

PUBLIC STATEMENT ON CERTAIN BAD PRACTICES IN CROSS-BORDER MARKETING OF INVESTMENT SERVICES BY FIRMS LOCATED IN OTHER EU COUNTRIES

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The increase in recent years in the marketing activity of specific complex, high-risk instruments among retail clients by certain specialised financial intermediaries has made it advisable to adopt various measures to protect these investors, both in Spain and at European level.

Among such measures, the CNMV has reinforced its monitoring and, where appropriate, supervision activities of the marketing of particularly complex products. As a result of this, certain inappropriate, common practices have been detected in the activity of some firms located in other EU countries that market products in Spain under the so-called European passport (mainly, firms acting under the freedom to provide services, that is, without an establishment or branch in Spain). This public statement refers to such practices and contains a series of guidelines for due compliance with applicable rules and regulations.

1 Marketing of investment services and client acquisition activities through non-authorised third parties

It is common for the aforementioned firms to offer via their websites “affiliate or associate programmes”, which consist in offering remuneration to third parties for client acquisition that is established as a fixed amount per client acquisition or even as a percentage of the income generated by client transactions.

These third parties, which in general have not obtained any licence for the provision of investment services, make the initial contact and acquire potential clients using various channels, through the Internet or other electronic means, or by phone calls, and sometimes “massively” through call centres.

In addition, it has been observed that in many cases, this acquisition activity is carried out in a particularly aggressive manner by persons lacking appropriate knowledge and skills.

In this regard, Article 144 of the Spanish Securities Market Act stipulates that the marketing of investment services and client acquisition may only be carried out professionally by investment firms or through tied agents.

It is considered that engaging in these types of remunerated activities for the marketing of investment services and client acquisition for investment firms via an affiliate or similar programme, only complies with prevailing legislation when such activities are carried on by firms authorised to provide investment services or by their tied agents. Accordingly, except for this case, the use of affiliate programmes for client acquisition in Spain by investment firms is considered unacceptable, given that it implies allowing or promoting unauthorised third parties to professionally engage in the marketing of investment services and client acquisition.

2 Promotion of CFD transactions via group entities located in third countries, which are not authorised to operate in the EU

Likewise, it is also common for websites, in Spanish, of intermediaries from other EU countries, which market contracts for difference (CFDs) and other complex instruments in Spain, to contain information or references to entities, usually from their group, located in third countries that are not authorised to operate in the EU, enabling retail investors to transact through these websites, contrary to the product intervention measures adopted by the CNMV to increase the level of protection for retail investors.

It is considered that the inclusion of these references to third-country firms, which sometimes includes information highlighting greater leverage opportunities allowed by non-EU legislation to transact with these high-risk products, constitutes a not allowed marketing activity of services offered by firms not authorised to operate in Spain and, ultimately, a circumvention of the restrictions established in Spain for the marketing of these products to retail clients¹.

In light of the foregoing, and in order to guarantee appropriate retail investor protection, the CNMV deems it necessary to transmit to financial intermediaries providing investment services in Spain, particularly those specialised in the marketing of CFDs or other complex products, the following:

- The duty of complying with the provisions of Article 144 of the Spanish Securities Market Act, and of ensuring, accordingly, that the marketing of their services and client acquisition in Spain is carried out solely by authorised firms or through registered agents. In particular, effecting payments to unauthorised firms for marketing and client acquisitions in Spain is not admissible.
- When offering affiliate or associate programmes, the need to expressly warn, through statements clearly identified on financial intermediaries' websites, that in Spain such programmes are only applicable to firms authorised to provide investment services or their agents, as the marketing of services and client acquisition are reserved activities.
- The infringement of current regulations in the event of any activity aimed at addressing retail clients residing in Spain to non-EU countries firms.

The CNMV intends to contact securities supervisors of other EU countries in charge of the supervision of the activities of firms acting under the freedom to provide services for them to convey the content of this public statement to intermediaries registered in their territories which have been granted a passport to operate in Spain without a branch. The CNMV does not rule out adopting additional measures in the event that situations arise which are detrimental to investors' interests in Spain, or for the correct functioning of markets.

The CNMV will continue to actively support the adoption in ESMA of measures coordinated at European level aimed at enhancing investor protection in this area.

¹ According to Section 22 of ESMA Public Statement 35-36-1743: "*Promotional or incentivising language about the possibility to open an account with a third country entity shall be seen as a marketing towards the client located in the EU, for example marketing the possibility to open an account where CFDs with higher leverage limits can be traded. By analogy, even if the language of a communication is purely informative, the information itself may have a promotional character given the broader context. CFD providers are not allowed to market CFDs to retail clients in the Union that do not comply with the requirements from ESMA's or national product intervention measures*".