



**Questionnaire concerning the implementation of the BASEL III guidelines and the regulatory framework for Managers of Alternative Investment Funds**

**Banking, Finance and Capital Markets Law Commission**

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**National Report of Spain**

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## **1. The implementation of the Basel III guidelines**

### **1.1 Is there a basic intend in your country to implement the Basel III guidelines?**

Yes, Spain, as a member of the European Union is compelled to implement the legislative package that the European Union (“EU”) adopted in 2013 in order to implement the Basel III agreement in the EU legal framework<sup>1</sup>.

According to the European Banking Authority (“EBA”)<sup>2</sup>, the implementation of the Basel III agreement will allow the European banking sector to better absorb economic shocks while ensuring that banks continue to finance economic activity and growth by: (i) improving the banking sector's ability to absorb shocks arising from financial and economic stress, whatever the source; (ii) improving risk management and governance; and (iii) strengthening banks' transparency and disclosures.

### **1.2 In which stage of the implementation of the Basel III guidelines is your country currently? When will the rules be enacted?**

Basel III guidelines are currently being implemented into the Spanish Jurisdiction. As mentioned in question 1.1 above, in order to implement the Basel III guidelines into the different jurisdictions of the Member States of the EU, in 2013 the EU enacted the EU Capital Requirements Regulation and the EU Capital Requirements Directive<sup>3</sup>, the so-called “CRD IV package”<sup>4</sup>.

The provisions of the EU Capital Requirements Regulation are directly applicable and enforceable into the jurisdictions of all Member States, including Spain,

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<sup>1</sup> Namely, the Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC Text with EEA relevance (“**EU Capital Requirements Directive**”) and the Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 Text with EEA relevance (“**EU Capital Requirements Regulation**”).

<sup>2</sup> The independent EU Authority established on 1 January 2011 as part of the European System of Financial Supervision (ESFS) and which works to ensure effective and consistent prudential regulation and supervision across the European banking sector.

<sup>3</sup> Vid. 1.

<sup>4</sup> Which include also the Biding Technical Standards (BTS) enacted by the EBA.

whereas the EU Capital Requirements Directive has to be transposed by each EU Member State into its own jurisdiction. At the time this report was issued Spain had transposed partially the EU Capital Requirements Directive.

In November 2013 the Spanish government enacted a Royal Decree-Law transposing partially the EU Capital Requirements Directive<sup>5</sup>. Furthermore, on 31<sup>st</sup> January, 2014 *Banco de España*<sup>6</sup> enacted a circular, which, among other things, fixed the minimum standards on capital requirements for the Spanish financial institutions during 2014.

The rest of the EU Capital Requirements Directive, and thus the complete set of the Basel III guidelines, shall be transposed and implemented into Spain by means of a draft law which was approved by the Spanish government in February 7<sup>th</sup>, 2014 (“**Draft Law**”)<sup>7</sup>. The Draft Law was being discussed by the Spanish parliament under its urgent procedure at the time this report was issued<sup>8</sup>.

**1.3 Is there a delay in the implementation of the Basel III guidelines? If yes, what is the main cause for it?**

No.

**1.4 Does the national implementation of the Basel III guidelines meet, exceed or undercut the stated minimum standards concerning the below mentioned issues?**

a) Capital requirements: They are met<sup>9</sup>.

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<sup>5</sup> *Real Decreto-ley 14/2013, de 29 de noviembre, 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.*

<sup>6</sup> Spain’s national central bank and supervisor of the Spanish banking system.

<sup>7</sup> *Proyecto de Ley de Ordenación, Supervisión y Solvencia de las Entidades de Crédito.*

<sup>8</sup> The enactment of the resulting law being expected for April 2014.

<sup>9</sup> Although both, the Basel III Guidelines and the EU Capital Requirements Regulation, provide for a transitional period during 2014 allowing for lower capital requirements (4% instead of 4,5% for Common Equity Tier capital and 5,5 instead of 6% for Tier Capital), Spain has opted for not making use of it and already requiring the envisaged and final capital requirements from January 1<sup>st</sup>, 2014.

