

MiFID: SCOPE AND APPLICATION IN SPAIN



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En Espagne, la mise en place de la directive MIF était attendue pour le 1^{er} novembre 2007. Parmi les grands changements : l'éventail de services des entreprises d'investissement devait être élargi et ces dernières seront désormais en compétition avec les marchés actions et réglementés. De plus, la transposition espagnole contiendra aussi, en principe, un certain nombre d'articles concernant la protection des investisseurs.



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The Markets in Financial Instrument Directive (hereinafter, "MiFID") is the latest and more significant in a series of legislative innovations introduced by the European Union in a process that started from 1999 (which is known as the Financial Services Action Plan).

Among others, the directive aims to complete the financial services in the single market, enhance the transparency and protection for the retail investor when receiving investment and activities service and increase the integration and competition of the European financial markets by creating the "European passport"¹.

MiFID was implemented through the Lamfalussy proceeding, designed to accelerate integration of European markets. The process is based on four levels approach that starts with European Directives issued by the European Council, progresses into more detailed technical guidance before

embracing the regulatory bodies in member states for the conduct of business rules. Finally the legislation becomes law and practice in the markets of the member states.

Thus, the first level Directive were approved on April 21, 2004, by the Council and European Parliament (hereinafter, "Directive 2004/39" or "Directive"). Other Directives that complete European Plan are the Directive approved on August 10, 2006, by the Commission (hereinafter, "Directive 2006/73") and the Directive approved on June 14, 2006 by the Council and European Parliament (hereinafter, "Directive 2006/49").

TRANSPOSITION INTO SPANISH LAW

Spain is approaching MiFID through the transposition into its legal system of Directives 2004/39, 2006/73 and 2006/49. The implementation of new legislation should be completed by November 1, 2007, limit established by the Directive and Commission to member states.

The legal mechanism to carry out such transposition consists of amendments to the current "Ley del Mercado de Valores"² (hereinafter, "LMV"), affecting deeply its main features. In conjunction to these measures, the Spanish regulatory organization "Comisión Nacional del Mercado de Valores"³ (hereinafter, "CNMV") is coordinating the market practice, stimulating the significant number of investment firms affected to elaborate their own adaptation plans to the MiFID.

Due to the fact that the current LMV is a text from 1988, amended in many occasions in order to adapt to it a wide range of local laws and EU Directives, it is provided in the new bill a future consolidation of the LMV by the Government. Consolidation of

1. By this known measure, an investment firm which receives authorisation by one member state is entitled to operate within all member states of the European Union.

2. See Law 24/1988, of July 28, which regulates the Spanish financial system and regulated markets.
3. Comisión Nacional de Mercado de Valores (CNMV) is the institution committed to supervise and inspect regulated markets in Spain and the activity of the entities which participate in them. It was created by Law "24/1988, del Mercado de Valores", being at the moment in process of modification.

“ In the event that new Law enters into force on November 1, 2007, Spanish investment firms will have six more months to adapt their articles of association, internal regulations and activity programs according to the imperatives of the new rules. ”

Law should be achieved in the term of one year after the reform enters into force.

Current phase in Spain

Last September 7, 2007 a draft bill prepared by the Government was published in the Official Gazette of the Chamber of Deputies. The tentative text was sent to the Chamber for its voting and presentation of amendments from the different political groups. Period for amendments was finished last September 17, 2007. By the time of this writing, the bill should be debating at the Senate from its prompt enactment. In the event of amendments by the Senate, the proceeding could be delayed.

Phases in the implementation of new legal framework

- **March, 2007.** Drafting of the bill by “Dirección General del Tesoro y Política Financiera”¹.
- **September, 2007.** Publication of the draft bill prepared by the Government and remittal to the Chamber of Deputies for voting by means of urgent procedure.
- **September 17, 2007.** End of the amendment period.
- **October, 2007.** Approval, in case it applies, by the Senate.
- **October – November, 2007.** Enactment and publication of the Law modifying LMV.

1. The Spanish Public Treasury is a Department of the Ministry of Economy and Finance.

Meanwhile, groups of investment firms and national banks have even published strategy plans in order to adapt their organisations according to the instructions of CNMV.

