

# Recent key developments in the area of Spanish financial regulation

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## **Bank of Spain Circular 3/2023 amending Circulars 2/2016 and 1/2022 (Official State Journal: 14 November 2023)**

Circular 3/2023 amends, on the one hand, Circular 2/2016, in order to introduce the prohibition on taking in deposits or other reimbursable funds from the public under the regime governing the provision of services in Spain without a branch for banks headquartered in non-EU Member States. In addition: (i) it introduces the minimum aspects to be analysed in the authorisation process and references application of the Securities Market and Investment Services Act to entities intending to provide investment services in Spain under the above-mentioned regime; and (ii) it eliminates the contents of the application form.

On the other hand, the new Circular revises the requirements for reporting on remuneration to the Bank of Spain for banks as well as specialised lending institutions (SLIs) via amendments to Circulars 2/2016 and 1/2022, respectively. As a result, the remuneration statements are now generally applicable to all credit institutions, the principle of proportionality applying, to the extent possible.

With respect to the remuneration disclosures to be provided periodically: (i) the Circular 2/2016 statements have been amended; (ii) two new statements have been introduced related with gender pay gap reporting and the information which must be used for the purpose of comparing the highest authorised ratios between fixed and variable components; and (iii) the frequencies with which the new remuneration statements have to be provided have been adjusted.

The first submission of statements relating to the general remuneration information to be furnished periodically will include information corresponding to 31 December 2023 and must be provided no later than 15 June 2024. Exceptionally, the first submission of the gender pay gap information statement will include information corresponding to 31 December 2024, to be provided no later than 15 June 2025.

## **Royal Decrees implementing the Securities Markets and Investment Services Act (Official State Journal: 9 November 2023)**

- Royal Decree 813/2023 on the legal regime governing investment service firms and other investment service providers.

The purpose of this Royal Decree is to implement: (i) the rules applicable to investment service firms (ISFs) and other persons and entities authorised to provide investment services, and their rules of conduct; and (ii) the rules applicable to data reporting service providers. It also transposes Directive (EU) 2019/2034 on the prudential supervision of investment firms and Delegated Directive (EU) 2021/1269 as regards sustainability factors into Spanish law.

In broad terms, it regulates the following aspects:

- A new prudential framework modifying the initial capital requirements applicable to investment service firms (ISFs).
- A new regime for ‘national financial advisors’. These entities will not be considered ISFs and will not be allowed

to provide services in other EU Member States.

- The cross-border investment services regime, distinguishing between cross-border activity within the EU, with requirements similar to the national rules, and cross-border activity with third states, with additional safeguards.
- Systematisation of the rules governing significant shareholdings.
- The management systems, procedures and mechanisms applicable to ISFs: (i) financial requirements; (ii) internal organisational and operational requirements; (iii) internal organisational and operational requirements for ISFs engaged in algorithm trading; (iv) internal organisational and operational requirements for ISFs that provide direct electronic access; and (v) internal governance, risk management, remuneration and transparency requirements for large and interconnected ISFs.
- With respect to incentives, the Royal Decree introduce the stipulation that the fees, commissions or non-monetary benefits derived from the provision of a financial instrument placement service not on a firm commitment basis or the underwriting of financial instruments or placement of financial instruments on a firm commitment basis are designed to enhance the quality of the related service to the client if they provide access to a primary market.
- The integration of the sustainability factors into product governance matters.
- Lastly, the provisions regarding data reporting service providers rendered obsolete by entry into effect of the European regulations have been updated.
- Royal Decree 814/2023 on financial instruments, admission to trading, registration of transferable securities and market infrastructures.

