares attracted investors which may be described as professional. In December 2008, BBVA issued preference shares worth EUR 4 billion, followed by Caja Madrid with shares valued at EUR 3 billion. Subsequently, practically all banks began to use this financial instrument on a mass scale, convincing clients to invest in such instruments.[100] It is understood today that the banks profited from the trust of their life-long clients, and enticed them on a mass scale to invest in preference shares, ignoring the economic and financial profile of these investors (at the peak of the sales campaign banks were targeting pensioners who lacked the necessary knowledge about the investment, and who based their decisions solely on the opinions of financial advisers). These retail investors were attracted by the product's high rate of return, which was said to guarantee a steady and profitable income comparable to deposits or mutual funds. Basel III radically changed the situation. Such shares were no longer considered as components of core Tier 1 capital, and were reclassified to the second category (Tier 2 capital). As a result, they could no longer be used by banks to achieve the liquidity levels required in July 2012.[101] The banks therefore started persuading their clients

[100] María Concepción Rayón Ballesteros, Josè Antonio Gómez Hernández, 'Se puede recobrar el capital invertido en partecipaciones preferentes?' (2013) XLVI Anuario Jurídico y Económico Escurialense 83.

[101] See Marcos M Fernando Pablo, 'Nuevo marco europeo de supervisión financiera' in Manuel Rebollo Puig (n 40) 430-431. The Basel III Accord was adopted on 12 September 2010. The new accord required banks to hold a minimum 4.5% of common equity (up from 2%) and introduced a supplementary capital buffer of 2.5%, raising the capital requirements

to exchange preference shares for other products. It was at this moment that the risk connected with the investment in preference shares became apparent. The complex nature of this financial instrument did not match the profile or the knowledge of its typical investor, who was largely unaware of the risk involved.[102]

The preference share was in itself a relatively new instrument on the Spanish financial products market, and these shares only began to be regularly issued in the 1990s. They were classified by the Bank of Spain as financial instruments issued by a company and which did not grant voting rights (*derechos politicos*) to their holders, instead offering investors instead a fixed income of permanent duration dependent on the results achieved; however, the issuing institution usually reserved the right to their depreciation after 5 years, after prior approval by the supervisory authority (which in the case of credit institutions was the Bank of Spain).[103] The National Securities Market Commission (*Comisión Nacional del Mercado de Valores – CNMV*) defined preference shares, in turn, as "complex instruments[104] of high risk exposure, which may generate return but also losses on the invested capital".[105] The income depends on whether the issuer makes any profit. In terms of their structure, preference shares show similarity to subordinate debt (*deuda subordinada*), but in terms of their effect the rights which they grant to the investor are different than those deriving from ordinary shares[106]. These products were finally regulated with Law no. 19/2003 dated 4 July on the legal regulation of capital flows and foreign economic transactions and on specific measures for *money laundering prevention.* The direct consequence was the commencement of the process of selling preference shares to small investors.

Initially, the process of commercialisation of preference shares did not raise any concerns on the part of the CMNV. In the face of the need to improve the financial standing of credit institutions, these instruments seemed to be an ideal remedy. It was not until later that the authorities realised banks were offering a high-risk product to investors with a low level of financial market knowledge, unaware of the structure or characteristics of the instruments they purchased.

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to 7% in total. See also: Alberto Moro Suárez (ed), 'El sistema bancario español' (2009) 28 Papeles de la Fundación (Fundación de Estudios Financieros, Madrid) 124-134.

[102] It is currently estimated that around 700,000 people was affected by the problem of preference shares and the total investment in these shares amounted to around 30,000,000,000 euro. Around 58% of banking and financial institutions are estimated to have issued preference shares, as cited in: María Concepción Rayón Ballesteros, Josè Antonio Gómez Hernández (n 100) 84.

[103] <www.bde.es/clientebanca/glosario/p/participaciones.htm> accessed 10 July 2015.

[104] Pursuant to Art. 79 bis 8 of the Law on the Securities Market (*Ley de Mercado de Valores*), a financial instrument is considered to be complex if its liquidity (*liquidez*), assumed losses for the client (*pérdidas asumibles por el cliente*) and assumption of risk (*asunción de riesgos*) require a high level of knowledge in finance.

[105] <www.cnmv.es/DocPortal/.../Fichas_Preferentes.pdf> accessed 12 July 2015.

[106] The issue rate of return of preference shares could be attractive for the investors: Sabadell Pastor offered 25% for 10 or 15 years, Bancaja 32% and the Royal Bank of Scotland 45%, as cited in: María Concepción Rayón Ballesteros, Josè Antonio Gómez Hernández (n 100) 87.

The preference shares themselves are not a form of "share" (*partecipación*), and much less a privileged share. In contrast to shares they do not grant any rights to their holders, who do not acquire any voting rights in the company nor the right to take part in shareholders meetings. What is more, in terms of the order of preference of claims, they are located in nearly the worst possible position, only before ordinary shareholders. It is also important to note that the sale of preference shares depends on whether there is a demand for these shares on a secondary market where they may be sold. There is no way to guarantee investors the possibility to sell these shares, nor to regain the invested funds. In addition, the potential bankruptcy of an issuing institution does not imply a guarantee of investment protection through the Deposit Guarantee Fund.