IMPACT OF THE NEW MIFID IN SPANISH MARKETS

The key changes that forthcoming bill will introduce into the Spanish legal system and therefore, into the organisation of investment firms, could be summarized as:

Modern investment services

According to the European Directive that inspires the bill, catalogue of services that investment firms provide will be extended. The two basic innovations are, in first place, the investment advice, defined as the provision of personal recommendations to a client, either upon its request or at the initiative of the investment firm, in respect of one or more transactions relating to investment instruments. However, there is a clear distinction between investment advice and marketing services in the Spanish regulation. It states that general recommendations linked to the field of financial services marketing will not be considered as investment advice but as commercial recommendations⁴.

This distinction and peculiarity of the Spanish bill arises in the different regulations that in Spain apply for investment advice (subject of the Directive) and the mere marketing which is the normal activity of banking networks and subject of other regulation.

In second place, the other new financial service is known as Multilateral Trading Facility (hereinafter, “MTF”) which means a multilateral system, operated by an investment firm or a market operator which brings together multiple third-party buying and selling interests in financial instruments⁵.

MTF together with regulated markets (“Mercado Secundario Oficial⁶”) and Systematic Internalised Firms constitute the different investment trade systems admitted by law. Therefore, investment firms will be able to compete with stock markets and other regulated markets.

New investment firms providing investment services

The list of investment firms has increased as well in accordance with the number of investment services. Together with the classic investment firms in Spain (Sociedades de Valores, Agencias de Valores, and Sociedades Gestoras de Carteras⁷) it will be regulated the investment advice companies (Empresas de Asesoramiento Financiero).

While credit entities and “Sociedades de Valores” are able to offer all investment services available, including MTF, the other investment firms have more limited range of services to provide. Investment advice companies will be entities that exclusively provide investment and company advice and financial analysis.

The Spanish bill provides authorisation not only to legal entities but also to persons who provide the investment advice, if they accomplish with the legal requirements.

It is relevant to mention that investment advice companies will not have obligation to contribute the CNMV Guarantee Fund (a system designed to cover and protect the investor in cases where the investment firm is declared in bankruptcy, among others)⁸.

Other peculiarity is related to the national institution to authorise the investment firms. The CNMV is the competent authority to authorise investment advice companies, while the Minister of Economy is competent to authorise the remaining (Sociedades de Valores, Agencias de Valores, and Sociedades Gestoras de Carteras). The Minister is also competent

6. The bill maintains the traditional Spanish denomination “Mercado secundario oficial” (secondary official market) as equivalent to Regulated Market in the Directive.

7. See in the bill definitions of the investment firms in article 64.1

8. See in Ley de Mercado de Valores, article 77.

4. See in the bill article 63.1.g.

5. See in the bill definition of MTF in article 118 and in Directive article 4.15.

to authorise the beginning of activity in regulated markets.

Measures to enhance investors' protection: the customer profile

In line as well with European Directive objectives, the Spanish bill contains a range of articles regarding investors' protection. The Spanish regulation sets forth an investment firms' obligation for classifying clients based on two profiles: professional clients and retail clients.

Applying forthcoming bill, investment firms must obtain specific clients information allowing them to adjust, according to clients' personal profile, their recommendations about investment deals and portfolio management service.

Organisation requirements of investment firms

Innovations in this field, and according to a key objective of the European Directive, are such as internal requirements in investment firms that will be supervised by CNMV: internal regulations adjusting control mechanisms and several financial require-

ments, such as providing own resources to the corporation and a limit to the credit.

Significant role of CNMV as competent authority

The powers of CNMV as competent authority for supervising will be increased, especially in respect of mechanisms to expand national and international cooperation between supervisors of other member states. The Spanish bill sets forth obligations of communication to CNMV when the investment firms and credit entities trade with investment instruments and also when appointing the members of investment firms. As well, CNMV is entitled with a wide range of faculties to supervise (also companies' solvency, and supervision of the new MTF) and inspect investment firms.

investors' protection, information and transparency of investment instruments trade, internal organisation (by creating new policies and creation of new departments of compliance).

As a consequence of the necessary change, investment firms in Spain will deal with significant costs in their internal organisation and human capital in order to adapt the new legislation. According to the Governor of the Bank of Spain, although the process of transposition in Spain is complex, Spanish investment firms have created already organization structures, control and risk systems and internal proceedings that apply to the trade of investment services. The implementation, however, aspires to assure a continuous process of improvement, opened beyond the date of entering into force. ■

A CONTINUOUS PROCESS OF IMPROVEMENT

Taking into account the foregoing, Organisation structure in Spanish investment firms will be affected in the most important fields such as

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