The purpose of this new legislation is to systematise and restructure the existing body of legislation in order to ensure clear and simple capital markets regulations. In broad terms, the new legislation addresses the following:

- Reorganisation of the provisions related to: (i) the aspects related with financial instruments and representation of transferable securities by means of book entries; (ii) the admission to trading on regulated markets of public securities offerings and responsibility for the prospectuses; (iii) the clearing, settlement and registration of transferable securities; and (iv) the position limits on the size of a net position in agricultural commodities derivatives and critical or significant commodity derivatives.
- Classification of shareholdings in limited-liability companies as apt securities for the purpose of activities carried on by crowdfunding platforms and ISFs.
- Elimination of central securities depositories' obligation to have an information system for the purpose of supervising transferable securities trading, clearance, settlement and registration (post trade interface or PTI).
- Elimination of the public offering concept.
- New exemptions for financial and non-financial counterparties that are subject to the legal liquidity provision requirement.
- The admission to trading requirements for each fixed-income issue will now be checked solely by the fixed-income market's governing body and no longer by the CNMV.
- Alignment of central securities depositories' oversight and control requirements with European regulations.
- Elimination of outdated references that are no longer applicable or fail to adequately reflect the reality of the Spanish capital

markets, such as the provisions regarding the market for public debt represented by book entries.

It also transposes Directive (EU) 2021/338 as regards information requirements, product governance and position limits to help the recovery from the COVID-19 crisis.

- Royal Decree 815/2023 as regards the CNMV's official registers, cooperation with other authorities and supervision of investment service firms.

The purpose of this Royal Decree is to implement the CNMV's supervisory and administrative powers. To that end it regulates the following:

- The official registers the CNMV must set up and maintain.
- Cooperation with the Bank of Spain, supervisory authorities of other EU Member States, ESMA and supervisory authorities of third states.
- The supervision of ISFs.
- The CNMV's reporting requirements around solvency.

It also partially transposes Directive (EU) 2019/2034.

- Royal Decree 816/2023 amending the undertakings for collective investment regime.

This Royal Decree amends Royal Decree 1082/2012 (implementing Law 35/2003 on collective investment schemes) and transposes Delegated Directive (EU) 2021/1270 as regards the sustainability risks and sustainability factors to be taken into account for Undertakings for Collective Investment in Transferable Securities (UCITS). The most important changes introduced include:

- Introduction of by-default electronic communication with investors and shareholders.

- Elimination of the requirement to provide investors with a quarterly report.
- Development of the procedure regulating expressions of interest when designating a new manager and/or depository to replace a manager and/or depository facing bankruptcy, licence revocation or suspension.
- Elimination of the requirement to provide the internal code of conduct when applying for a business permit.
- Introduction of sustainability risks into management companies' internal processes, systems and controls.

### **Royal Decree 1180/2023 on investor and UCI indemnification systems (Official State Journal: 28 December 2023)**

The purpose of this Royal Decree is to update the investment guarantee scheme (FOGAIN for its acronym in Spanish; hereinafter, the "Scheme"), modify the contribution regime and enhance the legal regime governing undertakings for collective investment (UCIs). The following changes stand out:

1. Royal Decree 948/2001, on investor indemnification systems:

- National financial advisors (see above) will have three months from effectiveness of this new Royal Decree to join the Scheme.
- The money, securities and instruments entrusted by professional investors are excluded from the insurance scheme.
- The annual financial contribution regime binding upon Scheme members has been modified.
- A new formula has been introduced for calculating the amount of assets needed to trigger the staggered reduction in contributions by participating firms.
- Introduction of a voluntary and gradual schedule for transitioning to the new

contribution regime for entities that were already contributing to the Scheme.

## 2. Royal Decree 1082/2012 (implementing the UCI Act):

- Modification of investment fund performance fees. Managers must specify in their prospectuses the system used to calculate performance or success fees. They must also establish a performance reference period such that a performance-based management fee can only be paid if the manager has accumulated a positive return during that benchmark period.
- Elimination of the requirement that the marketer not belong to the same group as the manager so that firms marketing investment funds can charge investors share custody and administration fees.
- Elimination of the requirement to include an indicator of running expenses in the prospectus.
- Specification that in the event of dissolution and liquidation of an investment fund, it is possible, while continuing to suspend the investor's right to request a reimbursement, to articulate payments on account of share reimbursements.
- Elimination of the quantitative limits previously imposed on UCIs with respect to investments in financial instruments featuring voting rights over an issue, leaving the reference to the possibility of exercising significant influence over the issuer.
- Elimination of the 1% liquidity coefficient requirement for UCIs.
- Adjustment of the minimum investment periods, eliminating the maximum quantitative limit associated with the first time the investor subscribes for shares (previously set at one year), replacing it with a time limit associated with when the hedge fund expects to liquidate its investments.
- Introduction of more flexible prorating of redemptions so that they are no longer