- b) Leverage Ratio: They are met.
- c) Counter cyclical capital buffer: They are met.
- d) Capital conservation buffer: They are met.

**1.5 How many systematically relevant financial institutions are located in your jurisdiction?**

Two, BBVA and Banco Santander<sup>10</sup>.

**1.6 How does your country regulate the capital requirements for systematically relevant financial institutions?**

The EU Capital Requirements Directive provides that the EU Member States shall designate the authority in charge of identifying global systemically important institutions (“**G-SIIs**”) and other systemically important institutions (“**O-SIIs**”), which have been authorised within their jurisdiction, in case of Spain, by the *Comisión Nacional del Mercado de Valores* (“**CNMV**”).

It is foreseen that G-SII shall maintain a G-SII buffer -supplementary to Common Equity Tier 1 capital- which shall correspond to the sub-category to which the G-SII is allocated by the competent authority. In addition, the EU Capital Requirements Directive establishes that O-SII must maintain an O-SII buffer -supplementary to Common Equity Tier 1 capital- of up to 2 % of the total risk exposure amount calculated in accordance with Article 92(3) of EU Capital Requirements Regulation. In addition, it is envisaged that both, G-SII and O-SII, will be subject to additional reporting obligations before the competent EU and national authorities.

The EU Capital Requirements Directive specifically opens the door to a further extension of the framework for G-SIIs to additional types of systemically important institutions within the EU by 2015.

The transposition of the provisions of the EU Capital Requirements Directive on G-SII and O-SII into the Spanish jurisdiction is taking place at the time of issuance of this report by means of the Draft Law.

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<sup>10</sup> Banco Bilbao Vizcaya Argentaria, S.A. and Banco Santander, S.A..

**1.7 Do you think that many banks in your country will struggle to meet the requirements of Basel III? Why do you think so?**

No, I do not think so. Due to the severe pressure that the Spanish economy and, thus, the Spanish banks have been subject to by the international financial markets during the last few years, they have been preparing themselves (and have been required to) to meet most of the requirements of Basel III already since 2011<sup>11</sup>.

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<sup>11</sup> *Circular del Banco de España 7/2012, de 20 de noviembre*, which was replaced by *Circular del Banco de España 2/2014, de 31 de enero* required Spanish Banks to fulfil with the requirements envisaged in Basel III already from January 1<sup>st</sup>, 2011.

## 2. Regulatory Framework for Managers of Alternative Investment Funds

### 2.1 Is there any legislation in your jurisdiction concerning Managers of Alternative Investment Funds?

Managers of Alternative Investment Funds are currently regulated under *Ley 35/2003, de 4 de noviembre, de Instituciones de Inversión Colectiva* (“**LIIC**”), *Real Decreto 1082/2012, de 13 de Julio, por el que se aprueba el Reglamento de desarrollo de la Ley 35/2003, de 4 de noviembre, de instituciones de inversión colectiva* (“**RLIIC**”) and *Ley 25/2005, de 24 de noviembre, reguladora de las entidades de capital-riesgo y sus sociedades gestoras* (“**LECR**”).

Furthermore, Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision (“**Commission Delegated Regulation 231/2013**”) is directly applicable into Spain. Likewise, as the transposition period has already expired and Spain has yet to implement it, Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (“**AIFM directive 2011/61/EU**”) is affected by the vertical direct effect doctrine established by the European Court of Justice<sup>12</sup>.

### 2.2 Is your jurisdiction member of the EU or the EEA and therefore legally obligated to implement the AIFM directive 2011/61/EU? If yes: Is the implementation of the AIFM directive 2011/61/EU already successfully completed?

Yes, Spain is a member of the EU and therefore required to incorporate the AIFM directive 2011/61/EU.

Although the enactment of the two pieces of legislation that will modify the previous regime (LIIC, RLIIC and LECR) and implement AIFM directive 2011/61/EU (“**AIFM Draft Laws**”)<sup>13</sup> seems imminent, at the time of issuance of

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<sup>12</sup> Case 41/74, *Van Duyn v. Home Office* [1974] ECR 1337 and Case 148/78, *Pubblico Ministero v. Tullio Ratti* [1979] ECR 1629, among others.