The problem arose in the beginning of 2009, when a difficult economic situation caused a dramatic drop in the nominal value of preference shares on the secondary market, thus generating heavy losses for investors. Royal Decree no. 2/2012 dated 3 February on banking sector reform contains special provisions concerning preference shares, similarly to Royal Decree no. 24/2012 dated 31 August on restructuring and resolution of credit entities. Both decrees intend to reinforce the investor protection regime, but they also contain a provision according to which holders of preference shares could be obligated to assume part of the losses of an institution which found itself in a critical situation[107], and also allow the FROB and the Bank of Spain to invoke economic reasons to prevent the enforcement of judgements favourable to aggrieved investors. In addition, restrictions are introduced to limit the commercialisation of these financial instruments in the future.

According to art. 51.1. of the Spanish Constitution: "The public authorities shall guarantee the protection of consumers and users and shall, by means of effective measures, safeguard their safety, health and legitimate economic interests" (*los poderes públicos garantizarán la defensa de los consumidores y usuarios, protegiendo, mediante procedimientos eficaces la seguridad, la salud y los legítimos interesem económicos de los mismos*). The case of preference shares was undoubtedly a situation involving a serious breach of investors' economic interests in which complex and risky products were offered to people with poor awareness of investment risk.

As underlined by practitioners, the most effective method of recovering the capital invested was filing an individual court case by the investor. In some cases, however, judgements were favourable for the banks (recognising that the purchaser received the required documentation, was properly informed and was fully aware of the investment risk assumed). In many other cases, judgements were favourable for the purchasers of preference shares and voided the contracts in view of defective consent (*vicio del consentimiento*). Furthermore, as follows from the case law, in respect of adhesion contracts (when the parties do not have the possibility of negotiating contractual clauses), the parties should be informed in a precise and thorough manner.[108]

The arguments of defect which were invoked in cases concerning preference shares concerned either the contract's origin itself (*vicios en el origen del contracto*) – a lack of transparent information, informing the client

[107] María Concepción Rayón Ballesteros, Josè Antonio Gómez Hernández (n 100) 90.
[108] ibid 94.

inadequately on product characteristics in order to adapt the investment to the client's needs; defects in banking services (*vicios en el proprio negocio bancario*) – such as in sales of shares of the banks which were facing a critical situation; or defects of consent (e.g. the agreement did not contain important information such as interest rates or guarantees). The Law on the Securities Market (*Ley del Mercado de Valores*) sets out an obligation to conduct a test of a product's compliance with the investor's needs, and to inform the investor about any possible risks; in some cases the banks informed their clients incorrectly that the product may be immediately liquefied, while failing to inform them that the shares could only be sold on the secondary market and that the payment of interest was conditional upon the profits made by a given issuer.

The following typical court judgements in preference shares cases are based on the aforementioned defects of contracts made with investors: the Provincial Court in Murcia (Cartagena 1.04.2011) ordered repayment of EUR 58,000 to an investor who bought preference shares in an Icelandic bank (the grounds for the judgement invoke the fact of insufficient information on the high level of risk involved and on the possibility of losing the invested funds); the Provincial Court of Gijón ordered a repayment of EUR 262,310 to a client who purchased preference shares in Lehman Brothers (due to serious negligence of duty to inform the client); the Provincial Court of Zaragoza (17.04.2012) ordered Banco Popular to repay EUR 69,306 to clients who were sold shares in Kaupthing Bank on the grounds that the offered product did not match the profile of the clients, who were low-educated pensioners that should be suggested a safer investment product; the Provincial Court of Vigo (25.04.2012) ordered Santander Bank to repay EUR 100,000 on the grounds that the investor informed of his intent to have the invested funds back at his disposal within 2 years, whereas the preference shares he was sold had a redemption date of 31 December 2050.

In the face of problems following from the sales of preference shares, more steps were taken in order to strengthen the weakened investor protection. This purpose was to be served by Royal Decree-Law no. 6 dated 22 March 2013 on protection for the holders of certain savings and investment products and other financial measures (*Protección a los titulares de determinados productos de ahorro e inversión y otras medidas de caracter financiero*)[109]. Apart from granting the FROB the possibility of buying unquoted shares originating from the compulsory exchange of hybrid capital instruments and subordinated debt (*deuda subordinada*) of the nationalised institutions (pursuant to the provisions of the Law no. 9 dated 14 November 2012), the Decree establishes basic criteria concerning arbitration procedures and resolving controversial issues related to these instruments.

The Decree establishes a Monitoring Committee for hybrid capital instruments and subordinated debt (*Comisión de seguimiento de instrumentom híbridos de capital y deuda subordinada*). The Committee is a collegial body assigned to the *Ministerio de Economía y Competitividad*, and its task is to analyse the factors that gave rise to the judicial and extrajudicial claims of the holders of hybrid capital instruments and subordinated debt in

[109] <www.boe.es/diario_boe/txt.php?id=BOE-A-2013-3199> accessed 12 June 2015.

relation to credit institutions under FROB control. In addition, its task is to submit a quarterly report on the basic aspects of the aforementioned claims without prejudice to the competence of other authorities or bodies in this field.

The Committee is chaired by the President of the CNMV, and it also comprises the Deputy Governor of the Bank of Spain as its Vice-Chair. The other members of the Committee include the Secretary-General for the Treasury and Financial Policy from the Ministry of Economy and Competitiveness, the Secretary-General of the Ministry of Health, Social Services and Equality, the President of the Consumer and User Council, as well as invited members without voting rights such as the FROB representative and consumer protection institutions of autonomous communities.

