SPANISH PARLIAMENT

**REPORT 10/2017 OF THE JOINT COMMITTEE ON THE EUROPEAN UNION OF 16 MARCH 2017 ON THE APPLICATION OF THE PRINCIPLE OF SUBSIDIARITY REGARDING:**

- **PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING REGULATION (EU) No 806/2014 AS REGARDS LOSS-ABSORBING AND RECAPITALISATION CAPACITY FOR CREDIT INSTITUTIONS AND INVESTMENT FIRMS (TEXT WITH EEA RELEVANCE) [COM (2016) 851 FINAL] [2016/0361 (COD)]{SWD(2016) 377} {SWD(2016) 378},**
- **PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING DIRECTIVE 2014/59/EU ON LOSS-ABSORBING AND RECAPITALISATION CAPACITY OF CREDIT INSTITUTIONS AND INVESTMENT FIRMS AND AMENDING DIRECTIVE 98/26/EC, DIRECTIVE 2002/47/EC, DIRECTIVE 2012/30/EU, DIRECTIVE 2011/35/EU, DIRECTIVE 2005/56/EC, DIRECTIVE 2004/25/EC AND DIRECTIVE 2007/36/EC (TEXT WITH EEA RELEVANCE) [COM (2016) 852 FINAL] [2016/0362 (COD)] {SWD (2016) 377} {SWD (2016) 378},**
- **REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING REGULATION (EU) NO 575/2013 AS REGARDS THE LEVERAGE RATIO, THE NET STABLE FUNDING RATIO, REQUIREMENTS FOR OWN FUNDS AND ELIGIBLE LIABILITIES, COUNTERPARTY CREDIT RISK, MARKET RISK, EXPOSURES TO CENTRAL COUNTERPARTIES, EXPOSURES TO COLLECTIVE INVESTMENT UNDERTAKINGS, LARGE EXPOSURES, REPORTING AND DISCLOSURE REQUIREMENTS AND AMENDING REGULATION (EU) No 648/2012 (TEXT WITH EEA RELEVANCE) [COM (2016) 850 FINAL] [COM (2016) 850 FINAL ANNEX] [2016/0360 (COD)] {SWD (2016) 377 FINAL} {SWD (2016) 378 FINAL}, AND**
- **PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON A FRAMEWORK FOR THE RECOVERY AND RESOLUTION OF CENTRAL COUNTERPARTIES AND AMENDING REGULATIONS (EU) No 1095/2010, (EU) No 648/2012, AND (EU) 2015/2365 (TEXT WITH EEA RELEVANCE) [COM (2016) 856 FINAL] [COM (2016) 856 FINAL ANNEX] [2016/0365 (COD)] {SWD (2016) 368 FINAL} {SWD (2016) 369 FINAL}**

## BACKGROUND

**A**. The Protocol on the application of the principles of subsidiarity and proportionality annexed to the 2007 Lisbon Treaty, in force since 1 December 2009, laid down a procedure for scrutiny by the national Parliaments to ensure that European draft legislative measures comply with the principle of subsidiarity. Spain implemented the Protocol by Law 24/2009 of 22 December 2009 amending Law 8/1994 of 19 May 1994. More specifically, the new Articles 3(j), 5 and 6 of Law 8/1994 are the legal basis for this report.

**B**. The Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 806/2014 as regards loss-absorbing and Recapitalisation Capacity for credit institutions and investment firms; the Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/59/EU on loss-absorbing and recapitalisation capacity of credit institutions and investment firms and amending Directive 98/26/EC, Directive 2002/47/EC, Directive 2012/30/EU, Directive 2011/35/EU, Directive 2005/56/EC, Directive 2004/25/EC and Directive 2007/36/EC; the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements and amending Regulation (EU) No 648/2012; and the Proposal for a Regulation of the European Parliament and of the Council on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, and (EU) 2015/2365, have been approved by the European Commission and forwarded to the national parliaments, which have a period of eight weeks, until 21 March 2017 for the first two proposals, 24 March 2017 for the third proposal and 30 March 2017 for the fourth proposal, in which to check whether the proposals comply with the principle of subsidiarity.

