

## CNMV BREXIT GUIDELINES FOR SPAIN

This Briefing focuses on the different guidelines that the Spanish Securities Market Commission has released in relation to Brexit and Royal Decree-Law 38/2020 and covers a range of topics, including, amongst others, the marketing of UK collective investment undertakings, access to UK and EU trading venues and OTC trading.

### 1. INTRODUCTION

The United Kingdom ("UK") ceased to be a Member State of the European Union ("EU") and became a third country on 31 January 2020, following ratification of the Withdrawal Agreement and ending 47 years of membership.

The Withdrawal Agreement provided a transition period from its entry into force until 31 December 2020, during which time EU law continued to apply in and to the UK, with certain exceptions. The main purpose of said Withdrawal Agreement was to provide a period for both citizens and businesses to prepare for the new situation and provide a stable framework for the negotiation of an agreement on the future relationship between the EU and the UK. That negotiation concluded on 24 December 2020, following a compromise on a Trade and Cooperation Agreement, an Agreement on Security of Information and an Agreement for Cooperation in the Peaceful Uses of Nuclear Energy between the two parties.

In this context the Spanish Government published Royal Decree-Law 38/2020, of 29 December ("RDL 38/2020"), designed to protect the interests of those citizens and businesses potentially affected by the end of the transition period on 31 December 2020 and the UK becoming a third country for all purposes as of 1 January 2021.

Amongst the measures contained in RDL 38/2020, there are some specifically related to the financial sector. These have been put in place in order to strengthen legal certainty and customer protection and to avoid any risk to financial stability.

For a detailed analysis of RDL 38/2020, please refer to our Briefing from February 2021 entitled "[Spain introduces post-Brexit rules for UK financial firms](#)".

This Briefing focuses on the different guidelines that the Spanish Securities Market Commission ("CNMV") has released in relation to Brexit and RDL 38/2020 and covers a range of topics, including the marketing of UK collective investment undertakings, access to UK and EU trading venues and OTC trading, amongst others.

#### Key issues

- As of 1 January 2021, the CNMV will not process any requests for passporting received from UK funds and any such requests will be subject to the third-country regime. As of such date, UK UCITS/AIFs distributed in Spain in accordance with a passport will be subject to ex officio de-registration by the CNMV, unless they have previously regularised their situation.
- Spanish entities can continue being members of third-country markets and UK firms will not be required to request a new authorisation to execute client orders or to deal on their own account in order to continue being remote participants of the Spanish securities markets.
- British investors will be able to avail of Direct Electronic Access (DEA) provided by members of Spanish markets and it will not be necessary for UK-domiciled DEA users to be a financial institution in accordance with MiFID II in order to continue to use the services of the Spanish markets via DEA.
- During the Transition Period (i.e. until 30 June 2021), entities may continue to execute OTC transactions and OTC trading of derivatives with Spanish entities with whom they had outstanding

## **2. GUIDELINES FROM THE CNMV ON BREXIT AND RDL 38/2020**

For the purpose of this Briefing, we should recall that Article 13.3 of RDL 38/2020 establishes the temporary validity of existing authorisations until 30 June 2021, stating that the UK's existing authorisation will remain in force until then (the "**Transition Period**"), in order to facilitate the orderly termination of existing contracts or the transfer thereof to an entity duly authorised to provide financial services in Spain.

### **2.1 Marketing of UK Funds in Spain, Post-Brexit**

As of 1 January 2021, UK management companies that are carrying out collective portfolio management activities or providing any other investment services permitted under current Spanish regulations will be subject to the regime established for third-country entities and therefore will require prior authorisation from the CNMV to continue providing such services.

Besides this, also as of 1 January 2021, the CNMV will not process any requests for passporting received from the UK and any such requests will be subject to the third-country regime. Therefore, as of such date, UCITS domiciled in the UK and alternative investment funds ("**AIFs**") domiciled in or with management companies in the UK which have been distributed in Spain in accordance with a passport ("**UK Funds**") will be subject to ex officio de-registration by the CNMV, unless they have previously regularised their situation (by requesting authorisation for the marketing thereof in accordance with the provisions for third countries or by merging with EU funds).

Meanwhile, those Spanish investors who kept their investments in the UK Funds on that date would not be able to benefit from the tax-roll over regime that applies to UCITS (and this is an issue of which they should be specifically alerted). Besides that, the CNMV understands that if, post-Brexit, Spanish investors keep their holdings in the UK Funds, they should continue to receive relevant fund information. If they are notified through a website, they would have to be informed that the UK Fund can no longer be marketed and distributed in Spain. Lastly, once the UK Funds are no longer distributed and have been removed from the CNMV's registry, the obligation to pay fees to the CNMV will end.

### **2.2 Access to UK and EU trading venues**

The CNMV states that the Spanish legal framework does not establish any requirement that Spanish entities must meet in order to be members of third-country markets.

With regard to the reverse situation (i.e. access to Spanish trading venues by remote third-country members), Spanish legislation does not establish requirements other than those applicable to members domiciled in the EU. The CNMV supervises compliance with the membership requirements set out in Article 69 of the Spanish Securities Market Act and in relevant market regulations.

The CNMV understands that UK firms that are currently members will not be required to request a new authorisation to execute client orders or to deal on their own account to continue being remote participants of the Spanish securities markets, as this circumstance was already included in the authorisation initially submitted.

#### **Key issues (cont.)**

transactions or pre-existing contracts, only if the new transactions are the direct result of, do not entail essential amendments to, or are expressly foreseen in, the pre-existing contracts, as they are not considered to be new contracts. In any event, any transactions carried out at the sole initiative of the European (Spanish) party will not require the counterparty located in the UK to have a licence in the EU.

### **2.3 Direct Electronic Access (DEA)**

Following the Transition Period, the question arises as to whether British investors will be able to avail of DEA access provided by members of Spanish markets.

The CNMV considers that it will not be necessary for UK-domiciled DEA users to be a financial institution authorised by a member country in accordance with MiFID II in order to continue using the services of the Spanish markets via DEA.

With regard to the DEA access provider, under MiFID II it must have the status of an investment firm.

### **2.4 OTC Trading**

During the Transition Period, entities may continue to execute, with Spanish entities, over-the-counter (OTC) transactions involving securities that do not meet listing requirements.

With regard to OTC trading of derivatives, entities may continue executing OTC derivative transactions with counterparties with whom they had outstanding transactions or pre-existing contracts during the Transition Period, provided that the new transactions are the direct result of, do not entail essential amendments to, or were expressly foreseen in the pre-existing contracts, as they are not considered to be new contracts.

In any event, during the Transition Period and after the end thereof, any transactions carried out at the sole initiative of the European (Spanish) party will not require the counterparty located in the UK to have a licence in the EU. Hence, of course, it includes the case of two regulated firms wishing to engage in interbroker-dealer activities, if the Spanish firm is the one that requests the execution of a transaction with the UK broker-dealer.

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