VII. THE BANK OF SPAIN IN THE NEW EUROPEAN SUPERVISORY SYSTEM – TOWARDS A BETTER GUARANTEE OF INVESTOR PROTECTION?

The financial crisis placed new challenges before the national banking supervisory authorities, revealing weak points in mechanisms of oversight over the activity of financial institutions. According to judgement no. 135 of the Spanish Constitutional Tribunal of 5 October 1992, the Bank of Spain constitutes a part of state administration, is the main monetary institution exercising functions concerning discipline and inspection of credit and savings institutions, and is equipped with regulatory and sanctioning powers in order to exercise these functions.[110]

Various Spanish scholarly works on this subject stress that supervision as an institution *in the broad sense* is based on four elements: a set of norms regulating the access of banking institutions to provision of services; the entire set of oversight activities which public authorities exercise with regard to banking institutions in order to verify their compliance with existing legal regulations; a set of norms applied by public authorities in order to react to any behaviour which may contradict the above norms, and an appropriate sanctioning regime.[111] Supervision *in the strict sense* may be defined as a set of intervention instruments available to public authorities with regard to the activity of banks to verify or inspect whether such activity is in compliance with the obligations, prohibitions or other rules imposed by statutory or regulatory requirements, in order to ensure the solvency of banking institutions, increase people's trust in banking operations and avoid the risk of upsetting the stability of the entire financial system.[112]

As indicated by Manuel Izquierdo Carrasco, the main areas to which the regulations apply are banks' own resources; issues related to the ownership of a given institution and to management bodies; administrative and accounting structure; risk management; transparency and information shared with market participants; and increasingly in recent times, policies

[110] More on the structure and functions of the Bank of Spain: see Álvaro Cuervo (n 56) 103-168.
[111] Manuel Izquierdo Carrasco, 'La supervisión pùblica sobre las entidades bancarias' in Manuel Rebollo Puig (n 40) 175.
[112] ibid 176.

related to remuneration schemes[113], in particular with regard to senior officers. Within banking supervision one may also indicate: oversight of regulations on counteracting money laundering and of customer protection instruments.

In Spain, the functions of regulation and supervision over banking operations are exercised by the Bank of Spain and the National Securities Market Commission (*Comisión Nacional del Mercado de Valores – CNMV*).[114] Contrary to the Anglo-Saxon models, in the Spanish model the regulator requires that financial institutions undergo a specific authorisation procedure before they can start providing certain financial services or launch certain products (e.g. a new savings product)[115], which is to ensure a higher level of protection to clients of financial services providers.

The Bank of Spain, although it comprises part of the institutional framework of state administration, is qualified as an independent body or a "regulatory agency".[116] In institutional terms its autonomy is reflected in the rules for appointing its governing bodies, for a term of 6 years and without the possibility of renewing their mandate. It is therefore described as a state administrative unit of a unique character: subject to the government in general, but enjoying full autonomy as regards monetary policy. Following its integration with the European Union and with the European Monetary Union, the Bank exercises its functions within the European System of Central Banks.[117] The functions exercised by the Bank of Spain therefore result from its belonging to the System and follow from the instructions and guidelines of the European Central Bank (ECB).

According to Article 1.1. of the Law of Autonomy of the Banco de España (*Ley de Autonomia del Banco de España*)[118], the Bank of Spain is an institution under public law with juridical personhood and full public and private legal capacity. The Bank is subject to the private law regime except in the exercise of its administrative function (legal acts of supervisory, sanctioning or of prescriptive nature are subject to administrative law). The Bank's governing bodies are the Governor (*gobernador*), the Deputy

[113] As the financial crisis worsened, regulatory authorities became increasingly aware of the fact that one of the reasons which largely contributed to the resulting economic situation was an inappropriate remuneration policy. Undoubtedly, financial institutions made the mistake of perceiving remuneration as only marginally related to risk management and therefore the policy of remuneration for senior officers created favourable conditions for making risky business decisions, not always in the best interest of customers or investors. International initiatives related to remuneration policies aimed at closing legal loopholes and making up for the neglect in this area: in April 2009 the Financial Stability Forum published Principles of Sound Compensation, and BIS published High Level Principles for Remuneration Policies. In the same month the European Commission adopted two recommendations: Commission Recommendation 2009/385/EC as regards the regime for the remuneration of directors of listed companies and Commission Recommendation 2009/384/EC on remuneration policies in the financial services sector.

[114] More on the Spanish securities market Carbajales (n 8) 55-83.

[115] Alberto Moro Suárez (n 101) 64-65.

[116] S Muñoz Machado, *Fundamentos e instrumentom jurídicos de la regulación económica* (Iustel, Madrid 2009) 18, as cited in: Juan Manuel Vega Serrano, 'El Banco de España y el Sistema Europeo de Supervisión' in Santiago Muñoz Machado, Juan Manuel Vega Serrano (n 9) 189.

[117] ibid 190-192.

[118] Law 13/1994 of 1 June, BOE no. 2.

Governor (*subgobernador*), the Governing Council (*consejo de gobierno*) and the Executive Commission (*comisíon ejecutiva*). The Governor is appointed by the King following a proposal by the Prime Minister among individuals renowned for their competence in monetary or banking matters.

Juan Manuel Vega Serrano categorises the functions of the Bank of Spain into those of a central bank, those of a supervisory authority, of the state financial operator, and of an educational and advisory body.[119] The functions of central banks have been to a large extent transferred to the EU level (the European System of Central Banks) – the role of the Bank of Spain as a central bank is therefore restricted to participating in development of the ESCB via the the Governing Council of the ECB, the body which gathers members of executive committees and the governors of the national central banks.

