

8 February 2021

## Cross Border Marketing of Investment Services Targeting Spanish Market on Freedom of Services Basis

The Authority would like to bring to the attention of licensed investment firms, specifically MiFID firms the Public Statement issued by the Comisión Nacional del Mercado de Valores ('CNMV') on certain bad practices in cross border marketing of investment services by firms located in other EU Countries. The relevant statement is being attached to this circular and investment firms are required to comply with the referred CNMV public statement when engaging in promotional efforts targeting clients situated in Spain.

May we also remind Compliance Officers, that they are required to review all promotional material on an ex-ante basis to ensure that such material complies with the applicable requirements. No promotional material is to be issued by the investment firm without the prior approval of the Compliance Officer. The Compliance Officer is also to ensure that the website and/or any other channel being used to reach out to clients or prospective clients is compliant with the requirements set out in Chapter 1 of the Conduct of Business Rulebook.

In case of any queries, do not hesitate to contact us on [financialpromotion@mfsa.mt](mailto:financialpromotion@mfsa.mt).

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

24 November 2020

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 clients<sup>1</sup>.

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.

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<sup>1</sup> 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".

# COMUNICADO SOBRE DETERMINADAS MALAS PRÁCTICAS EN LA COMERCIALIZACIÓN TRANSFRONTERIZA DE SERVICIOS DE INVERSIÓN POR PARTE DE ENTIDADES RADICADAS EN OTROS PAÍSES DE LA UNIÓN EUROPEA

24 de noviembre de 2020

El incremento en los últimos años de la actividad de comercialización de determinados instrumentos complejos y de elevado riesgo entre clientes minoristas por parte de ciertos intermediarios financieros especializados ha aconsejado la adopción de diversas medidas de protección de estos inversores, tanto en España como a nivel europeo.

Entre tales medidas, la CNMV ha reforzado sus actividades de seguimiento y en su caso supervisión de la comercialización de productos especialmente complejos. Como fruto de ello se han identificado ciertas prácticas inadecuadas que son frecuentes en la actividad de algunas entidades radicadas en otros países de la Unión Europea que comercializan productos en España con base en el denominado pasaporte europeo (fundamentalmente de entidades que actúan en libre prestación de servicios, esto es sin establecimiento o sucursal en España). El presente comunicado se refiere a tales prácticas y recoge una serie de pautas para el adecuado cumplimiento de la normativa de aplicación.

## **1 Actividades de comercialización de servicios de inversión y captación de clientes por medio de terceros no autorizados**

Es habitual que las entidades mencionadas ofrezcan a través de su sitio web “*programas de afiliados o asociados*”, consistentes en ofrecer una remuneración a terceros por la captación de clientes que se establece como un importe fijo por cliente captado o incluso como un porcentaje de los ingresos generados por la operativa de los clientes.

Son estos terceros, que en general no cuentan con ningún tipo de licencia para prestar servicios de inversión, los que realizan el primer contacto y la captación de los potenciales clientes por diversas vías, a través de internet u otros medios electrónicos, o mediante llamadas telefónicas, en ocasiones realizadas de manera masiva a través de “*call centers*”.

Además, se ha observado que en numerosas ocasiones esta actividad de captación se realiza de manera especialmente agresiva por parte de personas que carecen de conocimientos y capacidades adecuadas.

Al respecto, la Ley del Mercado de Valores establece en su artículo 144 que la comercialización de servicios de inversión y la captación de clientes sólo puede ser llevada a cabo profesionalmente por empresas de servicios de inversión o a través de agentes vinculados.

Se considera que el desarrollo de este tipo de actividades remuneradas de comercialización de servicios de inversión o de captación de clientes para empresas de servicios de inversión mediante un programa de afiliados o similar únicamente se ajusta a la normativa vigente cuando se realiza por otras empresas autorizadas a prestar servicios de inversión o por agentes vinculados a ellas. En consecuencia, y salvo en este supuesto, se considera inadmisibles la utilización de programas de afiliación para captar clientes en España por parte de entidades que presten servicios de inversión, en cuanto que ello implica permitir o

promover que terceros no autorizados se dediquen profesionalmente a la comercialización de servicios de inversión y la captación de clientes.

## **2 Promoción de la operativa en CFD a través de entidades del grupo situadas en terceros países y no autorizadas a operar en la UE**

Es asimismo frecuente que sitios web en castellano de intermediarios de otros países de la Unión Europea que comercializan en España contratos por diferencias (CFD) u otros instrumentos complejos incluyan información o referencias a entidades, generalmente de su grupo, situadas en terceros países no autorizadas a operar en la Unión, dando lugar a que los inversores minoristas puedan realizar a través de ellas operaciones al margen de las medidas de intervención de productos adoptadas por la CNMV para aumentar el nivel de protección de los clientes minoristas.

Se considera que la inclusión de estas referencias a entidades de terceros países, que en ocasiones incluyen información destacando las mayores posibilidades de apalancamiento permitidas por normativas extracomunitarias para operar en estos productos de elevado riesgo, constituye una actividad de promoción no permitida de los servicios de entidades no autorizadas a operar en España y, en último término, una elusión de las restricciones establecidas en España para la comercialización de estos productos a clientes minoristas<sup>1</sup>.

Considerando lo anterior y en aras de garantizar la adecuada protección de los inversores minoristas, la CNMV estima necesario transmitir a los intermediarios financieros que prestan servicios en España, particularmente a los especializados en la comercialización de CFD u otros productos complejos, lo siguiente:

- El deber de cumplir con lo establecido en el artículo 144 de la Ley del Mercado de Valores y de asegurarse, en consecuencia, de que la comercialización de sus servicios y captación de clientes en España se realiza únicamente por parte de entidades autorizadas o a través de agentes registrados. En particular, no resulta admisible realizar pagos por la comercialización o captación de clientes en España a entidades no autorizadas.
- La necesidad, cuando ofrezcan programas de afiliados o asociados, de advertir expresamente, con declaraciones claramente identificadas en sus sitios web, de que en España sólo pueden acogerse a dichos programas entidades autorizadas a prestar servicios de inversión o sus agentes, dado que la comercialización de servicios y la captación de clientes son actividades reservadas.
- El carácter contrario a la normativa vigente de cualquier actividad que tenga por objeto dirigir a clientes minoristas residentes en España a entidades situadas fuera de la Unión Europea.

La CNMV tiene previsto dirigirse a los supervisores de valores de otros países de la Unión Europea competentes para supervisar la actividad de entidades que actúan en libre prestación de servicios para que trasladen el contenido de este comunicado a los intermediarios registrados en su territorio que cuentan con pasaporte para operar en España sin sucursal, y no descarta la adopción de medidas adicionales en caso de situaciones perjudiciales para los intereses de los inversores en España o para el correcto funcionamiento de los mercados.

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<sup>1</sup> Según el apartado 22 del Public Statement de ESMA35-36-1743: *“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”.*

La CNMV continuará defendiendo activamente en ESMA la adopción de medidas coordinadas a nivel europeo tendentes a mejorar la protección de los inversores en este ámbito.