<sup>13</sup> *Anteproyecto de Ley XX/2013, de XX, por la que se modifica la Ley 35/2003, de 4 de noviembre, de Instituciones de Inversión Colectiva, en materia del régimen aplicable a las sociedades gestoras de instituciones de inversión colectiva autorizadas conforme a la Directiva 2011/61/UE* and *Anteproyecto de*

this report, the transposition of AIFM directive 2011/61/EU into the Spanish jurisdiction is not yet completed.

**2.3 At which point in time was the legislation concerning AIFM enacted?**

LIIC was enacted in 2003, RLIIC was enacted in 2012 and LECR in 2005.

As mentioned in question 2.2 above, the draft bills modifying the current regime and implementing AIFM directive 2011/61/EU have not been enacted at the time this report was issued.

**2.4 What is the name of the competent supervisory authority for Alternative Investment Funds in your country?**

The CNMV<sup>14</sup>.

**2.5 Which minimum-capital does an AIFM require in order to obtain a licence or authorization?**

The AIFM Draft Laws will require the minimum-capitals envisaged in Article 9 of the AIFM directive 2011/61/EU. Namely: (i) an initial capital of at least EUR 300,000 for internally managed AIF; (ii) an initial capital of at least EUR 125,000 when an AIFM is appointed as external manager of AIFs; (iii) Where the value of the portfolios of AIFs managed by the AIFM exceeds EUR 250 million, the AIFM shall provide an additional amount of own funds<sup>15</sup>.

**2.6 How long is the duration of authorisation process to obtain an AIFM-Licence?**

3 months, which could be extended to 3 additional months if the CNMV deems it necessary and appropriate<sup>16</sup>.

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*Ley XX/2013, de XX, por la que se regulan las entidades de capital- riesgo y otras sociedades de inversión y sus sociedades gestoras.*

<sup>14</sup> *Comisión Nacional del Mercado de Valores (CNMV) Articles 70(1) of LIIC and Article 50(1) of LECR.*

<sup>15</sup> That additional amount of own funds shall be equal to 0.02% of the amount by which the value of the portfolios of the AIFM exceeds EUR 250 million but the required total of the initial capital and the additional amount shall not, however, exceed EUR 10 million.

<sup>16</sup> As foreseen in the AIFM Draft Laws implementing article 8(5) of the AIFM directive 2011/61/EU.

**2.7 What are the key elements of the authorisation process?**

The key element of the authorisation process is the application for authorisation where the applicant shall bring forward evidence and documentation supporting his compliance with the requirements established in Articles 6, 7 and 8 of the AIFM directive 2011/61/EU, among others: (i) holding sufficient initial capital and own funds; (ii) the good reputation and experience of the persons effectively conducting the business of the applicant; (iii) the shareholders or members of the applicant found suitable -taking into account the need to ensure the sound and prudent management of the AIFM-; (iv) the head office and the registered office of the applicant being located in Spain; (v) a programme of activity setting out the organisational structure of the applicant; and (vi) information on the remuneration policies and practices of the applicant.

**2.8 Is it mandatory for AIFM to have a local residence in your jurisdiction?**

Yes, as established by Article 43(1)c of LIIC, Article 5 of LECR and as foreseen in the AIFM Draft Laws as results of the implementation of article 8(1)e of AIFM directive 2011/61/EU.

**2.9 Does the legislation distinguish between different types of AIFM? What are the key differences between them?**

Yes, the management of open-ended AIF is currently regulated by the LIIC, whereas the management of closed-ended AIF being regulated by the LECR. The AIFM Draft Laws transposing the AIFM directive 2011/61/EU will not make any distinction between both types of AIFM.<sup>17</sup>

**2.10 Are there any legislative restrictions regarding legal structures of AIFM?**

Both, the current regime (LIIC and LECR) and the AIFM Draft Laws transposing the AIFM directive 2011/61/EU provide that Managers of AIF shall use a Public Limited Company (PLC) as legal structure.