According to Art. 7.6 of the Law of Autonomy of the Banco de España (LABE), the Bank of Spain shall supervise, in accordance with the existing regulations, the solvency and the compliance of activities of credit institutions with specific regulations, and of any other financial market institutions it has been called on to oversee, without prejudice to the competences of autonomous communities in this regard and to the rules on co-operation between these communities and the Bank in performing such supervisory tasks. The oversight responsibilities of the Bank of Spain also extend over the mortgage market (Art. 43 bis of the Law on Discipline and Intervention of Credit Institutions, LDIEC), public debt market and the activity of credit institutions in the securities market (Art. 88 of the Securities Market Law, LMV). Supervision is a complex function aimed at promoting the smooth operation and the stability of the financial system (Art. 7.5 LABE). It therefore extends both over individual institutions in order to ensure appropriate (credit, operational and legal) risk management, as well as over the entire system (systemic risk).[120] Supervision implies prior authorisation of such institutions before their activity becomes legal. Subsequently, a supervisory authority performs a number of intervention measures such as verification of reports submitted by registered institutions, conducting inspections, and imposing sanctions or remedying measures.[121]

The structure of supervision in Spain is based on three institutions: the Bank of Spain, the National Securities Market Commission (CNMV), and the General Directorate of Insurance and Pension Funds. One of the objectives of the reform of the supervisory model planned in 2007 was for the Bank of Spain to remain the only institution supervising the solvency of all financial institutions (credit institutions, investment firms, insurance firms, etc.), and for the CNMV (changing its name to the National Financial Services Commission) to oversee the process of services provision (*supervisión de conductas*).[122] As underlined by Juan Manuel Vega Serrano, any changes in

[119] Juan Manuel Vega Serrano (n 116)195-197.
[120] ibid 197.
[121] More on supervision from the perspective of Spanish regulations: Marcos M Fernando Pablo, 'Nuevo marco europeo de supervisión financiera: una visión desde España' in Manuel Rebollo Puig (n 40) 421-433.
[122] G Gil, J Segura, 'La supervisión financiera, situación actual y temas para el debate' (2007) 12 Estabilidad Financiera (Banco de España, Madrid) 9.

the structure of the Spanish supervision authorities will depend on changes in the European supervisory structure.

One of the pillars of the Banking Union is the Single Supervisory Mechanism (SSM), which began its operations in the autumn of 2014. The objective of the system is tighter integration within the eurozone, alleviating problems of a regulatory nature and strengthening the legal stability of the system. The system is based on the principle of enhanced cooperation between the ECB and the national supervisors, which are obligated to implement the ECB's supervisory decisions, with the ECB being accountable for the entire functioning of the system. The Single Supervisory Mechanism only covers the eurozone, however it is open to countries that do not yet have the euro as their currency if they are willing to participate. The system functions following a decentralised model: the so-called *significant banks*[123] are subject to direct supervision of the ECB, while the other banks remain supervised by the national supervisory authorities but within the framework of guidelines and supervisory policies established by the ECB (the European Central Bank is also the authority competent for granting banking licences and oversight of *qualifying holdings*). With regard to *significant banks* the ECB's competences include the passporting system, recovery plans, management system and ICAAP, minimum capital requirements, as well as supplementary supervision of financial conglomerates. The system is undoubtedly displaying progress in integration activities, and is a huge step forward compared to the banking coordination system.

VIII. THE LAW ON ORGANISATION, SUPERVISION AND SOLVENCY OF CREDIT INSTITUTIONS DATED 26 JUNE 2014 (*LEY 10/2014, DE 26 DE JUNIO, DE ORDENACIÓN, SUPERVISIÓN Y SOLVENCIA DE ENTIDADES DE CRÉDITO*)

One of the more visible effects of reforming the financial markets in recent years is that practically all financial services have become internationalised, a phenomenon linked to a large extent with economic globalisation. This has significantly influenced national legislation, the supervision model and the scope of regulations on financial institutions, with the banking sector having to adjust to the necessity of adopting a supranational regulatory perspective. Globalisation led to the necessity of harmonising prudential requirements on a global scale and of improving the model of cooperation between regulators (including those from third countries).

Establishment of the Banking Union based on the single supervision and *resolution* mechanisms has strengthened the harmonisation process and limited dependence on the assessment of rating agencies. Since the entry into existence of the Single Supervisory Mechanism, the Bank of Spain has exercised its supervision functions in cooperation with the ECB taking into

[123] Banks which receive public funding; the three largest banks in a given Member State; banks with total assets value of at least EUR 30 billion; banks with assets of at least one-fifth of the Member State's GDP; *cross-border* banks which are deemed systemically significant by the ECB.

account the powers conferred upon the ECB by Council Regulation 1024/2014 of 15 October 2013 (SSM is the key system guaranteeing the cohesion of EU policies with regard to prudential supervision).

The objective of the Law on organisation, supervision and solvency of credit institutions is to transpose EU norms[124] into the Spanish legal system, and to implement regulatory reform with regard to supervision and solvency of banks. The Law foresees strengthening the competences of the Bank of Spain with respect to sanctioning banking institutions, revoking their authorisations and verifying their remuneration policies, and it also introduces the possibility to intervene in the activity of credit institutions. In addition, it foresees a change in the composition of the Management Committee (*Comisión Gestora*) of the Deposit Guarantee Fund (Fondo de Garantía de Depósitos, FGD), including the presence of a representative of the Ministry of Economy and the Ministry of Treasury.[125]

As shown in various academic works on the subject, a defective supervision model or deficiencies in its operation (lack of continuity, occasionality, procedural aspects) were factors which contributed to the scale and gravity of the current financial crisis[126] – for this reason the reform of banking supervision holds such a prominent place in the EU agenda. The enhancement and strengthening of supervision would be one way to sum up the direction of changes implemented in the European (and national) supervision structures.