**C**. On 21 February 2017, the Bureau and Spokespersons of the Joint Committee on the European Union decided to examine the European draft legislative measures in question, appointed Rubén Moreno Palanques (MP) as rapporteur and requested from the Government the report referred to in Article 3(j) of Law 8/1994.

**D**. The Government report has been received. Documents have been received from the Parliaments of Cantabria, Galicia, La Rioja and Catalonia stating that no reasoned opinion has been issued, the matter has been closed or that note has been taken of the proposal.

**E**. At its meeting on 14 March 2017 the Joint Committee on the European Union approved the following

## REPORT

**1**.- Article 5(1) of the Treaty on European Union states that '*the use of Union competences is governed by the principles of subsidiarity and proportionality'*. According to Article 5(3) of the same Treaty, '*under the principle of subsidiarity ... the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level*'.

**2.-** The legislative proposals analysed are based on Article 114 of the Treaty on the Functioning of the European Union, which provides as follows:

‘*Article 114*

*1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.*

*2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.*

*3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.*

*4. If, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 36, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.*

*5. Moreover, without prejudice to paragraph 4, if, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.*

*6. The Commission undertakes to approve or reject, within six months of the notifications referred to in paragraphs 4 and 5, the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market. In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved. When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.*

*7. When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.*

*8. When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.*

*9. By way of derogation from the procedure laid down in Articles 258 and 259, the Commission and any Member State may bring the matter directly before the Court of Justice of the European Union if it considers that another Member State is making improper use of the powers provided for in this Article.*

*10. The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Union control procedure*.'

**3**.- The proposed amendments to Regulation (EC) No 806/2014 (the Single Resolution Mechanism Regulation or SRMR) [COM (2016) 851] are part of a legislative package that includes also amendments to Regulation (EU) No 575/2013 (the Capital Requirements Regulation or CRR) [COM (2016) 850], to Directive 2013/36/EU (the Capital Requirements Directive or CRD) [COM (2016) 854] and to Directive 2014/59/EU (the Bank Recovery and Resolution Directive or BRRD) [COM (2016) 852, and COM (2016) 853].

**4**.- Over the past years the EU implemented a substantial reform of the financial services regulatory framework to enhance the resilience of financial institutions in the EU, largely based on global standards agreed with the EU's international partners. In particular, the reform package included Regulation (EU) No 575/2013 (the Capital Requirements Regulation or CRR) and Directive 2013/36/EU (the Capital Requirements Directive or CRD), on prudential requirements for and supervision of institutions, Directive 2014/59/EU (the Bank Recovery and Resolution Directive or BRRD), on recovery and resolution of institutions and Regulation (EU) No 806/2014 on the Single Resolution Mechanism (SRM).

Those measures were taken in response to the financial crisis that unfolded in 2007-2008.The absence of adequate crisis management and resolution frameworks forced governments around the world to rescue banks following the financial crisis. The subsequent impact on public finances as well as the undesirable incentive of socialising the costs of bank failure have underscored that a different approach is needed to manage bank crises and protect financial stability.

Within the Union and in line with the significant steps that have been agreed and taken at international level, Directive 2014/59/EU (BRRD) and Regulation (EU) No 806/2014 (SRMR) have established a robust bank resolution framework to effectively manage bank crises and reduce their negative impact on financial stability and public finances. A cornerstone of the new resolution framework is the 'bail-in' which consists of writing down debt or converting debt claims or other liabilities into equity according to a pre-defined hierarchy. The tool can be used to absorb losses of and internally recapitalise an institution that is failing or likely to fail, so that its viability is restored. Therefore, shareholders and other creditors will have to bear the burden of an institution's failure instead of taxpayers. In contrast to other jurisdictions, the Union bank recovery and resolution framework has already mandated resolution authorities to set for each credit institution or investment firm ('institution') a minimum requirement for own funds and eligible liabilities (MREL), which consist of highly bail-inable liabilities to be used to absorb losses and recapitalise institutions in case of failures. The delegated legislation concerning the practical implementation of this requirement has been adopted recently by the Commission.