**2.11 If you are a member of the EU or EEA, can AIFM in your country obtain an EEA/EU Passport which enables to distribute AIFs to professional investors?**

Yes, since July 22<sup>nd</sup>, 2013, EU or EEA AIFMS are entitled to obtain a passport allowing them to distribute AIFs to professional investors in Spain as long as the AIFM complies with the provisions of the AIFM directive 2011/61/EU. Conversely, Spanish AIFM may obtain an EEA/EU Passport allowing them to

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<sup>17</sup> As provided by Article 2 (2) c) of the AIFM directive 2011/61/EU.



commercialize AIFs to professional investors in the EU and/or EEA, provided they comply with the provisions and procedure established in Articles 31 and 32 of the AIFM directive 2011/61/EU.

**2.12 Do AIF themselves require to be licensed or authorised by a competent supervisory authority?**

Yes, by the CNMV.

**2.13 How are AIFs categorized and what is the authorisation or licence requirement for each category?**

AIFs under the Spanish jurisdiction are categorised -in accordance to its legal structure- as *Entidades de Capital Riesgo* (“**ECR**”) and *Inversiones de Inversión Colectiva* (“**IIC**”). The authorization/licence is, in both cases, obtained before the CNMV and the process differs very little between both types of categories.

**2.14 How long does the process of authorisation or licensing of AIFs take?**

Two months since the application for authorisation (or since they whole set of requested documentation has been filed before the CNMV).

**2.15 Are there certain legal structures for AIFs? Please name them.**

ECR and IIC -the two existing categories of AIFs in the Spanish Jurisdiction- shall use a Public Limited Company (PLC) or *Fondos* as legal structure<sup>18</sup>.

**2.16 What are the key differences with reference to the authorisation and marketing of AIFs that are distributed to retail investors and those only distributed to professional investors?**

The only and main difference between the authorisation and marketing of AIFs distributed to professional investors -known as AIFs of *régimen simplificado* (simplified regime)- in comparison to those distributed to retail investors -known as AIFs of *régimen común* (common regime)- is that those of *régimen simplificado* are not required to issue a Prospectus.

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<sup>18</sup> In case a AIF is incorporated as a *fondo* it lacks of legal personality and a manager shall be designated at the time of authorization.

However, following the provisions of the AIFM directive 2011/61, the AIFM Draft Laws will eliminate the distinction between AIFs of *régimen simplificado* and those of *régimen común* and a prospectus will be required in all cases.

**2.17 Are there any special requirements for leveraged AIFs?**

Currently there are no special requirements for leveraged AIFs within the Spanish Jurisdiction. However, as results of the transposition of the AIFM directive 2011/61, the AIFM Draft Laws will implement a system monitoring the leverage limits set by each AIF aimed to check its compliance at all times. Furthermore, whenever the competent national authority (CNMV) deems that the level of use of leverage by an AIF is contributing to the increase of systemic risk in the financial system or is likely to cause risks of disorder in the markets it will be entitled to impose limits to the level of leverage of the affected AIFM and/or other restrictions<sup>19</sup>.

**2.18 Are there any special regulations with regard to private investors or semi-professional investors?**

No. Nonetheless, AIFs of *régimen simplificado* (where a prospectus is not requested) can be offered to private or semi-professional investors only when the private or semi-professional investor engages to invest no less than EUR 500,000 in the AIF.

Furthermore, Article 43 of the AIFM directive 2011/61/EU provides that the Member States are entitled to impose stricter requirements on an AIFM that markets retail investors in their territory<sup>20</sup>.

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<sup>19</sup> After having notified ESMA, the ESRB and the competent authorities of the relevant AIF.

<sup>20</sup> Member States that allow the marketing of AIFs to retail investors in their territory will be required to inform the Commission and ESMA by 22 July 2014 of: (i) the types of AIF which AIFMs may market to retail investors in their territory and; (ii) any additional requirements that the Member State imposes for the marketing of AIFs to retail investors.