Javier Rodríquez Pellitero distinguishes the following main aspects of post-crisis supervision regulation:

– planning supervision (adopting annual supervision plans to facilitate earmarking of funds, making lists of measures or objectives to implement). He emphasizes the need for more intrusive supervision to increase awareness on the part of institutions of the possibility of intervention by a supervision authority;

– conducting on-the-spot supervision as another factor increasing awareness of "the presence of the supervision authority" among institutions;

– *stress tests* as one of the methods of examining the financial standing of an institution, supplementing interim reports (tests should be conducted on an annual basis and foresee stress scenarios with high potential impact on the financial system);

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[124] Directive 2013/36/EU (CRD IV) of 26 June 2013 and Regulation (EU) No 575/2013 – on capital requirements and access to the activity of credit institutions. Transposing the EU regulations into the Spanish legal system began with Royal Decree 14/2013 dated 29 November on urgent measures to adapt Spanish law to European Union regulations on the subject of supervision and solvency of financial institutions.

[125] This solution has not met with a warm welcome by President of the European Central Bank, Mario Draghi, who reminded of the necessity of sound management of guarantee funds in the EU Member States and also warned that the presence of politicians in the management body of the Deposit Guarantee Fund (FGD) should not impact on its effectiveness nor lead to further politicising of the process of restructuring of credit institutions (*resolución de entidades de crèdito)*. The ECB also recalled that although the FGD may take part in recovery processes and support institutions in a difficult situation, it should not weaken its primary function which is guaranteeing deposits.
<http://economia.elpais.com/economia/2014/06/08/actualidad/1402246409_761209.html> accessed 12 June 2015.

[126] Javier Rodríquez Pellitero, 'Resolución de crisis bancarias' in Santiago Muñoz Machado, Juan Manuel Vega Serrano (n 9) 836.

– the need to engage in special supervision with regard to some institutions (*SIFIs*[127] *– systemically important financial institutions, or their subcategory: G-SIFIs – global systemically important financial institutions*).[128]

The financial crisis has forced public authorities to adopt an integrated approach to regulation of financial markets. Measures taken at the EU level (Banking Union) have proven that this sector requires, in particular, harmonization of legislation and the establishment of common foundations and rules of conduct in all Member States. The objective behind creating a true internal financial market is to avoid concerns resulting from regulatory and institutional differences. Cross-border activity of financial corporations has in a way forced the establishment of mechanisms and public authorities with competences extending across the borders of Member States, such as the Single Supervisory Mechanism and the Single Resolution Mechanism.

At the same time, in the face of the difficulties resulting from the specificity of a division of competences between the central legislator and the autonomous communities in Spain (the situation of savings banks), the Constitutional Tribunal has pointed out in its case-law of recent years that regulation of financial markets should be founded upon the fundamental legislation of the state (*legislación basica*) and have a uniform character, in order to avoid fragmentation and to ensure that public authorities are able to effectively manage those activities which are definitely global in their scope and whose regulation and supervision is mainly a task of the EU institutions.[129]

Chapter 1 contains general provisions; Article 1(2) lists credit institutions: banks, savings banks, cooperative banks and the Official Credit Institute (ICO). Article 4 lists the competencies of the Bank of Spain with regard to granting licences for creating credit institutions, opening branches of foreign institutions in Spain or entering them into the relevant registers. Chapter 2 lists the requirements concerning authorisation (granting a licence), refusal (e.g. in case of not fulfilling capital requirements) and licence revocation (e.g. when a licence is obtained based on false data or in the case of an institution excluded from the Deposit Guarantee Fund (FGD)). In compliance with the rule of free service provision by credit institutions from the other Member States, Article 12 sets out the conditions for opening branch offices in Spain, whereas Art. 13 contains similar provisions related to institutions from countries outside the EU.

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[127] The Financial Stability Board, according to the decisions made in 2010 by the G-20 summit in Seoul, published in November 2011 documents concerning such types of institutions: <www.financialstabilityboard.org/list/fsb_publications/from_01012009/index.htm> accessed 13 June 2015.

[128] ibid 836-837.

[129] Projecto de Ley de ordenación, supervisión y solvencia de entidades de crèdito of 14 February 2014: <www.congreso.es/portal/page/portal/Congreso/Congreso/Iniciativas?_piref73_2148295_73_1335437_1335437.next_page=/wc/servidorCGI&CMD=VERLST&BASE=IW10&FMT=INITXDSS.fmt&DOCS=1-1&DOCORDER=FIFO&OPDEF=ADJ&QUERY=(121%2F000080*.NDOC.)> accessed 12 July 2015.

Chapter 4 contains regulations concerning the capacity to exercise senior functions, incompatibility of certain functions and supervision in relation to those functions (*idoneidad, incompatibilidades y registro de altos cargos*). It also sets out a requirement that credit institutions should have an administrative board consisting of individuals with appropriate competencies to exercise their functions (in particular business and professional experience, indispensable for sound management of such institution). Similar requirements concern general directors and internal auditors (Art. 24). Article 26 defines a regime for incompatibility of functions, according to which the Bank of Spain shall define the maximum number of functions that a member of a management board or a general director may exercise at the same time, considering particular conditions to which a credit institution is subject to, its size and complexity of its operations.

