

NEW CNMV CRITERIA ON THE PROVISION OF INVESTMENT SERVICES IN SPAIN BY THIRD-COUNTRY FIRMS WITHOUT THE ESTABLISHMENT OF A BRANCH

This client briefing summarises the latest communication from the CNMV (*Comisión Nacional del Mercado de Valores*) on the legal regime applicable to third-country firms that wish to provide investment services in Spain without establishing a branch in the Spanish territory.

Background

Spanish law implementing MiFID II requires that third-country firms wishing to target retail investors and elective professional investors resident in Spain open a permanent establishment (i.e., a branch) in Spain.

Moreover, Spain has gold-plated MiFID II and, as detailed below, grants powers to the CNMV to require third-country firms to open a branch in Spain (not allowing them to act on a cross-border basis without a permanent establishment) even if they target only eligible counterparties or per se professional clients. To reach this decision, the CNMV shall consider the volume of the activity, the complexity of the products and services provided and reasons of general interest.

The CNMV, in a communication released on 23 July 2021, explains that "following the exit of the United Kingdom from the European Union, several credit institutions and investment firms based in that country have expressed an interest in being able to provide services in Spain to eligible counterparties or professional clients without a branch. The restated text of the Spanish Securities Market Act (TRLMV) envisages that possibility in article 171, but authorises the CNMV to require the existence of a branch for general interest reasons or due to the volume of activity or complexity of the services and products".

In this regard, article 171.2 TRLMV sets out that:

"(...) depending on the volume of activity, complexity of the products or services or due to general interest reasons, the CNMV may require that third-country firms providing or proposing to provide investment services or activities in Spain, with or without ancillary services, to professional clients or eligible counterparties referred to, respectively, in articles 205 and 207, establish a branch in Spain, applying to the CNMV, in the case of an investment firm, or to the Bank of Spain, in the case of credit institutions, for the corresponding authorisation, (...)".

Key issues

- Spain has gold-plated MiFID II and grants powers to the CNMV to be able to require that third-country firms wishing to provide investment services in Spain to eligible counterparties or professional clients open a branch in Spain, not allowing them to act on a cross-border basis (without an establishment).
- In July 2021, the CNMV released a communication stating the requirements that third-country firms should meet in order to provide investment services without establishing a branch in Spain.
- Third-country investment firms wishing to act on a cross-border basis in Spain will have to obtain the prior authorisation of the CNMV and will be subject to CNMV supervision. This shall also apply to third-country credit institutions that provide investment services in Spain, which shall also be subject to the supervision, inspection and sanction by the Bank of Spain.

Therefore, as one of its objectives in the 2021 Plan of Activities, the CNMV included the preparation and dissemination of criteria for authorising third-country firms to provide investment services to eligible counterparties or professional clients in Spain without a branch.

New criteria for providing investment services without a branch in Spain

Third-country firms will be able to provide investment services without establishing a branch in Spain if the following requirements are met:

1. When there is reciprocity in the country of origin, meaning that a Spanish credit institution or investment firm can provide investment services in that country under similar conditions to those envisaged in Spanish legislation, without the need for a permanent establishment and, moreover, the situations in points 2 or 3 below exist.
2. Third-country firms will be able to provide investment services and activities, with or without ancillary services, without establishing a branch, to clients domiciled in Spain, provided such clients:
 - i) qualify as eligible counterparties pursuant to the definitions contained in article 207 TRLMV, or
 - ii) qualify as per se professionals pursuant to the definitions contained in article 205.2 TRLMV, without exceeding either of the following thresholds:
 - a. they provide services to fewer than 20 per se professional clients, or
 - b. the income generated from the provision of these services is less than 2 million euros.

If either of the above limits is exceeded in a financial year, the third-country investment firm will have to notify the CNMV as soon as possible and, in any event, within the first three months of the following financial year, and apply for the corresponding authorisation to establish a branch if it wishes to continue providing investment services in Spain.

3. Other situations in which, in the opinion of the CNMV, on an exceptional basis and in view of the specific circumstances and subject to adequate justification by the promoters, it is appropriate to grant authorisation for the provision of investment services to clients without the establishment of a branch. The CNMV will publish the criteria in those cases in which it applies the provisions of this section.

Prior authorisation from the Spanish regulator and other obligations

In any event, the third-country investment firms that operate in Spain without a branch will first have to obtain authorisation from the CNMV, by showing that they fulfil the relevant applicable requirements according to Spanish legislation and will be subject to CNMV supervision.

Likewise, third-country credit institutions authorised to operate in Spain will have to comply with the obligations established in the relevant Spanish legislation, also being subject to the supervision, inspection and sanction by the CNMV and also by the Bank of Spain with respect to the internal organisation requirements.

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