Pérez-Llorca

Financial Services – Updates
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SPAIN COMPLETES MIFID II IMPLEMENTATION

The implementation of MiFID II was finally completed on 28 December 2018, by means of the publication of Royal Decree 1464/2018, of 21 December, which develops the provisions of the Spanish Securities Act and represents the last phase of the implementation of MiFID II into Spanish law, following its partial implementation in December 2017 and September 2018.

This last piece of legislation implements, among other things, one of the most significant MiFID II changes in terms of the impact on the Spanish market: the conditions under which investment service providers can receive incentives (in particular, management fee rebates).

The abovementioned Royal Decree includes the same examples of models and type of services that allow an entity to continue to receive rebates such as those foreseen under the MiFID Delegated Directive. However, it also makes it possible for the Spanish National Securities Market Commission (CNMV) to add further specific examples to the list. It also clarifies certain important definitions of related terms (e.g. third party product) and under which conditions it should be understood that a wide range of products is being offered.

THE CNMV ADOPTS ESMA'S GUIDELINES ON SUITABILITY REQUIREMENTS

On 21 December 2018, the CNMV notified the European Securities and Markets Authority (ESMA) of its intention to comply with the guidelines relating to certain aspects of the MiFID II suitability requirements and, therefore, the CNMV will start to take into account the application of the provisions established by ESMA in relation to entities which provide advice (whether independent or not) or portfolio management services exercising their supervisory functions.

The most noteworthy aspects are the following:

a) Regarding the decision-making process when making recommendations or managing portfolios:

- The introduction of the obligation to evaluate whether equivalent financial instruments can be adjusted to the profile of the client, taking into account the cost and complexity of the products.

  The guidelines establish that institutions should back policies and procedures to ensure that, before recommending a product or acquiring it for the portfolio managed on behalf of a client, a broad assessment of possible investment alternatives is carried out, taking into account the cost and complexity of the products. When an entity offers a restricted range of products or recommends only one type of product, it is considered important that clients are made fully aware of this situation.

  If the entity chooses a product with a higher cost or complexity than an equivalent product, or recommends it to a customer, it should be able to justify this opinion. This type of decision must be documented and recorded and requires the special attention of the control function of the entity.

- It also addresses the obligation to perform a cost-benefit analysis when entities consider changes in investments, so that they are able to demonstrate that the benefits of the change outweigh the costs.

  The guidelines state that entities should back policies and procedures to ensure that this cost-benefit analysis of investment changes is carried out, and should establish controls which successfully prevent circumvention.

  When providing the advisory service, the entity should include a clear explanation of why the benefits of the recommended change outweigh the costs.

b) The guidelines apply to structured deposits insofar as MiFID II has extended the obligations of fit and proper assessment to these products.

c) They also address, for the first time, the good practice of considering the client's environmental, social and governance preferences.

d) They stress the need for institutions to adopt mechanisms to address the risk of clients overestimating their knowledge and experience by including, for example, specific questions to test the client's level of knowledge about product characteristics and risks. The consideration of age as a relevant factor to be taken into account in the suitability assessment process is maintained.

NO NEED TO OBTAIN THE CONSENT OF THE INVESTOR, AND A TAX NEUTRALITY REGIME FOR RECLASSIFICATION OF SHARE CLASSES DUE TO MIFID II

Following requests from the market (in particular, through Inverco, the Spanish Collective Investment Schemes Association), some transitional rules to facilitate and minimise the impact of

the reclassification of shares due to MiFID II were included in Royal Decree-Law 27/2018, adopting certain measures for tax and cadastral matters, issued on 28 December 2018.

The new Royal Decree-Law stipulates that all reclassifications of shares or units of collective investment schemes carried out between 3 January 2018 and March 2019, with the sole purpose of complying with the obligations of MiFID II, and in such a way that the participant or shareholder ceases to bear the costs associated with incentives, may be carried out without the need to obtain individual consent from the participants and shareholders, and will also be tax neutral for the investor.

ESMA REMINDS FIRMS OF THEIR MIFID OBLIGATIONS REGARDING THE DISCLOSURE OF INFORMATION ABOUT THE POSSIBLE IMPACT OF BREXIT

On 19 December 2018, ESMA issued a reminder that firms impacted by Brexit should ensure that they provide clear information to clients whose contracts and services may be affected. Once available, the information should be provided as soon as possible, and should cover at least the following areas:

a) **Impact of the UK's departure:** the specific implications of the departure of the UK from the EU for clients, depending on their individual circumstances.

b) **Actions the firm is taking**: the actions that are being taken to keep clients properly informed and prevent any detrimental effects for them.

c) **Implications of any corporate restructuring**: the implications for clients arising from any corporate restructuring. In particular, any relevant changes to contractual terms should be communicated and explained clearly, taking into account any relevant national provisions, where appropriate.

d) **Contractual rights**: any contractual and statutory rights of clients in these circumstances, including the right to cancel the contract and any right of recourse, where applicable. In particular, existing clients should be informed of any changes to their contractual relationship with the firm or of any impact on specific contracts that may occur as a result of the action taken by the firm (e.g. relocation to a another entity in the group or to a branch of another entity in the group which is based in an EU-27 country).

EU MANAGEMENT ENTITIES ACTING IN SPAIN THROUGH A BRANCH HAVE NEW REPORTING OBLIGATIONS VIS-À-VIS THE CNMV.

On 26 December 2018, the CNMV approved changes to its Circular 1/2010 on reporting information for entities that provide investment services (which regulates the so called T-forms) in order to gather specific information on the activities carried out by EU management companies that operate in Spain through a branch.

As from 2020, these entities will need to submit new specific forms (called SG forms) to the CNMV on an annual basis. The forms can be submitted until the end of February of each year and refer to

the immediately preceding financial year. Entities must submit these statements to the CNMV using the CIFRADOC system.

The CNMV may require more information, detail or further clarification of such statements, and may also require an entity to submit the statements more frequently than once a year.

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