Chapter 5 contains regulations on management models and remuneration policies which set out an obligation to introduce stable corporate governance procedures with clearly defined responsibilities, transparency, effective risk identification and assessment procedures, as well as audit procedures.

Article 32 details the requirements concerning remuneration policies, imposing an obligation on credit institutions to define and implement global remuneration policies. Art. 33 contains general provisions on remuneration policies (such as compliance with principles of sound management not increasing risk, supervision of compensation of senior officers directly by the remuneration committee, or compliance with the company's strategy and avoiding conflict of interest). Article 34 refers to variable remuneration components, defining the relation between fixed remuneration and variable remuneration, as well as the time and methods of results assessments which determine the variable remuneration component. Article 36 establishes the obligation to appoint a remuneration committee consisting of the members of the management board (*consejo de administración*). According to Art. 37, it is the management board that is responsible for the risk exposure of a given credit institution; in addition, credit institutions have to appoint a risk management committee (Art. 38).

Title III contains provisions on supervision which are quite important in the context of reforming the supervision model at the European level and increasing cooperation between the ECB and the national regulators. Chapter 1 Title III of the draft Law lists the supervision powers of the Bank of Spain, including also the competencies which are vested in the Bank that enable it to conduct supervision (the requirement to submit relevant documentation, inspection of registers or accounts). Supervisory activities are based on a supervision plan (Art. 55(1)) which is approved at least once a year. According to Art. 54, the Bank of Spain shall issue appropriate guidelines addressed at supervised institutions, presenting criteria, good practices and methodology recommended in order to fulfil the obligation of compliance with regulatory requirements.

Chapter 3 addresses cooperation between the supervisory bodies, and Art. 61 sets out the rules of cooperation between the Bank of Spain and regulators from other countries. According to Art. 61, the Bank of Spain will cooperate with its counterparts from other countries. This provision also foresees the possibility of entering into cooperation agreements or launching

a consultation process before making a decision on a merger or other significant activity of a given supervised institution. Article 62 defines the conditions of cooperation by the Bank of Spain with EU supervisory authorities: coordination activities related to gathering the required information, planning supervisory activities in coordination with other authorities, entering into agreements on cooperation. Chapter 4 contains provisions on prudential supervision, setting out the powers of the Bank of Spain with regard to verifying capital resources of supervised institutions.

Chapter 5 defines intervention measures and measures of a substitute character, containing regulations on appointing temporary management bodies in supervised institutions. Chapter 6 sets out the information obligations of the Bank of Spain and supervised institutions (it also contains provisions on data protection and defines the type of information required from supervised institutions). Title IV – the sanctioning regime – defines instruments which the Bank of Spain may use in order to discipline supervised institutions (classifying infringements [*infracciones*]into grave, serious and minor), while subsequent chapters set out individual types of sanctions (pecuniary sanctions calculated depending on the gravity of the infringement) and procedures of conduct.

The Banking Union and the Single Supervisory Mechanism are definitely a huge step forward towards strengthening the supervisory architecture of financial institutions in the European Union. The Mechanism aims at alleviating regulatory concerns and ensuring a rapid response to any irregularities in the functioning of supervised institutions. It is surely a great challenge both for the supervised institutions that will have to live up to the more restrictive regulatory requirements and for the supervisory authorities which will have to find their way around the new EU supervision system. The activities of the Spanish legislator addressed these needs; however, the question emerges whether some of the domestic regulations on the scope of powers of the national regulator are rendered moot with the EU regulations entering into force.

When analysing the development of the financial crisis in Spain in the context of banking supervision, one must note several elements which distinguish the Spanish financial system from other systems and which have influenced the nature and intensity of certain adverse phenomena. In Spain there was practically no "*shadow banking*" zone, and financial activity has been and remains to a large degree "bankarised". This leads to extensive regulation and supervision of the Spanish financial services sector, which at least theoretically should curtail systemic risk.[130] The negative side of this phenomenon and of the *stricte* banking crisis may be restriction of financing (*la restricción de financiación será especialmente intensa al no existir mecanismos alternativos de canalización de ahorro hacia la inversión*), as well as higher costs for the taxpayer in the event it becomes necessary to restore the capital base of financial institutions (the balance sheets of banks are greater in value than the country's GDP).[131]

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[130] Juan Manuel Vega Serrano, *La regulación bancaria. Adaptado a la Ley de Economia Sostenible y al Real Decreto Ley 2/1011, de 18 de febrero, para el reforzamiento del sistema financiero* (La Ley, Wolters Kluwer, Madrid 2011) 267.
[131] ibid 267.

It should also be noted that in Spain there are no counterparts to the American *mortgage brokers* – it is the banks themselves and their numerous branch offices that sell their financial products and assess the credit capacity of potential borrowers. Theoretically, this enables better supervision of credit risk, while on the other hand it leads to the emergence of a greater amount of adverse phenomena in case of systemic errors or negligence (as in the case of savings banks and preferential shares).

The reforms of domestic and European supervision structures aim at avoiding the regulatory errors which resulted in worsening of the financial crisis. Among the main directions of the reforms to the institutional supervision model, the following tendencies can be indicated[132]: one relates to the supervisory model defined as the "twin-peaks" model, according to which responsibility for financial supervision is split on the basis of two objectives: a) prudential supervision and b) *business conduct* and consumer protection. In this model the financial system is subject to supervision regardless of the sectors or legal forms of the supervised institutions (banks, insurance companies).[133]

Another tendency consists in reinforcing the role of central banks in the supervision system (which of course will take on a different character in the context of creating the Single Supervisory Mechanism and shifting responsibility on to the ECB). The last item is reinforcing public oversight over regulatory and supervisory functions, which was previously seen as an infringement on the independence of financial institutions (taking into account the costs borne by taxpayers during the financial crisis).