**5**.- At the global level, the Financial Stability Board (FSB) has published on 9 November 2015 the Total Loss-absorbing Capacity (TLAC) Term Sheet ('the TLAC standard') that was adopted a week later at the G20 summit in Turkey. The TLAC standard requires global

systemically important banks (G-SIBs), referred to as global systemically important institutions (G-SIIs) in the Union legislation, to hold a sufficient amount of highly loss-absorbing (bail-inable) liabilities to ensure smooth and fast absorption of losses and recapitalisation in resolution.

**6**.- While the general BRRD and SRMR frameworks remain valid and sound, the main objective of the proposal is to implement the TLAC standard and to integrate the TLAC requirement into the general MREL rules by avoiding duplication by applying two parallel requirements. Although TLAC and MREL pursue the same regulatory objective, there are, nevertheless, some differences between them in the way they are constructed.

– The scope of application of MREL covers not only G-SIIs, but the entire Union banking industry.

– Differently from the TLAC standard, which contains a harmonised minimum level, the level of MREL is determined by resolution authorities on the basis of a case-by-case institution specific assessment.

– Finally, the minimum TLAC requirement should be met in principle with subordinated debt instruments, while for the purposes of MREL, subordination of debt instruments could be required by resolution authorities on a case-by-case basis to the extent it is needed to ensure that in a given case bailed in creditors are not treated worse than in a hypothetical insolvency scenario (which is a scenario that is counterfactual to resolution).

**7**.- In order to achieve a simple and transparent framework providing legal certainty and consistency, the Commission is proposing to integrate the TLAC standard into the existing MREL rules and ensure that both requirements are met with largely similar instruments. This approach requires introducing limited adjustments to the existing MREL rules ensuring technical consistency with the structure of any future requirements for G-SIIs.

In particular, further appropriate technical amendments to the existing rules on MREL are needed to align them with the TLAC standard as regards inter alia the denominators used for measuring loss-absorbing capacity, the interaction with capital buffer requirements, disclosure of risks to investors and their application in relation to different resolution strategies. While implementing the TLAC standard for G-SIIs, the Commission's approach will not materially affect the burden of institutions which are not G-SIIs to comply with the provisions on MREL.

**8**.- Operationally, the harmonised minimum level of the TLAC standard will be introduced in the Union through amendments to the Capital Requirements Regulation and Directive (CRR and CRD) while the institution-specific add-on for G-SIIs and the institution specific MREL for non-G-SIIs will be dealt with through targeted amendments to the BRRD and SRMR.

**9**.- As such, the proposal is part of a wider review package of the Union financial legislation aiming at reducing risks in the financial sector (CRR/CRD review) and making it more resilient.

The first proposal [COM (2016) 851] covers specifically the targeted amendments to the SRMR related to the implementation of the TLAC standard in the Union. The proposal will apply to the Single Resolution Board (SRB) and national authorities of the Member States participating in the Single Resolution Mechanism (SRM) when they set and implement the

requirements on loss-absorbing and recapitalisation capacity of financial firms established in the Banking Union.

The proposal is compatible with the principle of subsidiarity because the objective pursued is the completion of the single market in the banking sector and the Banking Union. This can be done more effectively at EU level. Further, it is a proposal to amend Regulation (EU) No 806/2014 in respect of which reasons for compatibility with the principle of subsidiarity have already been given.