conditional on settlement at the next redemption date but rather on a sufficient liquidity requirement.

- Introduction of flexibility into the regime for marketing hedge funds to non-professional investors to align it with the regime established in Law 18/2022 (28 September 2022) on the creation and growth of companies.
- Introduction of stricter limits on management and deposit fees at side pockets. Specifically, from year two after creation of the fund or a side pocket, the management fee will be capped at the higher of one-third of that established in the original UCI, or at 0.20% of assets under management. Deposit fees will be capped at the amount stipulated in the original UCI.
- Permission for fund management rules to contemplate notice periods aligned with the deadline for dealing with subscription and redemption requests.
- Reinforcement of the risk diversification limits applicable to UCI management companies by including, in addition to securities issued, all manner of financial instruments and also cash, within the 25% limit on the concentration of exposures to a given entity or entities within the same group.

### **Royal Decree-law 8/2023 addressing the economic and social consequences of the conflicts in Ukraine and the Middle East (Official State Journal: 28 December 2023)**

In the financial arena, in broad terms, the following measures stand out:

- Mortgage-related measures
  - Extension until 31 December 2024 of the suspension of consideration or fees for the full or partial prepayment of mortgage loan or credit agreements at floating rates or any fees for the conversion of such agreements into fixed-rate arrangements

or arrangements with a fixed rate during an initial period of at least three years.

- Extension of the regime limiting prepayment fees for amended loans that were modified in order to convert them into fixed-rate mortgages so as to include arrangements in which the resulting transaction is a loan with a fixed rate of interest during an initial period of at least three years (mixed mortgages). As a result, during the first three years of the term of such a loan agreement, the consideration or fees charged for early repayment cannot exceed the financial loss that the borrower could incur, capped at 0.05% of the principle prepaid. After that three-year period, no consideration may be collected for conversion to a fixed or mixed arrangement.
- Payment services and systems measures
- Introduction of limits on the collection of fees for the provision of cash withdrawal services in branch offices for ‘vulnerable’ groups, meaning people over the age of 65 and those with certified disabilities of a severity of 33% or higher.
  - Introduction of the requirement to comply with the obligations set down in chapter II of the Digital Operational Resilience Act (DORA) by operators of payment systems and entities involved in payment-processing activities. The Bank of Spain will be tasked with supervising compliance with these obligations (other than for payment system operators considered systemically important by the ECB) and any penalties. The entities have until 17 January 2025 to implement the measures needed to comply with the new requirements.
- Housing-related measures
- The Ministry of Housing and Urban Agenda has been authorised, under an agreement with the Official Credit Institute, the ICO, and for a period of up to 35 years, to create and manage a surety facility of up to 2 billion euros offering partial state guarantees to secure financing provided to public and private developers for the development of social housing.
- Extension until 31 December 2024 of the suspension of eviction proceedings and foreclosures for vulnerable households without residential alternatives.
- Extension until 31 December 2024 of the possibility of applying for compensation from a lessor or landlord to tackle situations of social and economic vulnerability with respect to housing.
- Payment obligation measures for debtors affected by seismic movements and volcanoes affecting La Palma Island
- A new term has been established (until 30 January 2024) for those debtors affected by the seismic movements and volcanoes affecting La Palma Island that had requested a moratorium on payment obligations under secured or unsecured loan or credit agreements for requesting an additional six-month moratorium on that payment obligations.