The tasks and instruments related to the European system of supervision can be divided into the following groups[134]:
– lawmaking (technical standards, guidelines, recommendations);
– ensuring compliance with EU law (special recommendations addressed to national supervisory authorities which fail to ensure *compliance* of financial institutions with the EU law; mediation in disputes between the national supervisory authorities);
– supervisory convergence (promotion of common supervision models; conducting *peer-reviews*, issuing opinions on the prudential aspects of *cross-border* mergers);
– consumer protection (promoting transparency, guidelines and recommendations concerning market security, warnings against certain financial activity, temporary prohibitions or restrictions of financial activity);
– financial stability (*follow-up* to warnings and recommendations from the ESRB, risk monitoring and evaluation, assessment and recommendation concerning institutions or products, *stress-tests*);
– *crisis management* (issuing recommendations to the Council in emergency situations, coordination supervisory authorities' activity in crisis situations, decisions addressed at supervisory authorities in such situations);

[132] Francesco Cannata and Mario Quagliariello (eds), *Basel III and Beyond. A guide to banking regulation after the crisis* (Risk Books, London 2011) 443.
[133] Such model functions in France, the Netherlands and in Italy. The reform of the supervision system in Great Britain also introduced this model, establishing the *Prudential Regulatory Authority* and the *Financial Conduct Authority*.
[134] Andrea Enria, Pedro Gustavo Teixera, 'A new institutional framework for financial regulation and supervision' in Francesco Cannata, Mario Quagliariello (eds), *Basel III and Beyond* (Riskbooks, London 2011) 444.

– *crisis resolution* (development and coordination of plans, participation in reinforcing the deposit guarantee scheme, working on methods of rescuing insolvent institutions);
– advisory functions and international cooperation (opinions for the Parliament, the Council or the Commission, relations with regulators from third countries).

IX. REFORM OF FINANCIAL INSTITUTIONS - IS ETHICAL BANKING POSSIBLE?

In analyzing the reform of financial institutions in Spain, we cannot ignore the questions about the future of this system in respect of the solution referred to in the literature as ethical banking.[135] Socially responsible investing *(la inversión socialmente responsable*)[136] has served as the point of departure for a more extensive concept of Ethical Finance (*finanzas éticas*).

Jordi Calvo Rufanges points to some elements of key importance for the development of ethical finance, such as:

1. The emergence of the first ethical investment funds in English-speaking countries in the 1970s;

2. Establishment of the first ethical bank in Bangladesh in 1976 (Grameen Bank);

3. Founding of European ethical banks in the '80s and '90s, the most notable of which are Triodos Bank (the Netherlands), Banca Popolare Etica (Italy), JAK (Sweden), Okobank (Germany) and Alternative Bank Suisse (Switzerland).

The essence of an ethical bank consists in its understanding of money as an instrument of solidarity, and that it places the human factor first in the process of making economic and financial decisions. Its primary objectives are to facilitate financing and financial advice to entrepreneurial endeavours which generate added value in the social sphere, as well as those which focus on protection of the natural environment or on cultural activities. They also foster alternative investment by responsible investors.

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[135] Jordi Calvo Rufanges, *Banca armada vs banca ètica* (Dharana Editorial, Madrid 2013) 3.
[136] ibid 74. As regards European Ethical Finance (*Finanzas Èticas Europeas*), the most developed concept is that of so-called socially responsible investing (*la inversión socialmente responsable*), designed as an alternative approach to investing for people of a certain financial culture and social sensitivity, combining the financial goals of investors with social interests, as well as environmental sustainability or ethical aspects. This approach is entailed in the "solidarity" investment funds (*fondo "solidario*") that operate much in the same way as traditional funds, which invest with a view of obtaining the highest possible financial profits, but with one notable difference - a certain portion of remuneration received for managing these funds is allocated to a chosen NGO or to some other social purpose. A fund that is of the "solidarity" type may, then, finance companies of questionable ethical standing. Some of the positive initiatives supported by these types of funds include, for example, countering environmental pollution, cutting down energy consumption, recycling policies or providing assistance to local grassroots projects. SRIs are in a state of constant evolution, which sometimes proceeds at a faster pace (e.g. in the USA) or more slowly, such as in those countries were such instruments are not yet as commonplace (e.g. Spain). In Europe, they emerged relatively late and they were mainly associated with religious or social institutions.

The underlying values of an ethical bank, then, are those connected to ethics and solidarity, yet coupled with the efficiency and professionalism that bring financial profits with heed payed to pro-social aims. As a consequence of this combination of values, such entities are able to offer financial products and services analogous to those provided by banks, they extend the same guarantees and are subject to the same regulatory requirements, all the while representing the values of ethical policies, including in respect of the transparency and character of their financial activities. Some of the ethical banks fashion their operational model after third-sector entities; others function according to the standard model of the banking sector and traditional companies.

Some of the values of ethical finance include:[137]

– the principle of integrity applied in the process of weighing criteria regarding investments and granting credits;

– the principle of coherence applied in the process of using money with observance of espoused values;

– the principle of participation applied in the process of making decisions democratically;

– the principle of transparency applied in providing all available information regarding activities pursued and their outcomes;

– the principle of good impact, which means that financial institutions should not merely exclude negative criteria, but also define their investment policies in line with positive criteria, in order to participate in the process of social changes.