**10**.- The second proposal [COM (2016) 852] is a Proposal for a Directive amending the Directive on bank recovery and resolution or DRRB (Directive 2014/59/EC). In this case there is no exclusive competence of the EU, even though it complies with the principle of subsidiarity because the objective pursued is the completion of the single market in the financial sector, which can better be achieved at EU level. Moreover, it merely amends certain aspects of Directives in respect of which reasons for compatibility with the principle of subsidiarity have already been given.

**11**.- The third proposal [COM (2016) 850] is a Proposal for a Regulation amending the Regulation on capital requirements or CRR (Regulation (EC) No 575/2013). That proposal is also compatible with the principle of subsidiarity because the objective pursued is the completion of the single market as regards the financial sector and it therefore lays down several homogeneous prudential requirements for credit institutions adapted to the Basel III framework. In addition, it is a proposal to amend Regulation No 575/2013, for which reasons for compatibility with the principle of subsidiarity have already been given.

**12**.- The final proposal [COM (2016) 856] is a Proposal for a Regulation on a framework for the recovery and resolution of central counterparties (CCPs).

A central counterparty (CCP) intervenes between participants in financial markets to act as the buyer to every seller and the seller to every buyer for a specified set of contracts. CCPs deal in financial transactions in various asset classes such as in equities, derivatives and repos. Their services are usually provided to their clearing members (typically banks) who have a direct contractual link with CCPs and the clients of the clearing members (e.g. pension funds).

The scale and importance of CCPs in Europe and beyond is set to increase via the implementation of the G20 commitment to clear standardised derivatives transacted over-the-counter (OTC) through central counterparties. This obligation is implemented in the EU by the Regulation on OTC derivatives, central counterparties and trade repositories (‘EMIR’; Regulation (EU) No 648/2012). That Regulation also sets out comprehensive prudential requirements for CCPs, as well as requirements regarding the operations and oversight of CCPs.

While CCPs are already well-regulated, have robust resources to deal with financial distress under EMIR and have not undergone distress or failed in large numbers in the past, the challenge posed by their growing importance in processing increasing amounts of new types of risk is widely recognised by governments, authorities and other market participants. Considering their central and growing role in financial markets, all CCPs in the EU are therefore considered to be systemic.

The purpose of the CCP recovery and resolution measures is to complement rather than to duplicate aspects of the current EMIR framework. Moreover, they would bolster CCPs'

preparedness to mitigate financial stress, provide the authorities with more information about the operations of firms in their jurisdictions and provide them with a set of powers to deal with a firm's reduced financial balance in a coordinated manner and, where necessary, resolve the firm, thereby restoring its critical functions, safeguarding financial stability and minimising the cost to taxpayers. The authorities would only resort to powers of resolution where normal insolvency proceedings would be insufficient to meet those aims.

**13**.- There is no exclusive competence of the EU, even though it complies with the principle of subsidiarity because the objective pursued is the completion of the single market in the financial sector, and it therefore provides for a common resolution framework for central counterparties, in line with what was done regarding credit institutions and investment firms (Directive 2014/59/EU, the Directive on bank recovery and resolution or DRRB), complemented by a Single Resolution Mechanism (Regulation (EU) No 806/2014), and now by Proposals for amendments COM (2016) 852 and COM (2016) 851 respectively). This can better be achieved at EU level.

## CONCLUSION

**For the above reasons, the Joint Committee on the European Union is of the opinion that the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 806/2014 as regards loss-absorbing and Recapitalisation Capacity for credit institutions and investment firms; the Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/59/EU on loss-absorbing and recapitalisation capacity of credit institutions and investment firms and amending Directive 98/26/EC, Directive 2002/47/EC, Directive 2012/30/EU, Directive 2011/35/EU, Directive 2005/56/EC, Directive 2004/25/EC and Directive 2007/36/EC; the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements and amending Regulation (EU) No 648/2012; and the Proposal for a Regulation of the European Parliament and of the Council on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, and (EU) 2015/2365 comply with the principle of subsidiarity laid down in the current Treaty on European Union.**