Ethical banks come to be in many different ways. Sometimes NGOs or social economy networks morph into financial entities, as was the case of Banca Popolare Etica; other times, traditional banks simply choose to take on a more socially responsible angle and operate in accordance with ethical principles, such as The Co-operative Bank. In terms of their legal form, some of these banks are organized as cooperatives (*cooperativas*) or as joint-stock companies. In the former case, emphasis is placed on the participation of all shareholders (np. Banca Popolare Etica), and these shareholders may be natural persons (*particulares*), companies, institutions or social economy networks.

Organizations financed by ethical banks are NGOs or enterprises whose main objectives are non-profit; the factors determining whether financing will be allocated to such entities are the features of a given project, which should be in line with the objectives of the bank's ethical policies and be economically viable. Projects cover a broad spectrum of themes – from international cooperation and education, through environmental protection and ecology, to culture or prevention of social exclusion. Ethical banks offer both savings and investment products; some also offer insurance. All of them provide electronic banking services, debit and credit cards.

One such ethical bank, operating on the Spanish market since 2004, is Triodos Bank from the Netherlands. It offers the possibility of responsible investment, as it specializes in projects concerning environmental, social and cultural sectors, art, education and tourism. Established in 1980, the bank has its branches in such countries as Belgium, UK and Germany. Another

[137] *Financiación Esica y Solidaria*, quoted after Jordi Calvo Rufanges (n 135) 79.

example is FIARE – Banca Popolare Etica (*La Fundación Inversión Ahorro Responsable*), established in 2003 in Basque Country. FIARE acts as a representative of Banca Popolare Etica de Italia on Spanish territory. It offers credit and deposit services, and, together with the French NEF and Banca Popolare Etica, it promotes the development of the first European credit cooperative. Coop 57 also merits mention. It is a financial cooperative (*cooperativa de servicios financieros*) which seeks to advocate cooperation in the field of the solidarity economy. It allocates its own funds to credits granted for social economy projects promoting self-employment or entrepreneurship. Enclau has a similar profile. It is an association of public-benefit entities which provides an alternative financing network with the purpose of supporting social projects and activities. Enclau's operations are based on solidarity savings and deposits, and they are carried out in cooperation with Valencian savings banks, Caixa Popular de Valencia.[138]

Furthermore, in Spain there are also organizations whose purpose is to provide information on ethical banking and to promote it – one example is FETS (*Financiación Etica y Solidaria*), an association grouping Catalan third-sector and Social and Solidarity Economy organizations (*Economía Social y Solidaria*), established in 1999.

The difficult situation of the financial sector in Spain certainly raises questions about the future of this system, as well as about seeking possible alternatives. Surely, an alternative could be provided by ethical banking, which breaks with the vices associated with traditional financial institutions, such as abuses and speculation, maximum focus on profits, often without paying heed to social interests or even to the interests of individual investors.

Questions about alternative solutions are an inherent part of the discussion on the future of the Spanish financial system. There is growing criticism regarding privatization, transformations and mergers of failing financial institutions, especially since this is all done at public expense, and so the tab is ultimately picked up by Spanish society. Those who are against these measures postulate nationalization processes and a public bank.[139]

Without a doubt, the reform of savings banks has turned a blind eye to the social aspect - bancarization of these institutions has led to a complete monopoly of the banks and to the virtual elimination of *cajas de ahorros*. It would be, then, difficult not to concur with this criticism, voiced by both representatives of the scholarly community and the new political movements[140], which are amassing a growing following. This could lead to some major changes in the political arena, traditionally divided between the two dominating parties, PP and PSOE. Society itself, tired of the crisis and of having to shoulder the costs of rescuing financial institutions, is also rising up in protest.

At the same time, the Spanish process of restructuring financial institutions, focused on rescuing the failing commercial and savings banks,

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[138] For more about different institutions of this type in Spain, ibid 85 ff.

[139] See: Platforma por la Nacionalización de las Cajas de Ahorro y por una Banca Pública. *Banca Pública Rescatemos nuestro futuro* (Icaria Editorial, Barcelona 2013) 3.

[140] *Podemos* – a left-wing Spanish political party established on 17 January 2014. It gained surprising social backing in the May elections to the European Parliament and it stunned its opponents by winning 5 seats in the Parliament.

analyzed within the context of EU reforms of the financial sector, places much less emphasis on the area of interest to the EU legislator - i.e. investor protection, especially as regards transparency of information and financial consultancy. The Spanish legislative measures have largely concentrated on the sphere of resolutions, somewhat neglecting the issue of investor protection (which is visible, for example, in the specific role assigned to the Deposit Guarantee Fund or in the problems brought about by *acciones preferentes*). Justified criticism has been raised of the way that the Bank of Spain and CNMV conduct their supervisory activities (this also applies to audit firms involved in drafting reports on the financial standing of particular institutions).[141]

The European single banking supervision system aims to increase the safety and to impede similar supervisory errors of central banks, as well as to provide mechanisms for quick responses in the event of problems. Time will show to what extent it has proved effective.

The financial crisis has forced not merely reforms, but also shifts in thinking about ethical values in banking and about sound protection of customers and investors. As exemplified by the Spanish case, it is the very area on which future measures should focus, including those implemented by legislation of individual members states.

[141] ibid 45.